

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wyoming Interstate Company, Ltd.

Docket No. RP06-147-001

ORDER ON REHEARING DIRECTING COMPLIANCE FILING

(Issued May 25, 2006)

1. On February 15, 2006, Wyoming Interstate Company (WIC) filed a request for clarification and/or rehearing of the Commission's January 18, 2006 Order.¹ The January 18, 2006 Order accepted certain non-conforming service agreements filed by WIC and clarified the operation of a surcharge exemption provision of the Firm Transportation Service Agreements (FTSAs). The January 18, 2006 Order stated the general principle that there is no discount adjustment for negotiated rates. As discussed below, the Commission denies WIC's request for rehearing of that general policy, but clarifies the Commission's policy on discount adjustments, and the narrow exception to the general policy prohibiting such adjustments for negotiated rates. The Commission also directs WIC to revise its tariff accordingly, or show why it should not be required to revise its tariff to conform to this policy.

Background

2. On December 19, 2005, WIC submitted service agreements with potential nonconforming provisions for Commission review in light of the Commission's material deviation policies. WIC's filing included three FTSAs, two Precedent Agreements (PAs), and related tariff sheets reflecting the FTSAs as nonconforming negotiated rate agreements. The FTSAs contained a provision exempting the shippers from future surcharges that may apply to services under the FTSAs. The provision required shippers

¹ *Wyoming Interstate Company, Ltd.*, 114 FERC ¶ 61,040 (2006) (January 18, 2006 Order).

to pay WIC's normal fuel, lost and unaccounted (L&U), and other existing surcharges, but provided that the shippers shall not be liable for future surcharges that are the result of a WIC request for such surcharges authority.

3. In the January 18, 2006 Order, the Commission accepted WIC's nonconforming service agreements and the revised tariff sheets, subject to clarification regarding the operation of the surcharge exemption provision. The Commission clarified that a pipeline can exempt a shipper from any surcharge under a negotiated rate agreement, but the pipeline would be responsible for the cost of any rate exemption, since there is no discount adjustment for negotiated rates.

Request for Rehearing

4. WIC argues that the January 18, 2006 Order's clarification on the operation of the surcharge exemption provision is inconsistent with Commission policy. WIC asserts that the Commission has stated in prior orders that there is no *per se* rule against discount adjustments to recourse rates to reflect negotiated rates.² It also states that WIC's tariff language, specifying the circumstances where it would be eligible for discount-type adjustments for negotiated rates, has been accepted by the Commission,³ and permits WIC to seek discount-type adjustments for negotiated rates.

5. WIC requests that the Commission grant rehearing and/or clarify the Commission's policy. WIC argues that a determination not to allow discount adjustments for negotiated rates under any circumstances would represent, without explanation, a departure from past Commission policy, and would constitute unreasoned decision making.

Discussion

6. As discussed below, the Commission denies WIC's request for rehearing, and grants clarification on the Commission's negotiated rate discount policy. Also, upon further review of WIC's tariff, pursuant to section 5 of the Natural Gas Act (NGA),⁴ the

² Citing *Cheyenne Plains Gas Pipeline Co.*, 109 FERC ¶ 91,291 at P 9 (2004); *Colorado Interstate Gas Co.*, 85 FERC ¶ 61,042 at 61,126 (1998); *Wyoming Interstate Co., Ltd.*, 82 FERC ¶ 61,032 (1998).

³ General Terms and Conditions, Section 32.4. FERC's Gas Tariff, Second Revised Vol. No. 2.

⁴ 15 U.S.C. § 717e (2000).

Commission directs WIC either to bring its tariff into conformance with the Commission's negotiated rate discount policy, or explain why it should not be required to do so.

A. Discount Adjustment

7. The Commission's long-standing rate-making policies allow pipelines to seek rate adjustments in general NGA section 4 rate proceedings for rate discounts that were granted for competitive purposes. These discount adjustments to rates reflect the fact that their contribution to revenue and recovery of costs will be lower than a similar volume carried at undiscounted rates. Nevertheless the discount adjustment policy is premised on the theory that some contribution to the recovery of fixed costs is better than none at all. Negotiated rates are different from rate discounts. Significantly, they can be either higher than or lower than the maximum recourse rates.

8. The Commission's policy on a discount adjustment for negotiated rates is such that, while a pipeline, as WIC has done here, can exempt a shipper from any surcharge under a negotiated rate agreement, recourse rate shippers should not be worse off as a result of the negotiated rates.⁵ In applying its policy the Commission has been particularly concerned that the recourse rates (the otherwise applicable tariff rates for the same service) remain viable, and that no inappropriate cost shifting takes place. While the Commission has never departed from the general prohibition against discount adjustments for negotiated rates, it has allowed a pipeline to seek a discount adjustment if the negotiated rate contract in question was originally a discount rate arrangement.

9. The Commission recently clarified this policy on discount adjustments for negotiated rates in *El Paso Natural Gas Company*.⁶ In *El Paso*, the Commission clarified that it does not permit discount-type adjustments to recourse rates at the time a pipeline files for a general rate case to ensure that costs associated with negotiated rate shippers would not be shifted to recourse rate shippers.⁷ The Commission also reaffirmed that it

⁵ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines, (Alternative Rate Policy Statement)*, 74 FERC ¶ 61,076 at 61,242 (1996), *reh'g and clarification denied*, 75 FERC ¶ 61,024 (1996), *reh'g denied*, 75 FERC ¶ 61,066 (1996), *petition for review denied, Burlington Resources Oil & Gas Co. v. FERC*, Nos. 96-1160, *et al.*, U.S. App. LEXIS 20697 (D.C. Cir. July 20, 1998).

