136 FERC ¶ 61,104
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.

Transcontinental Gas Pipe Line Company, LLC Docket Nos. RP10-608-000
RP10-613-000

ORDER ON FURTHER REVIEW

(Issued August 15, 2011)

1. On April 15, 2010, in Docket No. RP10-608-000, and April 16, 2010, in Docket No. RP10-613-000, Transcontinental Gas Pipe Line Company, LLC (Transco) filed revised tariff sheets[1] to be effective on May 15, 2010 and May 16, 2010, respectively. Transco also filed non-conforming service agreements in those dockets to be effective on the effective date of each agreement. On May 13, 2010, the Commission accepted Transco's proposed tariff sheets and non-conforming agreements, effective on the dates requested, subject to further review and order of the Commission.[2]

2. The Commission's review of the subject agreements is complete. Based on this review, we will require Transco to file further information and modify several of its agreements and/or revise certain tariff sheets, subject to the conditions discussed below.

Details of the Filings

3. Transco stated that, in response to the Commission's order in *Southern Star Central Gas Pipeline, Inc.*,[3] it initiated a review of its agreements, including ancillary service agreements, that might affect the terms and conditions of service for material deviations from the applicable form of service agreement in Transco's Tariff. Transco further stated that it submitted the results of this review to the Commission's Office of

[1] Sixth Revised Sheet No. 29 in Docket No. RP10-608-000, and Seventh Revised Sheet No. 29 and Third Revised Sheet No. 29A in Docket No. RP10-613-000 to its FERC Gas Tariff, Fourth Revised Volume No. 1.

[2] *Transcontinental Gas Pipe Line Co., LLC*, 131 FERC 61,135 (2010).

[3] 125 FERC ¶ 61,082 (2008).

Enforcement on August 28, 2009 (August 28 Report). Transco stated that, in the August 28 Report, Transco identified certain service agreements containing deviations that could be considered material deviations and provided detailed descriptions of those deviations. Transco asserted that it would seek to renegotiate the identified deviations or would file the service agreements with the Commission as non-conforming service agreements. Transco further asserted that the service agreements filed in both these dockets were identified in the August 28 Report as containing deviations that could be considered material.

4. Specifically, in Docket No. RP10-608-000, Transco has submitted non-conforming agreements with Atlanta Gas Light Company (AGL), the City of Buford, Georgia (Buford), and Piedmont Natural Gas Co., Inc. (Piedmont).[4] In Docket No. RP10-613-000, Transco has submitted non-conforming agreements with PECO Energy Company (PECO) and PPL Energy Plus, LLC (PPL).[5] Transco asserts that the deviations are either not material or permissible. Transco's filings include marked copies of the agreements indicating the deviations. Transco also filed revised tariff sheets adding these service agreements to its list of non-conforming agreements.

Discussion

5. 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.[6] 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.[7] The Commission prohibits negotiated terms and conditions of service that result in a shipper receiving a different quality of service than that offered other shippers

[4] With regard to AGL, Transco submitted an amendment to an existing service agreement. With respect to Buford, Transco submitted contracts 1009763, 1012032, 1037190, 1042065, and 9002596. With regard to Piedmont, Transco submitted contract 1012026 and an amendment.

[5] With regard to PECO, Transco submitted contract 1044182 and three amendments. With respect to PPL, Transco submitted contract 9008608 and two amendments.

[6] 18 C.F.R. § 154.1(d) (2011).

[7] *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*).

under the pipeline's generally applicable tariff or that affect the quality of service received by others.[8] 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.[9]

6. The Commission has completed its review of the currently effective non-conforming and potentially non-conforming service agreements filed by Transco. Several of the contracts identified by Transco as potentially non-conforming appear to have had no material deviations at the time they were executed. However, Transco 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. 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 contains a *Memphis* clause,[10] the pipeline does not have to file the contract.[11] Because this is the case for some of the provisions in Transco's contracts,[12] those provisions should not be treated as non-conforming.

