

132 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Viking Gas Transmission Company

Docket No. RP09-765-000

ORDER ON FURTHER REVIEW

(Issued August 2, 2010)

1. On June 12, 2009, Viking Gas Transmission Company (Viking) filed 36 currently effective non-conforming and potentially non-conforming service agreements, as well as revised tariff sheets¹ updating its list of non-conforming agreements, for approval with the Commission. On July 9, 2009, the Commission issued a letter order accepting the agreements, effective on their respective effective dates, subject to further review and order of the Commission.² The July 9 Order also accepted the revised tariff sheets, effective June 12, 2009, as proposed, subject to further review by the Commission.

2. The Commission's review of the subject agreements is now complete. Based on this review, we will require Viking to modify several of its agreements and revise certain tariff sheets, subject to the conditions discussed below. In addition, pursuant to the Commission's authority under section 5 of the Natural Gas Act (NGA), the Commission directs Viking to revise the notice of termination provisions in its tariff within 45 days of the issuance of this order, as discussed in greater detail below.

Details of the Filing

3. Viking states that in light of changes in its personnel and procedures over the last several years, and because of the Commission's emphasis on strict compliance with the regulations relating to the filing of non-conforming agreements, Viking initiated a review

¹ Sixth Revised Sheet No. 87I and Original Sheet Nos. 87I.01 and 87I.02 to its FERC Gas Tariff, First Revised Volume No. 1.

² *Viking Gas Transmission Co.*, 128 FERC ¶ 61,016 (2009) (July 9 Order).

of its transportation agreements. Viking states that it has completed the review of its firm transportation agreements, excluding agreements with replacement shippers, and that its review uncovered several currently effective, potentially non-conforming firm transportation agreements that Viking had not previously filed with the Commission.

4. Viking explains that the approach it took when conducting the review was to identify a contract as potentially non-conforming whenever there was any reasonable basis for doing so. In addition, Viking states that it has provided transparency into its review processes by describing its methodology in detail and by summarizing the contracts it identified as conforming and non-conforming in Appendices B, C, and H of the June 12, 2009 filing. To aid the Commission in its review, Viking provided a 3-volume set of binders containing the 36 agreements and various appendices including summaries of the significant deviations in each contract, a table setting forth the history of the tariff sheets that comprise the Viking *pro forma* agreement, a table setting forth the tariff sheets that were in effect when each contract was executed or last amended, copies of the submitted contracts showing deviations from the relevant versions of the *pro forma* agreement, and summaries of the contracts with non-trivial deviations that based on Viking's interpretation of Commission guidance, are not material deviations.

5. Viking believes the Commission's and its own resources would best be conserved if the Commission accepted all of the contracts as permissible non-conforming agreements. Viking states that, on the whole, it regards the material deviations that exist in some of the agreements to have limited significance. Viking states that with improved internal procedures and the benefit of Commission guidance, Viking can prevent inadvertent or misguided execution of possibly non-conforming contracts in the future.

6. Viking states that to the extent the deviations in the contracts are material, they do not change the conditions under which Viking provides service and do not present a risk of undue discrimination. Viking states that many of the deviations are "grandfathered" arrangements that incorporate provisions originally contained in contracts adopted during the transition to open access service and, as such, they reflect unique circumstances not applicable to newly negotiated arrangements.

7. With regard to each contract, Viking requests that the Commission either (i) waive the requirement in sections 154.1(d), 154.112(b), and 154.207 of the Commission's regulations that non-conforming agreements be filed with the Commission no less than 30 days before they are proposed to take effect; or (ii) determine that the contract is not non-conforming. For those contracts accepted for filing as non-conforming agreements that have been amended, Viking requests waiver of section 154.601 of the Commission's regulations, to the extent it could be viewed as prohibiting the filing of such amended contracts.

