

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Columbia Gulf Transmission Corporation  
Columbia Gas Transmission Corporation

Docket No. RP05-20-000  
Docket No. RP05-21-000

ORDER ON DISCOUNTED RATE FILINGS

(Issued November 5, 2004)

1. On October 8, 2004, Columbia Gulf Transmission Corporation (Columbia Gulf) filed four discount letter agreements with three shippers in Docket No. RP05-20-000,<sup>1</sup> together with a revised tariff sheet adding these four agreements to its list of non-conforming agreements.<sup>2</sup> Columbia Gas Transmission Company (Columbia Gas) filed in Docket No. RP05-21-000 five discount letter agreements with the same three shippers as in the agreements filed by Columbia Gulf.<sup>3</sup> Columbia Gas also filed two new service agreements with another two shippers containing non-conforming provisions,<sup>4</sup> and a revised tariff sheet adding the seven agreements to its list of non-conforming agreements.<sup>5</sup> Both Columbia Gulf and Columbia Gas request an effective date of November 1, 2004 for the filings at issue here.

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<sup>1</sup> FTS-1 Service Agreement No. 79835 and FTS-2 Service Agreement Nos. 79836, 79974, and 79972.

<sup>2</sup> Thirteenth Revised Sheet No. 316 Superseding Twelfth Revised Sheet No. 316.

<sup>3</sup> FTS Service Agreement Nos. 79831 and 78567; SST Service Agreement Nos. 79833, 79971 and 79977; and FSS Service Agreement No. 79832.

<sup>4</sup> SST Service Agreement Nos. 77156 and 80160.

<sup>5</sup> Seventh Revised Sheet No. 500B Superseding Sixth Revised Tariff Sheet No. 500B.

2. All the filed discount agreements contain a provision restricting the shippers' rights to challenge the base rates and rate structure of the two pipelines. The Commission holds that Columbia Gulf and Columbia Gas must either remove that provision from the agreements or refile them as negotiated rate agreements. The Commission therefore rejects the tariff sheet filed by Columbia Gulf. The Commission accepts the two new non-conforming service agreements filed by Columbia Gas in Docket No. RP05-21-000. The Commission therefore accepts the tariff sheet filed by Columbia Gas, subject to revision, and requires Columbia Gas to modify the tariff sheet to conform to the requirements of this order. This order serves the public by assuring that the discount letter agreements are characterized and filed in a manner consistent with the Commission's policies governing non-conforming service agreements executed by interstate gas pipelines.

### **Background**

3. Columbia Gulf states that it has entered into two new service agreements with Mountaineer Gas Company (Mountaineer) for service under Rate Schedules FTS-1 and FTS-2, one new Rate Schedule FTS-2 service agreement with Cincinnati Gas and Electric Co. (CG&E), and one new Rate Schedule FTS-2 service agreement with Union Light, Heat and Power Company (ULH&P). Columbia Gulf states that these service agreements adhere to the *pro forma* service agreements in its tariff and therefore it is not filing those service agreements. However, Columbia Gulf states that it has also entered into four discount letter agreements providing for discounted rates that will be charged for service under the above four new service agreements. Columbia Gulf states that, while it believes that the discount rate letter agreements also do not need to be filed with the Commission, it is filing those letter agreements for Commission review out of an abundance of caution in light of the evolving nature of the Commission's policy in the area of non-conforming service agreements.

4. Each of the discount letter agreements filed by Columbia Gulf in Docket No. RP05-20-000 contains provisions under which the shipper agrees to waive its right under Natural Gas Act (NGA) section 5 to file a complaint directed at the "base rate or the rate structure of either Columbia Gulf or its affiliate Columbia Gas." In the case of the two agreements with Mountaineer, the ban on filing a complaint runs through March 31, 2013. Beginning on April 1, 2013 the shipper shall have the right to file a section 5 complaint so long as the complaint does not seek a rate change to take effect before November 1, 2014. The letter agreements also similarly restrict the right of Mountaineer to assist third parties seeking to challenge any of Columbia Gulf's or Columbia Gas's rates in a section 5 proceeding. If Mountaineer violates these provisions, the discount agreement shall become null and void and Mountaineer must pay Columbia Gulf's maximum rate. Additional remedies Columbia Gulf may pursue if the restricted provisions are violated are to seek vacatur of the discounted agreements or to pursue recovery of civil damages that might result.

5. Columbia Gulf filed virtually the same provisions with CG&E with an additional proviso that after 2010 CG&E may intervene if it has been divested by Cinergy Corp., or state regulatory body recommends or requires participation in the proceeding. Similar provisions apply to Columbia Gulf's agreement with ULH&P, a CG&E affiliate.