7. The Commission finds that there are agreements containing material deviations from Transco's respective *pro forma* service agreements, and thus are non-conforming. Many of the material deviations identified in these agreements are permissible since they are either allowed under Transco's generally applicable tariff, or are administrative or non-substantive in nature, and pose no threat of undue discrimination among shippers.

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[8] *Monroe Gas Storage Co., LLC*, 130 FERC ¶ 61,113, at P 28 (2010).

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

[10] A *Memphis* clause allows a pipeline to reserve the right to make Natural Gas Act (NGA) section 4 filings to propose changes in the rates and terms and conditions of service in settlements and contracts. *See United Gas Pipe Line 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, *order on clarification and reh'g*, 117 FERC ¶ 61,190, at P 7 (2006).

[11] *Texas Gas Transmission, LLC*, 130 FERC ¶ 61,114, at P 16 (2010).

[12] *See* the Docket No. RP10-613-000 Transmittal Letter, at 10.

However, the Commission finds that material deviations in certain of the agreements warrant further examination, as discussed below.

Contractual Right of First Refusal

8. Transco executed the PECO firm service agreement on June 1, 2001, and filed the agreement as part of its June 19, 2001 application for a certificate for its Leidy East project. The Commission issued a certificate for that project on October 25, 2001.[13] On October 10, 2002, Transco filed the service agreement as a negotiated rate agreement, and the Commission accepted Transco's filing on October 31, 2002. Exhibit C of the PECO service agreement provides the shipper with the option to extend the ten-year primary term of the service agreement for an additional five-year term, at the lower of Transco's then applicable maximum recourse rates or the negotiated rate in the agreement. Exhibit C requires PECO to provide Transco at least one year's notice of its election to exercise this option. Exhibit C also provides PECO with a right of first refusal (ROFR) exercisable either at the end of the primary term if it does not exercise the option to extend the primary term or at the end of the five-year extended term.

9. Transco executed the PPL firm service agreement on September 19, 2000, and it filed the agreement as part of its September 20, 2000 application to amend its certificate for its MarketLink project. The Commission granted that application on December 13, 2000.[14] On October 10, 2002, Transco filed the service agreement as a negotiated rate agreement, and the Commission accepted the service agreement on October 31, 2002. Exhibit C of the PPL service agreement contains similar contract extension rights as the PECO service agreement, except that PPL has the option to extend the 10-year primary term for two consecutive additional five-year periods. If PPL does not exercise the option at the end of the primary term or the first extended term, Transco must provide it a ROFR before selling the capacity to a third party.

10. 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.[15] Because PECO and PPL pay negotiated rates, they are not eligible for the regulatory ROFR. If a shipper would not otherwise qualify for the regulatory ROFR under section

[13] *Transcontinental Gas Pipeline Corp.*, 97 FERC ¶ 61,094 (2001), *reh'g denied*, 98 FERC ¶ 61,086 (2002).

[14] *Transcontinental Gas Pipeline Corp.*, 93 FERC ¶ 61,241 (2000), *reh'g denied*, 94 FERC ¶ 61,128 (2001).

[15] 18 C.F.R. § 284.221(d)(2) (2011).

284.221(d)(2), the Commission permits pipelines to negotiate contractual ROFRs.[16] However, the Commission only permits pipelines to negotiate contractual ROFRs if their tariff contains a provision offering to negotiate such contractual ROFRs on a not unduly discriminatory basis.[17] Transco's tariff does not contain such a provision. Therefore, the ROFR provisions in the PECO and PPL contracts are material deviations providing a valuable substantive right to those shippers.

