

135 FERC ¶ 61,231
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

June 16, 2011

In Reply Refer To:
Northwest Pipeline GP
Docket No. RP11-59-001

Northwest Pipeline GP
PO Box 58900
Salt Lake City, Utah 84158-0900

Attention: Pam Barnes
Manager, Certificates and Tariffs

Reference: Non-Conforming Agreement

Ladies and Gentlemen:

1. On October 13, 2010, Northwest Pipeline GP (Northwest) filed for review, pursuant to section 154.1(d) of the Commission's Regulations,¹ tariff records to incorporate a non-conforming service agreement that materially deviates from its Form of Service Agreements. On November 13, 2010, the Commission accepted and suspended the tariff records, effective November 13, 2010, subject to a compliance filing, and further review and order of the Commission.² On December 10, 2010, in Docket No. RP11-59-001, Northwest submitted a compliance filing, as directed in the November 13 Order. Having reviewed the agreement further, we require Northwest to eliminate a non-conforming provision, as discussed below.

2. In the transactions at issue, Northwest posted for competitive bid available capacity for a minimum undisclosed reserve rate. Northwest stated that the posting allowed for a primary term up to ten years for discounted rate bids, and where the party requested a discounted rate, allowed for parties to offer contract extensions to increase the incremental economic value of their bids. Further, Northwest stated that the posting provided that if a discounted rate or contract extensions were offered, particular non-

¹ 18 C.F.R. §154.1(d) (2011).

² *Northwest Pipeline GP*, 133 FERC ¶ 61,133 (2010) (November 13 Order).

conforming provisions would be included in the service agreement. Northwest stated that on September 29, 2010, Northwest and Northwest Natural Gas Company (NW Natural) entered into Contract No. 138587 for firm transportation resulting from the posting and award (Service Agreement).

3. The November 13 Order required Northwest to submit a compliance filing explaining (1) its authority to offer non-conforming provisions in a posting of available capacity, (2) what non-conforming provisions were offered in the instant open season, (3) the reason for each non-conforming provision offered in the open season, (4) whether the non-conforming provisions in the NW Natural Service Agreement are limited to those offered in the open season, and (5) why the non-conforming provisions in the NW Natural Service Agreement do not present a substantial risk of undue discrimination. On December 10, 2010, Northwest submitted a compliance filing, providing the explanations requested in the November 13 Order.

4. Public notice of Northwest's Filing was issued on December 14, 2010. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.³ Pursuant to Rule 214,⁴ all timely filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted. No party filed a protest or adverse comments.

5. In response to the Commission's request for an explanation regarding Northwest's authority to offer non-conforming provisions in a posting of available capacity, Northwest states that it has authority pursuant to section 25.2(e) of its tariff, to include non-conforming provisions in a posting of available capacity. Northwest notes that section 25.2(e) (8) states "each posting will set forth the following, if applicable... Special conditions, including bid evaluation criteria."⁵ Northwest states that although section 25.2(e) does not expressly contain the words "non-conforming provision," it believes this section provides it authority to include non-conforming provisions in a posting for available capacity otherwise the Commission's review process of non-conforming provisions would never be called into play. Northwest argues that even if the above section does not expressly provide it this authority, it is unaware of any requirement that a pipeline must have express tariff authority to offer non-conforming provisions. In addition, Northwest notes that in *Equitrans L.P.*, 133 FERC 61,075 (2010) the Commission recently approved a non-conforming provision that was included in an

³ 18 C.F.R. § 154.210 (2011).

⁴ 18 C.F.R. § 385.214 (2011).

⁵ Sheet No. 275-A, GT&C – Available Capacity, 1.0.0 to Fifth Revised Volume No. 1, FERC NGA Gas Tariff.

open season posting that allowed a shipper to ramp up its maximum daily quantity over specific intervals.

6. The Service Agreement provides that if NW Natural reduces the contract demand under any of its current Rate Schedule TF-1 service agreements during the term of the Service Agreement Northwest will have the right to terminate the Service Agreement by providing one year prior notice. Northwest will not have the right to terminate the Service Agreement if NW Natural's reduction in contract demand is attributable to a temporary capacity release from another shipper, the expiration of a temporary release of capacity to NW Natural, or the turning back of capacity by NW Natural in a reverse open season for capacity expansions. We find this deviation to be permissible as it ensures that bids for discount rates were made for incremental capacity that was needed by the shipper and that the discounted capacity will not be used to replace capacity currently contracted under maximum rates. Northwest notes that this provision was also included in the open season posting for available capacity. We find that including this provision in an open season posting is consistent with section 25.2(e) (8) of Northwest's tariff,⁶ which permits Northwest to include special conditions in an open season posting.

7. Further, Northwest states the Service Agreement provides that in the event the Commission does not approve the non-conforming provisions, the Service Agreement will be null and void. Northwest notes that this provision is consistent with the Commission's determination that a pipeline should not have a unilateral right to amend or restate an agreement to cure an impermissible non-conforming provision,⁷ and this provision recognizes that the parties have agreed the agreement will be void if the Commission rejects any of the non-conforming provisions. We find this deviation to be permissible.

8. The Service Agreement contains a non-conforming provision which provides that NW Natural has agreed to file in support of its discounted rate in all of Northwest's subsequent rate cases and that NW Natural "will not oppose similar third party discounts in any of Northwest's rate cases" under either section 4 or 5 of the Natural Gas Act while the Service Agreement is in effect.

9. In its compliance filing, Northwest states that the purpose for this provision is to prevent NW Natural from taking inconsistent positions in the future and that NW Natural should not be allowed to benefit from this discount rate while reserving its right to oppose granting the same discount to others at a later date. We find this non-conforming provision to be contrary to Commission policy prohibiting non-conforming provisions

⁶ Sheet No. 275-A, GT&C – Available Capacity, 1.0.0 to Fifth Revised Volume No. 1, FERC NGA Gas Tariff.

⁷ *Kern River Gas Transmission Co.*, 132 FERC ¶ 61,111 (2011).

that restrict shippers' rights to challenge rates beyond the specific discounted rate at issue.⁸ The Commission has held that the parties to negotiated rate and discounted rate agreements may include a provision under which the shipper waives its rights as to the rate for the particular transaction in question, without risk of undue discrimination. However, the Commission has generally held that broader waivers of the type at issue here, under which the shipper waives its rights as to similar discounts, do present a risk of undue discrimination. Therefore, we find this non-conforming provision to be an impermissible deviation and direct Northwest to remove the provision from the service agreement. The Commission accepts the Service Agreement subject to Northwest filing revised tariff records consistent with this order, within 30 days of this order.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

⁸ *Columbia Gulf Transmission Corp.*, 109 FERC ¶ 61,152 (2004), *reh'g denied*, 111 FERC ¶ 61,338 (2005), *aff'd*, *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739 (D.C. Cir. 2007).