6. The five discounted rate agreements filed by Columbia Gas in Docket No. RP05-21-000 involve the same three shippers involved with Columbia Gulf, Mountaineer, CG&E, and ULH&P. The provisions providing for the waiver of the shipper's section 5 rates are the same as those described in the preceding paragraph. Columbia Gas also filed two new service agreements which it states are non-conforming. One is with Baltimore Gas & Electric Co. (BG&E) (No. 77156), and provides for firm transportation and storage. The agreement provides for an increase in BG&E's maximum daily delivery obligation (MDDO) at a particular delivery point if certain industrial customers receiving service at that point terminate their contracts with Columbia Gas. The second non-conforming agreement is with Columbia Gas of Kentucky (No. 80160) and has a similar provision for an increase in MDDO at a point if certain industrial customers receiving service at that point terminate their contracts with Columbia Gas. The non-conforming agreements continue existing contractual arrangements that were previously reviewed by the Commission and permitted to continue.<sup>6</sup>

### **Interventions and Protests**

7. Notice of both dockets at issue here issued on October 21, 2004. Interventions and protests were due as provided in § 154.210 of the Commission's regulations, 18 C.F.R. § 154.210. Pursuant to Rule 214, 18 C.F.R. § 385.214, all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. The Cities of Charlottesville and Richmond, Virginia (Cities) also filed a protest. Columbia Gulf and Columbia Gas filed an answer to the Cities' protest which the Commission will accept as providing additional information regarding their filing.

### **Discussion**

8. The Commission finds that Columbia Gulf and Columbia Gas may not include in a discount agreement any provision limiting the rights of shippers to seek Commission action under NGA section 5 to modify the pipeline's recourse rates. Columbia Gulf and Columbia Gas cite five cases they assert support their conclusion that a shipper may

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<sup>6</sup> See *Columbia Gas Transmission Corp.* 97 FERC ¶ 61,221 (2001).

waive some or all of its section 5 rights in exchange for a discounted rate.<sup>7</sup> They argue that these cases recognize that such a waiver enables the parties to protect their agreements by precluding challenges to the rates they negotiated. In response, the Cities assert that all of the cases cited by Columbia Gulf and Columbia Gas are negotiated rate cases and so hold on their face. They further assert that discounted rate agreements relying on the pipeline's *pro forma* service agreement are executed in response to competition and may not include clauses that reflect other considerations. The Cities therefore argue that for this reason the Commission has only accepted agreements waiving a customer's section 5 rights as negotiated rate agreements.

9. As the Cities state, the cases relied on by Columbia Gulf and Columbia Gas all involved negotiated rate transactions, not discounted rate agreements such as those at issue here. In the negotiated rate context, the Commission has found that, where the parties have agreed to a negotiated rate, it is reasonable for the parties to include a provision that the customer not seek to change the agreed-upon rate for the service to be provided under the negotiated rate. This assures that there will be rate certainty for the duration of the agreement and that both parties will receive the benefits of their bargain. The Commission has also observed that, in the negotiated rate situation, the shipper has the alternative option of obtaining service at the just and reasonable recourse rate, without having to give up its rights under NGA section 5.

10. Here, not only do Columbia Gulf and Columbia Gas seek permission to include a waiver of section 5 rights in discounted recourse rate agreements, but the proposed waiver provisions are significantly broader than any the Commission has approved in negotiated rate transactions. Under the waiver provisions in the discounted rate agreements at issue here, the Columbia Gulf shippers would waive their right to challenge all the base rates, and the entire rate structure, of both Columbia Gulf and its affiliate Columbia Gas. The Columbia Gas shippers would agree to a similarly broad waiver of section 5 rights. Thus, the waiver goes far beyond the discounted rates agreed to for the service to be provided under the service agreements in question, and would apply to the pipelines' recourse rates for all their services, including service not covered by the subject service agreements but which the shippers could conceivably contract for in the future.

11. The Commission has rejected efforts to include such broad waivers of section 5 rights in negotiated rate agreements not subject to the pipeline's recourse rates, and finds

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<sup>7</sup> The cited cases are: *Gulf Stream Natural Gas, L.L.C.*, 107 FERC ¶ 61,303 (2004); *East Tennessee Natural Gas Company*, 107 FERC ¶ 61,197 (2004), *ANR Pipeline Company*, 106 FERC ¶ 61,284 (2004); *Gulf South Pipeline Company, L.P.*, 98 FERC ¶ 61,318 (2004); *Central New York Oil and Gas Company, LLC* and *Tennessee Gas Pipeline*, 94 FERC ¶ 61,194 (2004).

they would be even more unreasonable in discounted rate agreements that are subject to the pipeline's recourse rates. Thus, in *CenterPoint Energy Gas Transmission Co.*, the Commission directed the pipeline to remove provisions from existing negotiated rate agreements that required the shippers to a collective agreement, known as the AGC Agreement, "to surrender the right to petition the Commission for changes in any of CEGT's other rates even if those rates should become unjust and unreasonable during the term of the AGC Rate Agreement and are for services not provided pursuant to the AGC Rate Agreement."<sup>8</sup> The broad waiver of section 5 rights included in the discount agreements at issue here would thus be inappropriate even if included in a negotiated rate agreement.