11. Transco requests that these provisions be grandfathered as longstanding agreements relied upon by the parties. The Commission has recognized that it may be equitable to allow a material deviation to remain in effect if it is part of a longstanding agreement relied on by the parties and entered into prior to the clarification of the standards governing non-conforming agreements in *Columbia Gas* in November 2001.[18] Factors to be considered in deciding whether to grandfather a provision include the following: (1) whether the shipper reasonably relied to its detriment on the legality of the provision when it entered into the contract such that it will now suffer irreparable harm if the provision were removed; (2) the remedies currently available to the shipper to return itself to the position it would have been in if it had known when the contract was originally executed that the provision was illegal; (3) whether other shippers are harmed by a continuation of the provision; (4) whether the Commission was aware of the contract when it was originally entered into and did not require it to be modified; and (5) whether the provision will continue indefinitely or will terminate at some date certain.[19]

12. Under the circumstances of this case, the Commission will permit the ROFR provisions to be grandfathered. The provisions were originally part of the proposed precedent agreements for new expansion projects prior to the Commission's clarification

[16] *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 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).

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

[18] *Columbia Gas*, 97 FERC ¶ 61,221, at 62,010; *See also Texas Eastern Transmission, LP*, 119 FERC ¶ 61,337, at P 11 (2007) (*Texas Eastern*).

[19] *See Enbridge Pipelines (Midla) L.L.C.*, 128 FERC ¶ 61,089, at P 19 (2009) (*Enbridge*), refusing to grandfather a material deviation that would continue in effect indefinitely after the primary term of a service agreement.

of its policy regarding non-conforming contracts. Those agreements were filed with the Commission, and the Commission did not modify them. Thus, the shippers could reasonably rely on the legality of the ROFR provisions. The ROFR provisions assure that at the end of the primary terms of the service agreements, the shippers will have the ability to retain their capacity under new contracts. Removal of the ROFR provisions would take away that assurance. Therefore, these provisions may be grandfathered as longstanding agreements relied upon by the shippers in the proposed precedent agreements for the expansion projects prior to the Commission's clarification of its policy. However, consistent with our rulings in *Columbia Gas* and *Texas Eastern*, any new Transco contracts containing such non-conforming provisions must be filed with, and approved by, the Commission before they may be placed into effect.

Rollover Provisions

13. Buford and Piedmont have service agreements for service on Transco's Southeast Expansion Project containing evergreen provisions that deviate from the evergreen provision in Transco's *pro forma* service agreements. Transco constructed that project in two phases, the first in 1994 and the second in 1995/1996. Buford has contracts for service on both the 1994 Project and the 1995/1996 Project. Piedmont has contracts for service only on the 1995/1996 Project.

14. The evergreen provision in Transco's *pro forma* service agreement provides that the agreement will remain in effect for an agreed-upon primary term "and thereafter until terminated by Seller or Buyer upon at least two (2) years written notice." The Buford and Piedmont service agreements provide that they will remain in effect for a twenty year primary term "and *year-to-year* thereafter until terminated" (emphasis added) on two years written notice. Transco states that the insertion of the words "year to year" deviates from the *pro forma* service agreement and establishes a rolling one-year evergreen period. However, it argues that deviation does not provide shippers greater operational flexibility than other shippers and arguably provides less flexibility. Transco states that it gave Buford and Piedmont the opportunity to amend these agreements to remove the "year-to-year" deviation, but they declined to do so. Transco asserts that this provision does not create a risk of undue discrimination. Transco further asserts that this is also a longstanding agreement relied upon by the parties and, therefore, should be accepted.

15. 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.[20] Deviations in the terms under which agreements may be renewed are material.[21] Therefore, the provisions in the Buford and Piedmont service agreements are material deviations.

16. The Commission will not grandfather this provision as requested by Transco. While this provision was entered into before the November 2001 clarification of the standards governing non-conforming agreements, we do not find equitable reasons justifying its continuation. In contrast to the ROFR provision discussed above, it does not appear necessary to grandfather the evergreen provisions in the Buford and Piedmont service agreements to avoid the possibility of irreparable harm. Modifying those evergreen provisions to conform with the evergreen provision in Transco's *pro forma* service agreements will not eliminate the shippers' evergreen rights. Such a modification to remove the year-to-year language will only render the time when Transco and the shippers can exercise their rights under that provision consistent with the evergreen provisions in all of the service agreements of Transco's other shippers. In addition, absent modification of the evergreen provisions in the Buford and Piedmont agreements, those provisions will remain in effect indefinitely beyond the primary term of the contract, contrary to our general policy of not permitting grandfathering beyond the primary term of the service agreements in question.[22] Under the circumstances here, the Commission will not grant permission to extend this substantial material deviation for an indefinite period beyond the primary term of the contract unless this right is offered to all similarly-situated shippers. Therefore, we direct Transco, within 45 days of the issuance of this order, either to remove this impermissible non-conforming language or to revise its generally applicable tariff or *pro forma* agreement to offer the provision to all similarly-situated shippers.

