

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Suedeem G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Wyoming Interstate Company, Ltd.

Docket Nos. RP06-147-002 and  
RP06-147-003

ORDER ON REHEARING AND ACCEPTING TARIFF SHEETS

(Issued November 2, 2006)

1. On June 26, 2006, Wyoming Interstate Company (WIC) filed a request for rehearing of the Commission's May 25, 2006 Order in this proceeding.<sup>1</sup> WIC also filed a response to the May 25, 2006 Order's requirement for WIC to revise its tariff to reflect the Commission's policy on discount adjustments on negotiated rate contracts or show why it should not be required to revise its tariff to conform with this policy. As discussed below, the Commission will grant rehearing to clarify the May 25, 2006 Order, and accept the proposed revised tariff sheets, effective January 19, 2006.

**I. 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 firm transportation service agreements (FTSAs), two Precedent Agreements, 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 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 surcharge authority.

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<sup>1</sup> *Wyoming Interstate Co., Ltd.*, 115 FERC ¶ 61,238 (2006) (May 25, 2006 Order).

3. In an order issued on January 18, 2006,<sup>2</sup> 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. Subsequently, WIC filed a request for clarification and/or rehearing of the January 18, 2006 Order.

4. In the May 25, 2006 Order we denied WIC's request for rehearing, and granted clarification of the Commission's negotiated rate policy. In addition, upon further review of WIC's tariff, pursuant to section 5 of the Natural Gas Act (NGA),<sup>3</sup> the Commission found that WIC's tariff at section 32.4 of the General Terms and Conditions (GT&C) did not conform to the Commission's policy on discount-type adjustments for negotiated rates. Accordingly, we directed WIC to submit, within 30 days of the issuance of the order, revised tariff sheets in conformance with the Commission's policy or an explanation showing why WIC should not be required to revise its tariff consistent with Commission policy.

## **II. Request for Rehearing**

5. On rehearing, WIC argues that the May 25, 2006 Order improperly characterizes Commission policy as absolutely precluding any discount adjustment related to a negotiated rate contract that was not first entered into as a discounted recourse rate agreement and thereafter converted to a negotiated rate agreement. WIC argues that the Commission has never established a *per se* prohibition on granting a discount adjustment for a negotiated rate contract. WIC also argues that a pipeline could present to the Commission a circumstance under which some additional type of discounted negotiated rate contract would be eligible for inclusion for a discount adjustment. WIC states that in order to do so, the pipeline would have to demonstrate that its proposal adequately protects recourse rate shippers from inappropriate cost shifting.

6. In addition, WIC argues that to the extent the Commission is establishing a categorical rule (*i.e.*, that a negotiated rate that was not converted from a recourse rate can never be considered for a discount adjustment), then there can be no requirement to flow-through to recourse rate shippers any revenue a pipeline receives under a negotiated rate agreement in excess of recourse rate levels. WIC states that if the Commission

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<sup>2</sup> *Wyoming Interstate Co., Ltd.*, 114 FERC ¶ 61,040 (2006).

<sup>3</sup> 15 U.S.C. § 717d (2000).

recognizes that it is not establishing a *per se* prohibition on granting a discount adjustment for a negotiated rate contract, then the treatment of all negotiated rate revenues, whether lower or higher than recourse rate revenues, could be addressed in individual pipeline rate cases.

7. WIC also states that the Commission has failed to make factual findings that would allow its policy to be applied to WIC, and that by requiring WIC to file new tariff sheets to include language comparable to that approved in *Northwest Pipeline Corporation*,<sup>4</sup> the Commission fails to recognize that it has already accepted Substitute Second Revised Sheet No. 85A of the GT&C of WIC's tariff which it asserts includes such language.

8. WIC requests that the Commission grant rehearing and/or clarify that the Commission's policy with respect to discount adjustments for negotiated rate contracts is to ensure that recourse ratepayers are protected from inappropriate cost shifting in any discount adjustment.

### Discussion

9. The Commission's 1996 Negotiated Rate Policy Statement<sup>5</sup> allows pipelines to negotiate individualized rates which, unlike discounted rates,<sup>6</sup> are not constrained by the maximum and minimum rates in the pipeline's tariff.<sup>7</sup> However, pipelines must permit shippers to opt for use of the traditional cost-of-service "recourse rates" in the pipeline's tariff, instead of requiring them to negotiate rates for any particular service. The Commission relies on the availability of the recourse rates to prevent pipelines from exercising market power by assuring that the customer can fall back to the just and

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<sup>4</sup> 79 FERC ¶ 61,416 (1997), *order on reh'g*, 84 FERC ¶ 61,109 (1998) (*Northwest*).

