

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Dominion Transmission, Inc.

Docket No. RP96-383-072

ORDER ON REHEARING

(Issued May 4, 2006)

1. On December 30, 2005, Equitable Production Company (Equitable) filed a request for rehearing of the Commission's November 30, 2005 letter order (November 30 Order).<sup>1</sup> The November 30 Order accepted a revised tariff sheet<sup>2</sup> filed by Dominion Transmission, Inc. (Dominion), on November 3, 2005 (November 3 Filing), reflecting an amendment to an existing negotiated rate agreement between Dominion and Dominion Field Services Inc. (DFS), as pool operator for Penn Virginia Oil & Gas Corporation (Penn Virginia). For the reasons discussed below, the Commission denies the request for rehearing of the November 30 Order.

**Background**

2. Dominion provides interruptible transportation service under its Rate Schedule IT for gas produced by Penn Virginia. Dominion receives Penn Virginia's gas production on Dominion's dry gathering system located behind its Oscar Nelson Compressor Station. Penn Virginia contracted with DFS, Dominion's affiliate, to act as pool operator. As a result, DFS is the shipper under the Rate Schedule IT service agreement pursuant to which Penn Virginia's gas is transported. DFS pays a negotiated rate for that IT service.

3. On November 3, 2005, Dominion filed a tariff sheet reflecting an amendment to the negotiated rate paid by DFS. Previously, DFS had been paying a negotiated gathering rate of \$0.295 per Dth plus a fuel retention percentage of 2.28 percent. The amendment to the negotiated rate increased the fuel retention percentage to 4.3 percent for the period January 1, 2006 through December 31, 2007, with other provisions of the negotiated rate unchanged.

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<sup>1</sup> 113 FERC ¶ 61,219 (2005).

<sup>2</sup> Second Revised Sheet No. 1415 to FERC Gas Tariff, Third Revised Volume No. 1.

4. Equitable filed a protest to the November 3 Filing and an alternative request for hearing, asking the Commission to require Dominion to offer it the same rate as the rate in the DFS negotiated rate agreement. Equitable is a producer of natural gas in the Appalachian Basin and receives gathering service from Dominion. In its protest, Equitable contended that Dominion was unlawfully providing a discounted gathering rate to its affiliate, DFS, while refusing to extend an identical rate to Equitable. Equitable is paying a gathering rate established in Dominion's limited section 4 proceeding in Docket No. RP01-74-000. In that proceeding, Dominion proposed to unbundle its gathering rates from its rates for transportation service. In December 2000, Dominion submitted a settlement jointly sponsored by it and the Independent Oil and Gas Association of West Virginia (IOGA) to resolve Docket No. RP01-74-000 (IOGA Settlement). That settlement provided for Dominion to recover all of its gathering costs by retaining specified percentages of metered gas volumes, rather than through a monetary rate. The gathering retention percentage was 9.34 percent, inclusive of the existing fuel retention percentage of 2.28 percent. The settlement provided that the agreed-upon retention percentages would remain in effect through December 31, 2005, and provided for year-to-year extensions unless cancelled by either party with twelve months prior written notice. Equitable opposed the settlement, contending that it should include a monetary cap on the amounts Dominion could collect. The Commission approved the settlement for the consenting parties, including IOGA and Cabot Oil & Gas Marketing Corporation (Cabot),<sup>3</sup> and severed Equitable for further proceedings.

5. In August 2001, Dominion filed a separate settlement with Equitable (Equitable Settlement). That settlement provided for Equitable to pay a monetized rate of \$0.3100 cents per Dth for gathering service, plus the existing 2.28 fuel retention percentage. The Equitable Settlement provided that the agreed-upon rates would remain in effect through December 31, 2005 and year-to-year thereafter unless cancelled by either party upon 12 months notice. The settlement further provided that upon its expiration, Dominion shall charge Equitable its "generally applicable recourse rate, as described in section 5.1." Section 5.1 of the Equitable Settlement provides, "DTI's recourse rates for gathering... for all customers shall be the currently effective IOGA Settlement rates which are included in DTI's tariff." The Commission approved the Equitable Settlement in October 2001.<sup>4</sup>

6. Equitable stated in its protest to the November 3 Filing that Dominion provided it with the required 12-month notice of termination of the Equitable Settlement in December 2004. Equitable further stated that since that time, it has been in negotiations regarding the appropriate gathering rates to be paid by Equitable after the December 31, 2005 termination of the Equitable Settlement. Equitable asserted that Dominion has told

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<sup>3</sup> *Dominion Transmission, Inc.*, 94 FERC ¶ 61,329 (2001).

<sup>4</sup> *Dominion Transmission, Inc.*, 97 FERC ¶ 61,088 (2001).

it that Dominion intends to charge it the recourse rates in its tariff, as of January 1, 2006, which is the 9.34 retention percentage, inclusive of the 2.28 fuel retention percentage. Equitable stated that it is similarly situated to DFS as a shipper on Dominion's gathering system and thus should receive the same \$0.295 monetized gathering rate that Dominion is charging its affiliate DFS. In the alternative, Equitable requested that the Commission set this matter for hearing.

