

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

December 28, 2004

In Reply Refer To:
Algonquin Gas Transmission, LLC
Docket No. RP05-106-000

Algonquin Gas Transmission, LLC
P.O. Box 1642
Houston, TX 77251-1642

Attention: David A. McCallum, Director, Rates and Tariffs

Reference: First Revised Sheet No. 507 to FERC Gas Tariff, Fifth Revised Volume
No. 1

Dear Mr. McCallum:

1. On December 1, 2004, Algonquin Gas Transmission, LLC (Algonquin) filed the referenced tariff sheet to be effective January 1, 2005. Algonquin's filing seeks the authority to extend a right-of-first-refusal (ROFR) to shippers who might not otherwise qualify under the Commission's regulations. For reasons discussed more fully below, the Commission accepts and suspends Algonquin's tariff sheet, effective the earlier of June 1, 2005 or upon further order of the Commission, subject to condition. This order benefits customers by ensuring that service is rendered in a not unduly discriminatory manner.
2. Algonquin proposes to revise section 1.40 of the General Terms and Conditions (GT&C) of its tariff to provide that Algonquin may agree, on a not unduly discriminatory basis, that a firm service agreement subject to a negotiated rate may qualify as a ROFR Agreement.
3. Public notice of the filing was issued on December 7, 2004. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.¹ Pursuant to Rule 214 (18 C.F.R. § 385.214 (2004)), all timely filed motions to intervene and any motion to intervene out-of-time filed before the issuance date of this order are

¹ 18 C.F.R. § 154.210 (2004).

granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. A motion to intervene and a protest was filed by Northeast Energy Associates (Northeast). Algonquin filed an answer to Northeast's protest. Although answers to protests generally are not allowed by Rule 213 of the Commission's regulations, [18 C.F.R. §385.212](#) (2004), here we waive this rule since Algonquin's answer facilitates the decision-making process.

4. Northeast claims that by excluding discount rate shippers from the offer to negotiate contractual ROFRs Algonquin is in fact being discriminatory. Northeast states that Algonquin does not cite any Commission precedent allowing for limiting contractual ROFRs to negotiated rate deals. Northeast also states that Algonquin does not discuss why shippers who seek discount agreements should be treated differently than negotiated rate shippers.

5. Northeast contends that Commission precedent on this issue requires that pipelines provide shippers with the option to negotiate a contractual ROFR in any circumstance where a regulatory ROFR would not apply automatically, including for discounted and negotiated rate deals.² Northeast avers that the "any circumstances" referred to in *Texas Eastern* accordingly must include all situations in which a shipper is paying less than the maximum recourse rate for the service or where the service is for a term less than one year. Northeast asserts that this, by definition, should include discount rate situations as well as some negotiated rate situations. Northeast argues that *Texas Eastern* should be read to require that a pipeline seeking to expand ROFR rights by contract to those not otherwise qualified under the Commission's regulations must not discriminate between discount rate shippers and negotiated rate shippers.

6. Northeast states that similarly, in *TransColorado Gas Transmission Company*, the Commission approved as reasonable a tariff provision stating that "[a] shipper paying a discounted rate or a negotiated rate will not have the ROFR, unless otherwise agreed to in writing by TransColorado."³

7. Northeast asserts that based on this applicable precedent, the Commission should either reject Algonquin's proposal or accept it only subject to a modification extending the contractual ROFR opportunity to discounted rate shippers as well as negotiated rate shippers in accordance with the language approved for *TransColorado*.

² Citing *Texas Eastern Transmission, LP*, 109 FERC ¶ 61,145 (2004) (*Texas Eastern*).

³ *TransColorado Gas Transmission Company*, 109 FERC ¶ 61,117 (2004) at P 13.

8. Algonquin asserts that section 284.221(d) only requires pipelines to provide a regulatory ROFR to firm shippers paying the maximum rate for services of twelve months or more. Therefore, Algonquin contends, pipelines have discretion whether to offer a contractual ROFR to other shippers, including the discretion to offer a ROFR to some categories of shippers who do not qualify for the regulatory ROFR but not to others. Algonquin contends that the Commission has only required that pipelines put in place a tariff provision indicating the circumstances under which it would permit a contractual ROFR and then apply the tariff provision in a not unduly discriminatory manner, *i.e.*, the tariff provision itself does not have to be not unduly discriminatory. As a result, Algonquin claims that it does not have to give discount rate shippers a right to negotiate contractual ROFRs; instead, Algonquin argues it simply must apply the proposed tariff provision giving negotiated rate shippers a right to negotiate contractual ROFRs in a not unduly discriminatory manner.

9. The Commission permits pipelines to negotiate a contractual ROFR with shippers when they would not otherwise qualify for the regulatory ROFR required to be given to long-term maximum rate shippers by section 284.221(d) of the Commission's regulations and the pipelines' tariff. As Algonquin points out, the Commission has held that if a pipeline offers contractual ROFRs to one category of firm shippers, it does not necessarily have to give contractual ROFRs to all other firm shippers not eligible for the regulatory ROFR.⁴ However, there must be a not unduly discriminatory reason for distinguishing between the shippers who are offered a regulatory ROFR and those who are not. As the Commission also found, a pipeline must "offer a contractual ROFR to similarly-situated shippers."⁵ In order to ensure that such contractual ROFRs are offered on a not unduly discriminatory basis, the 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.⁶ Here, Algonquin has as yet provided no explanation why it is reasonable to distinguish between negotiated rate and discount rate shippers for purposes of negotiating a contractual ROFR and only offer such a ROFR to negotiated rate shippers.

10. The Commission accordingly finds that Algonquin has not met its section 4 burden of proving that its tariff proposal is just and reasonable and not unduly discriminatory. Therefore the Commission directs Algonquin either: (1) to file, within 20 days of the issuance of this order, an explanation why it is not discriminatory to offer a contractual ROFR only to negotiated rate shippers; or (2) to modify its proposal so as to offer to negotiate contractual ROFRs with both negotiated rate and discounted rate

⁴ *Tennessee Gas Pipeline Co.*, 99 FERC ¶ 61,285 at 62,000 (2002).

⁵ *Id.*

⁶ *See ANR Pipeline Co.*, 103 FERC ¶ 61,084 (2003); *ANR Pipeline Co.*, 105 FERC ¶ 61,112 at P 19 (2003).

shippers on a not unduly discriminatory basis. Otherwise the Commission will reject the proposal for being unjust, unreasonable and unduly discriminatory in contravention of the requirements of section 4 of the Natural Gas Act. Accordingly, the referenced tariff sheet is accepted and suspended until the earlier of June 1, 2005 or further order of the Commission, subject to the aforementioned condition.

By direction of the Commission.

Linda Mitry,
Deputy Secretary.

cc: All Parties