<sup>5</sup> *Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, *order on clarification*, 74 FERC ¶ 61,194, *reh'g denied*, 75 FERC ¶ 61,024 (1996) (*Negotiated Rate Policy Statement*), and *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042 (2006) (*Modified Negotiated Rate Policy Statement*).

<sup>6</sup> See 18 C.F.R. § 284.10(c)(5) (2006).

<sup>7</sup> See *Northern Natural Gas Co.*, 105 FERC ¶ 61,299 (2003) (clarifying the distinction between discounted and negotiated rates).

reasonable tariff rate if the pipeline unilaterally demands excessive prices or withholds service.<sup>8</sup>

10. After the Commission issued the Negotiated Rate Policy Statement, the issue arose as to whether pipelines that enter into negotiated rate transactions should be permitted in subsequent section 4 rate cases to reduce the volumes used to design their recourse rates to account for any negotiated rates below their maximum recourse rates. While the Commission initially held that that issue should be addressed in individual section 4 rate cases,<sup>9</sup> the Commission subsequently modified that determination. In a series of orders issued in November 1997, the Commission explained its policy on this issue as follows:

The Commission's policy with respect to negotiated rates is that "customers electing the recourse rates will be no worse off as a result of the use of negotiated rates." Although the Commission is not promulgating a *per se* rule against discount-type adjustments to recourse rates to reflect negotiated rates, the Commission does require that a pipeline's negotiated rate proposal protect the recourse rate-paying shippers against inappropriate cost-shifting.

Pipelines assert that there may be times when negotiated rates could benefit recourse rate shippers. However, such instances are hypotheticals that lack any certainty or mechanism to ensure that such negotiated rate transactions would be beneficial and not harmful to recourse rate shippers. Since the inception of the Commission's negotiated rate policy, the Commission has made clear its intention to keep recourse shippers from being adversely affected. Thus, without protective measures in place, the Commission will not permit discount adjustments for negotiated rates.

While retaining and attracting new load is an important goal, the Commission considers that this goal must be achieved in manner that adequately protects existing shippers. Negotiated rates are a new voluntary option available to pipelines that does not preclude the pipeline discounting rates to attract or retain load. However, when a pipeline chooses to use the new authority to negotiate new rate forms (such as index rates or non-SFV rates), the Commission must be assured that no harm will occur to the shippers still taking service using the existing form of rates. NorAm has not provided this assurance regarding its negotiated rates program. Thus,

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<sup>8</sup> *Negotiated Rate Policy Statement*, 74 FERC ¶ 61,076 at 61,238-42.

<sup>9</sup> *See, e.g., NorAm Gas Transmission Co.*, 75 FERC ¶ 61, 091 (1996).

the Commission continues to hold that in order to ensure that the risks involved in NorAm's negotiating rates do not fall on its recourse shippers, no discount-type adjustment will be allowed for negotiated rates in NorAm's next rate case.<sup>10</sup>

11. This remains the Commission's policy on discount adjustments for negotiated rates. Thus, the Commission does not have a *per se* prohibition on discount-type adjustments with respect to negotiated rates. However, in order for a pipeline to seek such a discount adjustment in its next rate case, the pipeline must include in the negotiated rate provisions of its tariff a protective mechanism that will ensure that its negotiated rate transactions will not cause any inappropriate cost shifting to the recourse rate shippers.

12. In *Northwest*, the Commission approved such a protective mechanism allowing Northwest to seek a discount-type adjustment for negotiated rate transactions.<sup>11</sup> Under Northwest's tariff, Northwest must first enter into a Part 284 agreement with the shipper before it accepts any negotiated rate bids from that shipper. In addition, Northwest cannot seek a discount adjustment in a future rate case for a negotiated rate, unless it first discounted the recourse rate under a Part 284 agreement and then subsequently converted the agreement to a negotiated rate. Under the tariff, the discount adjustment would be based on the higher of the negotiated rate revenues actually received by Northwest or the discounted recourse rate revenues that would have been received absent the conversion to a negotiated rate contract. Further, Northwest would have to show that competition required the discount without the benefit of any presumption that the discount was given to meet competition.