12. However, the Commission's concern with such provisions is even greater in the context of discounted rate transactions. This is because a fundamental premise underlying the Commission's policy of permitting pipelines and shippers to enter into negotiated rate agreements not subject to the maximum recourse rate is that the shipper always has the alternative of obtaining service pursuant to the just and reasonable recourse rate. Assuring shippers this alternative minimizes the possibility of any abuse of market power by the pipeline in the operation of its negotiated rate program. In contrast to negotiated rates, discounted rates must fall within the pipeline's maximum and minimum recourse rate. Thus, a shipper who agrees to a discounted rate is assured that, at no time during the term of its service agreement, will it ever be required to pay more than the just and reasonable maximum recourse rate. If the maximum recourse rate were ever reduced below the level of the shipper's discounted rate, the shipper would get the benefit of the reduction in the maximum just and reasonable recourse rate. The Commission concludes that discounted rate shippers should not be deprived of the right to complain under NGA section 5 that the maximum recourse rate has become unjust and unreasonable and must be lowered.

13. To the extent a pipeline and its shipper want to obtain rate certainty by agreeing to a rate that will remain in effect throughout the term of the service agreement, the Commission provides them an opportunity to do so by entering into a negotiated rate agreement. The Commission reiterates that it is permissible to limit challenges to the specific rate(s) included in the negotiated rate agreement so as to ensure rate certainty. However, shippers entering into discounted rate transactions must always have the ability to exercise their statutory rights under NGA section 5 to ensure that the rates they are paying are no higher than a just and reasonable maximum recourse rate for the service in question.

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<sup>8</sup> *CenterPoint Energy Gas Transmission Co.*, 105 FERC ¶ 61,281 (2004) at PP 44-45.

14. Finally, in their answer Columbia Gulf and Columbia Gas rely on *Northern Natural*<sup>9</sup> to support their conclusion asserting that the discounted rate agreements here are readily distinguished from negotiated rates. They argue that it is well established that discounted rates are distinguishable from negotiated rates, among other differences, because discounted rates do not involve the use of complex formulas, indexing, or a required minimum quantity,<sup>10</sup> and that a discounted rate is any rate that deviates from the rate sheets but falls within the tariff range.<sup>11</sup> The argument and the citations are irrelevant because, as the proceeding paragraphs explain, the issue here is not the nature of the rate, but the conditions that Columbia Gulf and Columbia Gas have imposed on the shippers' rights under section 5 of the NGA. Such non-conforming provisions have nothing to do with the mechanics by which the discount is determined. Thus the cited cases only reinforce the conclusion here.

15. For the reasons stated above, the Commission holds that Columbia Gulf and Columbia Gas must either (1) remove those clauses restricting the shippers section 5 rights from all the discount agreements at issue here, or (2) refile those agreements as negotiated rate agreements with clauses that are consistent with the holding in this order. Whichever option Columbia Gulf and Columbia Gas choose, there will be no reason to include these agreements on the pipelines' respective tariff sheets listing non-conforming agreements. Accordingly, the tariff sheet filed by Columbia Gulf is rejected and Columbia Gas must refile its revised tariff sheet to remove the subject discount agreements, while continuing to list the two non-conforming agreements discussed in the next paragraph.

16. The Commission accepts Columbia Gas's two non-conforming agreements with BG&E and Columbia Gas of Kentucky. As Columbia Gas explains, BG&E and Columbia Gas of Kentucky agreed to relinquish their MDDO rights at the points in question so that Columbia Gas could serve certain industrial customers at those points. The relinquishment was subject to the MDDO rights reverting back to BG&E and Columbia Gas of Kentucky to the extent the industrial customers terminated their contracts with Columbia Gas. When the Commission required Columbia Gas to file its non-conforming contracts in Docket No. CP01-70-001 for Commission review, the Commission determined in a November 2001 order that these particular provisions could

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<sup>9</sup> *Northern Natural Gas Company v. FERC*, 335 F.3d 1089 (D.C. Cir. 2003) at 1092-93 (*Northern Natural*)

<sup>10</sup> *Citing Northern Natural Gas Co.*, 90 FERC ¶ 61,181 at 61,145-50 (2000), quotation marks omitted.

<sup>11</sup> *Northern Natural* at 1094.

continue.<sup>12</sup> Since Columbia Gas has simply agreed to carry forward these provisions to new superseding agreements executed by the same customers, the Commission will permit these grandfathered provisions to continue. However, as the November 2001 order stated, before Columbia Gas can put into effect any new such arrangements not involving the particular MDDO rights at issue here, the relevant service agreements must be filed and approved by the Commission.

The Commission orders:

(A) Within 15 days of the date of this order, for each of the discount letter agreements listed in footnotes one and three, Columbia Gulf and Columbia Gas, respectively, must either file a statement that they have removed the provisions providing for the waiver of the section 5 rights or refile those agreements as negotiated rate agreements containing clauses that are consistent with this order.

(B) The tariff sheet listed in footnote two and filed by Columbia Gulf is rejected.

(C) The two non-conforming service agreements filed by Columbia Gas and listed in footnote four are accepted. The tariff sheet listed in footnote five and filed by Columbia Gas is accepted subject to Columbia Gas refiling the tariff sheet within 15 days of the date of this order to exclude reference to the service agreements rejected by ordering paragraph A.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>12</sup> 97 FERC at 62,009-10.