7. In the November 30 Order, the Commission found that Equitable's request that Dominion provide Equitable the same rate it is charging DFS is outside the scope of this proceeding. The Commission noted that Equitable did not protest any aspect of the increase in the fuel retention rate that was the subject of the November 3 Filing. The Commission determined that if Equitable believes that it is similarly situated to DFS and is entitled to the same rate, it may utilize the Commission's complaint procedures to pursue a remedy. Accordingly, the Commission denied Equitable's protest and alternative request for hearing without prejudice.

8. On January 13, 2006, in Docket No. RP96-383-071, the Commission accepted tariff sheets filed by Dominion which, among other things, set forth the details of a negotiated rate agreement with Cabot.<sup>5</sup> That negotiated rate agreement included a monetized gathering charge of \$0.315 per Dth with a gathering fuel retention charge of 4.3 percent of metered receipts. In that proceeding, Equitable filed a protest that is similar to its protest in this proceeding. The Commission noted that Equitable did not raise any issue that Cabot's negotiated rate was unjust and unreasonable. The Commission accepted the negotiated rate, without prejudice to Equitable pursuing the discrimination issues through the Commission's complaint procedures. Equitable did not file a request for rehearing of that decision.

9. In its request for rehearing of the November 30 Order, Equitable argues that section 4 of the Natural Gas Act (NGA) requires Commission action on its protest rather than denying the protest without prejudice to Equitable filing a section 5 complaint. Equitable asserts that, in a case involving section 205 of the Federal Power Act (FPA) which is virtually identical to NGA section 4, the Supreme Court has ruled that the Commission "must arrive at a rate level deemed by it to be just and reasonable, but in doing so must consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect."<sup>6</sup> Equitable further asserts that the Commission must address Equitable's contentions of undue prejudice and discrimination in this proceeding. Equitable further contends that the Commission has prolonged the discriminatory and anti-competitive harm which can not be readily rectified after gas sales have been lost.

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<sup>5</sup> 114 FERC ¶ 61,023 (2006)(*Cabot*).

<sup>6</sup> *Citing FPC v. Conway Corp. et al.*, 426 U. S. 271, 278 (1976)(*Conway*).

10. Equitable argues that Dominion has not justified subjecting Equitable to an undue prejudice or disadvantage contrary to section 4(b) of the NGA. Equitable contends that the Commission can reduce Equitable's rate to rectify the alleged discrimination<sup>7</sup> and must consider the anti-competitive impact of the rate differentials. Equitable further contends that Dominion's filing conflicts with the anti-discrimination principles of the Negotiated Rate Policy Statement<sup>8</sup> and the Commission's Standards of Conduct<sup>9</sup> by failing to offer to Equitable gathering service at rates similar to those Dominion charges to DFS and Cabot.

11. Equitable further argues that Dominion's pending abandonment application in Docket No. CP06-10-000 compounds the harm to Equitable from the alleged discriminatory rate treatment since the result of granting the requested reclassification of the facilities as gathering would be that Equitable would have to pay gathering charges in addition to the current transportation rate it pays, and Dominion proposes in that proceeding a negotiated rate only for DFS. Equitable further argues that if it does not receive the same rate as DFS, it would pay a recourse rate of 9.34 percent or a significant amount above the amount that it would pay at the same rate given DFS.<sup>10</sup> Finally, Equitable argues that an appropriate remedy for the discrimination alleged is to condition acceptance of Dominion's filing on Dominion offering similar terms to Equitable.

### **Discussion**

12. The Commission denies Equitable's request for rehearing of the November 30 Order. Dominion's tariff authorizes it to enter into negotiated rate transactions with individual customers.<sup>11</sup> Consistent with that tariff authorization, Dominion proposed in the instant section 4 filing to amend its negotiated rate agreement with DFS to increase the fuel retention percentage, while continuing the existing \$0.295 monetized gathering rate. Dominion's filing proposed no change in the rate it charges Equitable. Equitable

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<sup>7</sup> *Citing Town of Norwood, Mass. v. FERC*, 587 F.2d 1306 (D.C. Cir. 1978).

<sup>8</sup> *Citing Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 at P 4, 26, 34, and n.3 (2003)(2003 Modified Negotiated Rates Policy Statement) and *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 at 62,001- 62,002 (2001)(*Columbia Gas*).

<sup>9</sup> *Citing* 18 C.F. R. § 358.5(c)(2).

<sup>10</sup> Equitable asserts that the difference in the rates charged to it and DFS results in an approximate annualized amount of over \$500,000.

<sup>11</sup> *CNG Transmission Corp.*, 77 FERC ¶ 61,092, *reh'g*, 80 FERC ¶ 61,401 (1997).

does not argue that the level of DFS' negotiated rate included in Dominion's November 3 section 4 filing is unjust and unreasonable. Rather, Equitable requests that the Commission require Dominion to provide it with the same \$0.295 monetized gathering rate as in the DFS negotiated rate agreement on the ground that it is similarly situated to DFS. The Commission continues to find that Equitable's assertions should be best addressed in a separate proceeding under the Commission's complaint procedures.