13. WIC's existing section 32.4 does not provide for the same level of protection from cost shifting as the tariff provisions approved in *Northwest*. Unlike Northwest's tariff, which restricts discount adjustments for negotiated rates to negotiated rates that have been converted from Part 284 agreements, WIC's currently effective tariff states that WIC may seek to include negotiated rates in recourse rate adjustments *whenever* the rate

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<sup>10</sup> *NorAm Gas Transmission Co.*, 81 FERC ¶ 61,204 at 61,872 (1997) (internal citations omitted). See also *Wyoming Interstate Co., Ltd.*, 90 FERC ¶ 61,220 at 61,720 (2000); *CNG Transmission Corp.*, 81 FERC ¶ 61,401, at 62,328 (1997); *Tennessee Gas Pipeline Co.*, 81 FERC ¶ 61,207, at 61,880 (1997); *Columbia Gulf Transmission Co.*, 81 FERC ¶ 61,206, at 61,876 (1997); *Koch Gateway Pipeline Co.*, 81 FERC ¶ 61,205, at 61,874 (1998).

<sup>11</sup> 79 FERC ¶ 61,416 (1997), *order on reh'g*, 84 FERC ¶ 61, 109 (1998).

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.<sup>12</sup> Unlike the limitations of Northwest's mechanism, WIC's tariff provision allows it to seek a discount adjustment for *all* of its negotiated rate transactions where the negotiated rate is less than the maximum recourse rate during the test period. This approach illustrates one of the Commission's primary concerns about discount adjustments for negotiated rates. That is, because negotiated rates, unlike discounted rates, can be above, as well as below, the maximum recourse rate, pipelines should not be able to shift the cost of below maximum rate discounts to the recourse rate shippers, while keeping the profits from above maximum rate negotiated rate transactions for themselves. The Northwest mechanism, unlike the WIC approach, minimizes this risk, since the only negotiated rate transactions that can qualify for a discount adjustment, are transactions that started out as discounts below the maximum rate. The Northwest mechanism then assures that recourse rate shippers can receive the upside benefit if the negotiated rate enables the pipeline to recover more than it would have under the discounted rate, since any discount adjustment would be based on the higher of the discounted rate or the negotiated rate.

14. For the reasons discussed above, we clarify that there is no *per se* rule against discount-type adjustments to recourse rates to reflect negotiated rate; however, a pipeline's negotiated rate proposal must protect the recourse rate-paying shippers against inappropriate cost-shifting. Where a pipeline has a tariff provision allowing for discount-type adjustments for negotiated rates (i.e., similar to that approved in *Northwest*), issues regarding whether or not the pipeline should be allowed to keep negotiated revenues in excess of the recourse rate can best be dealt with in the pipeline's general rate proceedings.<sup>13</sup>

15. Further, we clarify that to the extent a pipeline does not have a tariff provision permitting a discount adjustment for negotiated rates, there is no requirement for the pipeline to flow-through to recourse rate shippers any revenue the pipeline receives under a negotiated rate agreement in excess of recourse rate levels. As we have stated, pipelines should not be able to shift the cost of below maximum rate discounts to the recourse rate shippers, while keeping the profits from above maximum rate negotiated rate transactions

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<sup>12</sup> This language is similar to tariff language proposed by El Paso, which the Commission found to be overly broad and inadequate at protecting recourse rate shippers from inappropriate cost-shifting. *See El Paso Natural Gas Co.*, 114 FERC ¶ 61,305 at P 303 (2006).

<sup>13</sup> *See Northwest*, 84 FERC ¶ 61, 109 at 61,606.

for themselves. Where there is no tariff provision permitting a discount adjustment, the risk of cost shifting does not exist; therefore, pipelines are entitled to keep the profits from negotiated rates above the maximum recourse rate.

16. WIC also argues that by requiring it to file new tariff sheets to include language comparable to that approved in a *Northwest*, the Commission fails to recognize that it has already accepted WIC's tariff language for discount-type adjustments for negotiated rates. Whether or not WIC's tariff had been or should have been approved previously, our determination that WIC was required to revise its tariff sheet or provide an explanation of why it should not be required to do so, was pursuant to the Commission's authority under section 5 of the NGA to investigate tariffs.<sup>14</sup>

17. Upon invoking our discretionary authority under section 5 of the NGA, we reexamined section 32.4 of the GT&C of WIC's tariff for conformance with our policy. In doing so, we found that WIC's tariff language was very similar to that filed by El Paso, which was also found to be overly broad, and dissimilar to the language accepted in *Northwest*. Accordingly, under our authority pursuant to section 5 of the NGA, we directed WIC to revise its tariff pages or show cause why it should not have to do so.