Discussion

8. Section 154.1(d) of the Commission's regulations requires pipelines to file with the Commission contracts that materially deviate from the pipeline's form of service agreements.³ In *Columbia Gas*, the Commission explained that a material deviation is any provision in a service agreement that (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties.⁴ In the 2003 Policy Statement, the Commission clarified that "[s]ince there would appear to be no reason for the parties to use language different from that in the form of service agreement other than to affect the substantive right of the parties, this effectively means that all language that is different from the form of service agreement should be filed with the Commission."⁵

9. However, not all material deviations are impermissible. As the Commission explained in *Columbia Gas*, provisions that materially deviate from the corresponding *pro forma* service agreement fall into two general categories: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination.⁶

10. The Commission has completed its review of the 36 currently effective non-conforming and potentially non-conforming service agreements filed by Viking. Ten of the contracts identified by Viking as potentially non-conforming appear to have had no material deviations at the time they were executed. However, Viking submitted these contracts because one or more of the tariff sheets comprising the *pro forma* agreement changed between the execution of the contract and the date of the last amendment to that contract.⁷

³ 18 C.F.R. 154.1(d) (2010).

⁴ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia Gas*). See also *ANR Pipeline Co.*, 97 FERC ¶ 61,224, at 62,022 (2001) (*ANR*).

⁵ *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 32 (2003) (2003 Policy Statement).

⁶ *Columbia Gas*, 97 FERC ¶ 61,221 at 62,003; *ANR*, 97 FERC ¶ 61,224 at 62,024.

⁷ These include contract numbers AF0003, AF0004, AF0005, AF0050, AF0053, AF0061, AF0063, AF0115, AF0142, and AF0144.

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11. The Commission has stated that if a contract contains a material deviation from the currently effective version of the *pro forma* service agreement, but the contract conforms to the *pro forma* service agreement in effect at the time the contract became effective and the contract contains a *Memphis* clause,⁸ the pipeline does not have to file the contract.⁹ Because this is the case for ten of Viking's contracts, those contracts should not be treated as non-conforming agreements and Viking is therefore directed to remove them from section 32 of its tariff within 45 days of the issuance of this order.

12. The Commission finds that the remaining 26 of Viking's agreements contain material deviations from Viking's respective *pro forma* service agreements, and thus are non-conforming. The vast majority of the material deviations identified in these 26 agreements are permissible since they are either allowed under Viking's generally applicable tariff, or are administrative or non-substantive in nature, and pose no threat of undue discrimination among shippers. However, the Commission finds that the material deviations in certain of the contracts warrant further examination, as discussed below.

Rollover Provisions

13. Agreements AF0048 and AF0049 have automatic renewal provisions providing that the terms of the agreements automatically renew on a year-to-year basis after the initial terms. Section 10.1 of the *pro forma* agreement provides a blank for the term of the agreement to be inserted and contemplates termination as of the end of the initial terms or "as of the end of any extended period." Viking states that the language in AF0048 and AF0049 providing the agreements will remain in effect on a year-to-year basis after the initial term is merely part of the information used to fill in the blank, and that it is at least arguable that the *pro forma* agreement permitted insertion of rollover provisions, in addition to a description of the initial term. Moreover, Viking states that the right to terminate these contracts on twenty-four months' notice appears to conflict with, and perhaps make irrelevant, the year-to-year rollover provision.

⁸ A *Memphis* clause allows a pipeline to reserve the right to make NGA section 4 filings to propose changes in the rates and terms and conditions of service in settlements and contracts. See *United Gas Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958); *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678-A, 117 FERC ¶ 61,190, at P 7 (2006).

⁹ *Texas Gas Transmission, LLC*, 130 FERC ¶ 61,114, at P 9 (2010).

14. The Commission only permits pipelines to negotiate provisions giving shippers the right to extend their contracts if the pipeline's tariff contains a provision stating that it will offer and negotiate such provisions on a not unduly discriminatory basis.¹⁰ Viking's tariff does not contain a provision authorizing automatic renewal provisions.

15. Moreover, while section 10.1 of the *pro forma* agreement does have a blank to insert the ending date of the service agreement, such a blank may not be used to insert an automatic renewal provision of the type at issue here without some indication in the pipeline's tariff and/or *pro forma* agreement that the pipeline offers such rollover provisions. As discussed above, a material deviation includes any provision that affects the substantive rights of the parties and goes beyond filling in the blank spaces in the form of service agreement with the appropriate language allowed by the tariff.¹¹ An automatic renewal provision extending a service agreement on a year-to-year basis is a valuable substantive right and goes beyond simply filling in a blank for an ending date for the service agreement.¹² Accordingly, we direct Viking to either renegotiate Agreements AF0048 and AF0049 to remove the impermissible non-conforming language or to offer the negotiation of automatic renewal provisions to all similarly-situated shippers through a generally applicable tariff provision within 45 days of the issuance of this order.