Bypass Agreement

17. The AGL agreement is a bypass letter agreement dated June 10, 1991, as amended on March 24, 1993 (AGL Agreement). The AGL Agreement provides options to AGL in the event Transco bypasses it to provide service directly to an existing gas burning facility that, prior to the date of such direct service, was served by AGL. The AGL Agreement was amended to provide that it would not terminate as long as AGL is a Transco customer receiving service under Rate Schedule FS or FT. Section 1 of the AGL

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[20] *See Columbia Gas*, 97 FERC ¶ 61,221, at 62,002.

[21] *Equitrans, L.P.*, 130 FERC ¶ 61,024 (2010).

[22] *See Enbridge*, 128 FERC ¶ 61,089, at P 19.

Agreement requires Transco to offer AGL sales or transportation service under the same terms and conditions (including rates) offered to the existing facility previously served by AGL if Transco is required to bypass AGL. Section 2(a) provides that option if Transco voluntarily bypasses AGL by constructing facilities or not a opposing a tap connecting the existing facilities to its system.

18. Transco asserts that section 2(b) of the AGL Agreement provides AGL the option to reduce its Rate Schedule FT entitlements up to the level of direct service provided by Transco in the event that Transco voluntarily bypasses AGL. Transco contends that this option is consistent with the Commission's bypass policy subsequently established in *Texas Gas Transmission Corp.*, 69 FERC ¶ 61,245 (1994) (*Texas Gas*), under which the Commission will permit a local distribution company (LDC) to reduce its contract demand when there is a nexus between the LDC's contract demand on the bypassing pipeline and the LDC's service to the end user, and there is a connection between the LDC's level of requested reduction in contract demand and the level of service provided by the pipeline to the end user. Transco asserts that section 2(c) of the AGL Agreement provides that Transco will give Atlanta Gas sixty days notice prior to commencing a voluntary bypass which is required by section 284.13(f) of the Commission's regulations.[23] Transco further asserts that, to date, the provisions of the AGL Agreement have not been triggered and sales service is no longer provided to AGL rendering the provisions related to sales moot.

19. Transco asserts that its tariff contains no corresponding provision governing the matter addressed in the AGL Agreement. However, Transco contends that the AGL Agreement is consistent with its tariff provisions relating to discounts and the Commission's policies relating to bypass and, therefore, does not affect the substantive rights of the parties or the quality of service. Transco asserts section 3.5 of Rate Schedule FT and section 3.3 of Rate Schedule IT provide that Transco may, in its sole judgment, agree to discount its rate under those rate schedules, and section 40 of the General Terms and Conditions of its tariff permits such discounted rates to apply to specified quantities. Transco further contends that to the extent that sections 1 and 2(a) of the AGL Agreement are construed as a most favored nations (MFN) provision for the discounted rate, the Commission has determined that parties may agree to such provisions. Transco argues that the AGL Agreement should be accepted as a longstanding agreement entered into well before the Commission clarified its policies regarding material deviations and non-conforming service agreements.