⁶ *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305 at P 302 (2006) (*El Paso*).

⁷ *See, e.g., NorAm Gas Transmission Co.*, 77 FERC ¶ 61,011 (1996).

has permitted pipelines to include tariff language permitting such adjustments in the limited situation where the pipeline agrees to a discounted rate with a shipper and then converts it to a negotiated rate. For example, in *Northwest Pipeline Corp.*, the Commission approved a provision allowing Northwest to seek a discount-type adjustment for a negotiated rate agreement only if the agreement had been converted from a pre-existing discounted Part 284 agreement.⁸ The Commission also stated that if a pipeline seeks a discount-type adjustment in a rate case, then it must apply the standards used for affiliate discounts thereby proving that any discount reflected in the negotiated rate is required to meet competition.

10. Accordingly, as stated in the January 18, 2006 Order, there is generally no discount adjustment for negotiated rates, and the pipeline is responsible for the cost of any rate exemption it provides pursuant to negotiated rate agreements. The exception to such a prohibition is limited to circumstances where a discount rate is converted to a negotiated rate as described above, and clarified in *El Paso*.

B. WIC's Tariff

11. Additionally, in *El Paso*, the Commission found El Paso's proposed tariff on negotiated rate discounts to be overly broad. El Paso proposed that it may seek to include negotiated rates in such recourse rate adjustments *whenever* the rate for service is below the posted maximum rate for service under the applicable rate schedule for all or part of the twelve-month base period and/or the nine-month adjustment period for such rate change proceeding. As a result, the Commission required El Paso to adhere to the Commission's policy on negotiated rate discounts by revising its tariff sheets to be consistent with the limitation for permitting discount-type adjustment only when a former discount rate is converted to a negotiated rate.

12. Similarly, upon further review of WIC's tariff, at section 32.4 of the General Terms and Conditions (GT&C), we find that the tariff language does not conform to the Commission's policy on discount-type adjustments for negotiated rates. WIC's tariff language, as El Paso's had proposed, also states that it may seek to include negotiated rates in such recourse rate adjustments *whenever* the rate for service is below the posted

⁸ *Northwest Pipeline Corp.*, 79 FERC ¶ 61,416 (1997), *order on reh'g*, 84 FERC ¶ 61, 109 (1998) (*Northwest*).

maximum rate for service under the applicable rate schedule for all or part of the twelve-month base period and/or the nine-month adjustment period for such rate change proceeding.⁹ The Commission finds that section 32.4 lacks the specificity of the tariff language that was approved in *Northwest*, delineating the special circumstance of the conversion of a discount rate agreement to a negotiated rate agreement. Northwest's tariff correctly states the limited circumstance in which a discount adjustment for a negotiated rate may be sought:

⁹ WIC's tariff, section 32.4 states:

Subject to the limitations set forth below, Transporter may seek to include non-conforming negotiated rates in a discount type adjustment to the level of Transporter's recourse rates in general rate changes initiated by Transporter under section 4 of the Natural Gas Act. Transporter may seek to include non-conforming negotiated rates in such recourse rate adjustment whenever the rate for service is below the posted maximum rate for service under the applicable rate schedule for all or part of the 12-month base period and/or the nine month adjustment period for such rate change proceeding. However, if the non-conforming negotiated rate agreement(s) was/were not in effect during the base period, such discount may still be requested in the recourse rate adjustment when the rate for service under the non-conforming negotiated rate agreement is projected to be in effect with rates below the otherwise applicable maximum recourse rate as of the end of the 9-month adjustment period applicable to such rate proceeding.

A discount adjustment to recourse rates shall only be allowed to the extent that Transporter can meet the standards required of an affiliate discount type adjustment including requiring that the Transporter shall have the burden of proving that any discount granted is required to meet competition.

Transporter shall be required to demonstrate that any discount type adjustment does not have an adverse impact on recourse rate shippers.

Transporter will not seek in future general rate proceedings discount-type adjustments to demand charge billing determinants for capacity converted from recourse rate service agreements to negotiated rate service agreement, unless the recourse rate had been discounted. *In those situations where the Transporter had granted a market-justified discount to the recourse rate and subsequently converted the service agreement to a negotiated rate service agreement, Transporter may seek a discount-type adjustment.* Such adjustment would be based on the greater of: (i) the negotiated rate revenue received or (ii) the discount recourse rate revenues which otherwise would have been received.¹⁰ (emphasis added)

13. Unlike Northwest's tariff language, WIC's section 32.4 fails to specify that it will not seek a discount-type adjustment unless a recourse rate was granted a market-justified discount and subsequently converted to a negotiated rate. Therefore, in accordance with section 5 of the NGA, we find cause to require revision of WIC's section 32.4 as inconsistent with established Commission policy, and therefore unjust and unreasonable. Accordingly, we direct WIC to file within 30 days of the date of this order, either an explanation showing why it should not be required to revise its tariff consistent with Commission policy, or a revised tariff sheet(s) to modify its section 32.4 to conform to the narrow condition precedent for seeking discount adjustment for a negotiated rate, as reflected in Northwest's tariff language, namely, a pre-existing discount agreement that has been converted to a negotiated rate agreement.

¹⁰ Section 19.5, Sixth Revised Sheet No. 246, Northwest Pipeline Corp, FERC Gas Tariff, Third Revised Volume No. 1.

The Commission orders:

(A) WIC's request for rehearing of the January 18, 2006 Order is denied, as discussed in the body of this order.

(B) WIC is directed to submit, within 30 days of the issuance of this order, revised tariff sheets reflecting the modifications set forth in this order or an explanation showing why it should not be required to revise its tariff consistent with Commission policy.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.