18. In addition, because we have clarified that there is no *per se* rule against discount adjustments to recourse rates to reflect negotiated rates we need not address WIC's argument that, to the extent that the May 25, 2006 Order states a *per se* prohibition, the Commission failed to make factual findings.

### III. Compliance Filing

#### A. Procedural Matters

19. Notice of WIC's June 23, 2006, compliance filing was issued on June 27, 2006, with interventions and protests due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2006). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2006), all timely filed motions to intervene and any motions to intervene out-of-time filed before the date of issuance of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on

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<sup>14</sup> 15 U.S.C. § 717d (2000).

existing parties. On July 10, 2006, Indicated Shippers<sup>15</sup> filed an answer in response to the filing.

20. Indicated Shippers state that the Commission should affirm its general ban on negotiated rate discount adjustments and should reaffirm its rejection of WIC's tariff. Indicated Shippers argue that WIC's reliance on the fact that its current tariff language was a part of a settlement overlooks that the Commission often requires a pipeline to revise a tariff provision that was adopted in a previously-approved settlement if the revision is needed to comply with new Commission policies. Indicated Shippers also argue that a negotiated rate is prone to exotic formulations, so that it is more difficult to determine whether market conditions justify them, than it is to justify the market basis of a discounted rate. In addition, Indicted Shippers urge as a paramount guide that "customers electing the recourse rate should be no worse off as a result of the use of negotiated rates than they would be absent the use of negotiated rates."<sup>16</sup>

#### **B. Substantive Matters**

21. WIC states that since the section 32.4 provisions are an integrated part of a settlement<sup>17</sup> that is still in effect today, its current tariff language is appropriate and should remain unchanged throughout the term of the settlement. Nonetheless, WIC states that, if the Commission so directs, it is willing to revise section 32.4 of the GT&C. WIC attached a redlined version of tariff Sheet No. 85A showing the revisions to comply with the May 25, 2006 Order. WIC's revised Sheet No. 85A is as follows:

32.4(a) Treatment of discounts: ~~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 and rate changes initiated by others under Section 5 of  
the Natural Gas Act. Transporter may seek to include non-conforming~~

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<sup>15</sup> The Indicated Shippers are BP Energy Company, BP America Production Company and Chevron Natural Gas, a division of Chevron U.S.A. Inc.

<sup>16</sup> Indicated Shippers Answer at pp. 5-6 (*quoting Negotiated Rate Policy Statement*, 74 FERC ¶ 61,076 at 61,242).

<sup>17</sup> Citing *Wyoming Interstate Pipeline Co.*, 92 FERC ¶ 61,256 (2000); *Wyoming Interstate Pipeline Co.*, Docket No. RP99-381-007 (March 21, 2001) (unpublished letter order).

~~negotiated rates in such recourse rate adjustment whenever the rate 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.

- (i) Demonstrating that, in the absence of Transporter's entering into such non-conforming negotiated rate agreement providing for such discount, Transporter would not have been able to contract for such capacity at any higher rate, and that recourse rates would otherwise be as high or higher than recourse rates which result after applying the discount adjustment; or
  - (ii) Making another comparable showing that the non-conforming negotiated rate discount contributes more fixed costs to the system than could have been achieved without the discount.
- (b) Transporter may also seek to include in a discount-type adjustment non-conforming negotiated rate agreements that were converted from pre-existing discounted Part 284 agreements to non-conforming negotiated rate agreements. Such adjustment would be based on the greater of: (i) the negotiated rate revenues received or (ii) the discounted recourse rate revenues which otherwise would have been received.

22. We find that WIC's Sheet No. 85A, as revised, reflects the revisions required by the May 25, 2006 Order and conforms with the Commission's policy for discount adjustments related to negotiated rate agreements. Accordingly, we accept WIC's revised tariff sheet for filing, effective January 19, 2006.

The Commission orders:

(A) WIC's request for clarification and rehearing of the May 25, 2006 Order is granted as discussed in the body of this order.

(B) WIC's revised Sheet No. 85A is accepted for filing effective January 19, 2006.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.