20. The AGL Agreement permitting AGL to reduce its contract demand in the event of a bypass is a material deviation from Transco’s tariff. The tariff provisions concerning discounted rates cited by Transco only authorize Transco to offer individual shippers

[23] 18 C.F.R. § 284.13(f) (2011).

rates below Transco's maximum recourse rates subject to certain conditions. Those tariff provisions do not authorize Transco to offer a shipper a right to reduce its contract demand, if Transco bypasses the shipper. Similarly, the Commission's policy permitting MFN clauses does not apply in this case. The Commission's policy requires that such MFN clauses relate only to rates and not result in the customer receiving a different quality of service from other shippers or adversely affect other shippers.[24]

21. The Commission also finds that the equities weigh against grandfathering this material deviation. Transco does not state that it ever previously filed this agreement with the Commission, unlike the ROFR provisions discussed above. In addition, the AGL Agreement has an indefinite term for as long as AGL is a Transco customer receiving service under any contract for Rate Schedule FS or FT service. Therefore, if this provision were grandfathered, it would remain in effect indefinitely into the future, contrary to our general policy discussed above of not grandfathering material deviations of this type indefinitely. Moreover, the Commission finds it would be unduly discriminatory to allow a single shipper on the Transco system to have an open-ended special provision protecting it from bypass which is not available to any other shipper on the Transco system. While Transco asserts that Commission policy, as set forth in *Texas Gas*, provides other LDCs on its system a similar right to contract demand reductions in the event of bypass, the *Texas Gas* policy requires an LDC seeking such a contract demand reduction to proceed under NGA section 5. Such a process is not comparable to AGL's contractual right to obtain such a contract demand reduction. Therefore, the Commission will not grandfather this agreement. If Transco desires to have this bypass agreement accepted by the Commission, Transco is directed to propose a generally applicable tariff provision offering such rights to an appropriate class of similarly-situated shippers, within 45 days of the date this order is issued.

Liquidated Damages Clause

22. Transco states that the PPL service agreement was amended to include certain provisions from ancillary agreements and the ancillary agreements were then terminated. The January 22, 2010 amendment to the PPL agreement includes a non-conforming liquidated damages clause. The January 22, 2010 amendment states that:

> Buyer has informed Seller that to deliver its firm capacity to Buyer under its Service Agreement, Buyer will require certain minimum delivery pressures. Accordingly, Seller will design its MarketLink facilities and use good faith efforts, including adjusting the available interruptible and secondary capacity allocation for the next gas day and interrupting interruptible transportation, if necessary, to maintain deliveries of gas to Buyer at the proposed delivery points as stated in the attached Exhibit B.

[24] *Northern Natural Gas Co.*, 110 FERC ¶ 61,321, at P 29 (2005).

The liquidated damages provision provides that Transco agrees to pay the shipper $25,000 per day for each day that Transco is unable to make firm deliveries at the minimum delivery pressures. Transco argues that this provision was required to ensure that Transco would achieve the minimum pressures needed by PPL for deliveries at its facilities. Transco asserts that this provision does not give PPL any priority to capacity or result in a different quality of service for PPL than other shippers, and, therefore, does not present a significant potential for undue discrimination against among shippers, citing *Natural Gas Pipeline Co. of America*, 118 FERC ¶ 61,211, at P 65 (2007) (*Natural*).

23. This liquidated damages provision is a material deviation from Transco's existing *pro forma* service agreement. In the *Natural* case, the Commission found that the liquidated damages clause under consideration was a permissible material deviation since the pipeline supported a finding that the non-conforming provision was necessary to secure the necessary financial commitment for the construction of new infrastructure to ensure the viability of the project.[25] Therefore, Transco is directed either to (1) provide further information with adequate support for a finding that the liquidated damages clause is a permissible material deviation consistent with Commission precedent or (2) revise its generally applicable tariff or *pro forma* service agreement to offer the provision to all similarly-situated shippers within 45 days of the issuance of this order.

The Commission orders:

(A) The Commission accepts Transco's non-conforming agreements, effective as of their respective effective dates, subject to the conditions set forth in the body of this order.

(B) Transco is directed to file further information and revised tariff sheets and/or modify its agreements consistent with the discussion in the body of this order within 45 days of the date this order issues.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[25] *Natural*, 118 FERC ¶ 61,211, at P 65, citing *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 78 (2006).