Contractual Right of First Refusal

16. Agreement AF0024 is a negotiated rate agreement that provides the shipper with a right of first refusal (ROFR) upon the expiration of the contractual term. Section 284.221(d)(2) of the Commission's regulations provides ROFRs to firm shippers with contracts for service of a year or more who are paying the maximum rate.¹³ If a shipper would not otherwise qualify for the regulatory ROFR under section 284.221(d)(2), the Commission permits pipelines to negotiate contractual ROFRs.¹⁴ However, the

¹⁰ See *Gulf South Pipeline Co., LP*, 118 FERC ¶ 61,262, at P 33 (2007); *Northern Natural Gas Co.*, 113 FERC ¶ 61,032, P 11 (2005).

¹¹ See *Columbia Gas*, 97 FERC ¶ 61,221, at 62,002 (2001).

¹² *Questar Southern Trails Pipeline Co.*, 130 FERC ¶ 61,234, at P 6 (2010).

¹³ 18 C.F.R. 284.221(d)(2) (2010).

¹⁴ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31, 341, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g*

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Commission only permits pipelines to negotiate contractual ROFRs if its tariff contains a provision offering to negotiate such contractual ROFRs on a not unduly discriminatory basis.¹⁵ Viking's tariff does not contain such a provision. Therefore, Viking is required to either remove the contractual ROFR from Agreement AF0024, or add a provision to its tariff providing that it will offer, on a non-discriminatory basis, contractual ROFRs to shippers that do not qualify for regulatory ROFRs within 45 days of the issuance of this order.

Notification of Termination Provisions

17. Section 154.602 of the Commission's regulations requires a pipeline to provide 30 days' notice to the Commission prior to termination of service. Section 10.3 of Viking's *pro forma* Rate Schedule FT-A service agreement and section 6.2 of Viking's General Terms and Conditions (GT&C) both provide for termination of service within 15 days' notice to the Commission. Accordingly, the Commission finds, under section 5 of the NGA, that section 10.3 of Viking's *pro forma* Rate Schedule FT-A and section 6.2 of Viking's GT&C are unjust and unreasonable. Viking must revise this section of its tariff to establish a 30 days' notice requirement, consistent with the Commission's regulations, within 45 days of the issuance of this order.

Waivers

18. With regard to each contract filed, Viking requests a waiver of the requirement in sections 154.1(d), 154.112(b) and 154.207 of the Commission's regulations that non-conforming agreements be filed with the Commission no less than 30 days before they are proposed to take effect or, in the alternative, a determination that the contract is not non-conforming. In addition, with respect to each contract accepted for filing as a non-conforming agreement that has been amended, Viking requests a waiver of section 154.601 of the Commission's regulations, to the extent it could be viewed as prohibiting the filing of such amended contracts.

19. For good cause shown, we grant Viking all waivers necessary to have its agreements continue in effect, subject to the conditions discussed above.

denied, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

¹⁵ *Enbridge Pipelines (AlaTenn) L.L.C.*, 112 FERC ¶ 61,084, at P 9 (2005).

The Commission orders:

(A) We accept Viking's non-conforming agreements, effective as of their respective effective dates, and require Viking, as discussed in the body of this order, to modify several of its agreements and revise certain tariff sheets within 45 days of the date this order issues.

(B) For good cause shown, we grant all waivers necessary so that the currently effective agreements Viking filed in this proceeding can remain in effect for their respective terms and under their current terms and conditions, subject to the conditions discussed in the body of this order.

(C) Pursuant to section 5 of the NGA, we direct Viking to modify section 10.3 of its *pro forma* Rate Schedule FT-A and section 6.2 of Viking's GT&C within 45 days of the issuance of this order, as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.