13. In the 1996 Negotiated Rates Policy Statement, the Commission stated that pipelines must "negotiate rates with their customers in a manner that is not unduly discriminatory and that treats similarly situated shippers similarly."<sup>12</sup> However, the fact that two shippers are receiving the same services from a pipeline does not necessarily mean they are similarly situated.<sup>13</sup> Whether another shipper is similarly situated involves a number of factual questions, including whether a difference in competitive factors justifies different rates.<sup>14</sup> In addition, as the United States Court of Appeals for the District of Columbia Circuit held in *UMDG v. FERC*, 732 F. 2d 202, 212-213 (D.C. Cir. 1984), rate disparities may be justified when they arise out of settlements, depending upon the circumstances surrounding the execution of the settlement. The Commission stated, in the 1996 Negotiated Rates Policy Statement, that customers wishing "to argue that they are similarly situated with a customer receiving a negotiated rate and that a pipeline has been unduly discriminatory may file a complaint with the Commission at any time."<sup>15</sup> The complaint procedures, set forth in Rule 206 of the Commission's regulations, 18 C.F.R. § 385.206 (2005), provide the appropriate forum for resolving any contention that a pipeline improperly failed to offer a negotiated rate to a similarly situated shipper, including investigating the relevant facts and providing an opportunity for settlement.

14. The Commission rejects Equitable's contention that the Commission has improperly imposed on it the burden of proceeding under NGA section 5. The only rate change Dominion has proposed in the instant section 4 filing is an increase in the fuel retainage percentage in DFS's negotiated rate. Equitable is not challenging that section 4 proposal. Rather, it is seeking to have the Commission require Dominion to offer it the same monetized gathering rate which is in the DFS negotiated rate agreement, that Dominion did not propose to change the instant section 4 filing. In effect, Equitable is

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<sup>12</sup> *1996 Negotiated Rates Policy Statement*, 74 FERC ¶ 61,076 at 61,242 (1996).

<sup>13</sup> *Williston Basin Interstate Pipeline Co.*, 85 FERC ¶ 61,247 at 62,029 (1998).

<sup>14</sup> *Wisconsin Gas Co. v. Viking Gas Transmission Co.*, 105 FERC ¶ 61,303 at P 11, 13, and 15 (2003).

<sup>15</sup> 74 FERC ¶ 61,076 at 61,242.

challenging Dominion's recourse rate. However, the Commission previously found Dominion's recourse rate to be just and reasonable when it approved the IOGA and Equitable Settlements, and Dominion's instant section 4 filing did not propose to change either the rate Dominion charges Equitable or the DFS monetized gathering rate that Equitable seeks. A party challenging an existing rate found to be just and reasonable must meet its burden of proof under section 5 of the NGA. In this case, the Commission has determined that allowing Equitable to file a complaint pursuant to section 5 is in accordance with the Commission's established rules and procedures regarding negotiated rates. Such a proceeding would provide an appropriate forum to investigate such matters as whether the rate disparity at issue here is justified by the Equitable Settlement and the parties' actions since Dominion gave notice and terminated that settlement on December 31, 2005.

15. Equitable argues that this decision is inconsistent with the *Conway* decision. However, in *Conway*, a utility proposed a rate increase for its wholesale customers under section 205 and some customers opposed that proposed rate increase. The customers complained that the proposed increase in their rates made it more difficult for them to compete with the utility for retail sales which the utility also made. However, in this case as explained above, Equitable has not challenged the rate changes proposed in the instant section 4 filing as unjust and unreasonable, but seeks a change in its current rate, which Dominion did not propose to change.

16. In its rehearing request, Equitable contends that the Commission stated in the 2003 Modified Negotiated Rates Policy Statement that it would consider issues of discrimination in reviewing pipeline filings of negotiated rate agreements. However, the portion of the 2003 Modified Negotiated Rates Policy Statement, relied upon by Equitable, is directed to review of material deviations between the filed negotiated rate agreement and the form of service agreement in the pipeline's tariff to determine whether the material deviation can be approved.<sup>16</sup> In this case, there is no allegation that the proposed negotiated rate contains such a material deviation.

17. Finally, with regard to the alleged potential harm Equitable might suffer as a result of the approval of Dominion's abandonment application in Docket No. CP06-10-000, Equitable filed a protest and alternative request for hearing in that proceeding. On March 16, 2006, in *Dominion Transmission, Inc.*, 114 FERC ¶ 61,266 (2006), the Commission issued an order which found that the primary function of the facilities at issue was gathering and approved the requested refunctionalization.<sup>17</sup> The Commission noted that

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<sup>16</sup> The *Columbia Gas* decision cited by Equitable also concerns material deviations from the form of service agreement.

<sup>17</sup> The Commission denied the request for abandonment authority as premature.

potential rate impacts of the proposed reclassification have no bearing on the proper functionalization of the facilities, and the Commission's determinations must be consistent with the actual function of the facilities. No request for rehearing of that order was filed.

The Commission orders:

The request for rehearing by Equitable of the November 30 Order is denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.