

UNITED STATES OF AMERICA 111FERC ¶61,377
FEDERAL ENERGY REGULATORY COMMISSION

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

Discovery Gas Transmission L.L.C.

Docket Nos. RP05-180-001
RP05-180-002

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued June 8, 2005)

1. Discovery Gas Transmission, L.L.C. (Discovery) requests rehearing of the Commission's letter order of March 31, 2005 which conditionally accepted proposed changes in tariff sheets respecting waiver of tariff provisions and gas index points, subject to Discovery filing revised waiver language and information showing that the proposed gas index points meet the Commission's liquidity criteria.¹ Indicated Shippers² also filed a request for clarification or, alternatively, rehearing of the March 31, 2005 Order. On April 15, 2005, Discovery made a compliance filing in response to the March 31, 2005 Order.³

2. In this order we grant rehearing and clarification of the March 31, 2005 Order. We also accept Discovery's compliance filing in response to the March 31, 2005 Order, subject to Discovery filing revised waiver language consistent with the discussion in this order. This order benefits the public because it provides clarity to the pipelines and shippers regarding waiver tariff provisions.

¹ *Discovery Gas Transmission, LLC*, 110 FERC ¶ 61,401 (2005) (March 31, 2005 Order).

² Indicated Shippers consist of BP Energy Company, BP America Production Company, and Chevron Texaco Natural Gas, a division of Chevron U.S.A. Inc.

³ The compliance filing included the following, proposed revised tariff sheets to be effective April 1, 2005: Substitute First Revised Sheet No. 143, Substitute Third Revised Sheet No. 144 and Substitute First Revised Sheet No. 194 to Discovery's FERC Gas Tariff, Original Volume No. 1.

Background

3. On February 9, 2005, Discovery filed tariff sheets to clarify, update and clean up several items in Discovery's tariff. Among the tariff provisions that Discovery proposed was language in section 23.1 of its General Terms and Conditions (GT&C) allowing Discovery to waive its rights and its shippers' obligations under its tariff on a not unduly discriminatory basis. Accordingly, Discovery proposed that section 23.1 would state that "transporter may waive any of its rights or any obligations of shipper on a basis that is not unduly discriminatory."⁴

4. In the March 31, 2005 Order, the Commission, concerned that the proposed GT&C section 23.1 would grant Discovery too much discretion with a potential for unduly discriminatory application, directed Discovery to revise the waiver provision.⁵ Specifically, the Commission concluded that pipelines should only use waiver provisions to waive past occurrences such as past defaults and not to waive a broad range of tariff provisions for mutual benefit in the context of a transportation agreement.⁶ Accordingly, citing Commission precedent,⁷ the Commission ordered Discovery to limit the application of GT&C section 23.1 to waiver of defaults that have actually occurred under the provisions of the tariff, and to revise the section to clarify that it applies only to specific defaults that have already occurred.

5. In the February 9, 2005 Filing, Discovery also proposed to update the description of the gas indices set forth in the imbalance cash-out provisions of its GT&C. Discovery proposed to revise section 9.4 of its GT&C to establish index prices based on spot prices published by Energy Intelligence Group (Energy Group) and to change the name of three index points to use the descriptions published by Energy Group. Discovery stated that no substantive change was intended by the update of such language.

⁴ General Terms and Conditions, section 23.1.

⁵ March 31, 2005 Order, 110 FERC ¶ 61,401 at P 5.

⁶ *Id.*

⁷ See *Northern Border Pipeline Co., LLC*, 110 FERC ¶ 61,203 (2005) (*Northern Border*); and *CenterPoint Energy Gas Transmission Co.*, 104 FERC ¶ 61,281(2003) (*CenterPoint*).

6. In the March 31, 2005 Order, the Commission accepted Discovery's revisions subject to Discovery filing data showing that the proposed index points meet the criteria for liquidity set forth in the Commission's *Order Regarding Future Monitoring of Voluntary Price Formation, Use of Prices Indices in Jurisdictional Tariffs, and Closing Certain Tariff Dockets* issued on November 19, 2004, in Docket No. PL03-3-005.⁸

Requests for Rehearing and Clarification

7. On May 2, 2005, Discovery submitted a request for a rehearing of the March 31, 2005 Order on the limited issue related to the waiver provision. Discovery requests that the Commission authorize Discovery to waive its rights and its shipper's obligations, on a not unduly discriminatory basis, and approve the waiver language originally proposed by Discovery in the February 9, 2005 Filing. Discovery argues that 1) limiting the waiver authority to specific past defaults will lead to inefficient results, and 2) the Commission's existing filing requirement will protect shippers against undue discrimination.

8. Indicated Shippers also filed a request for clarification or, alternatively, rehearing of the Commission's March 31, 2005 Order on May 2, 2005. They ask that the Commission clarify that the Commission did not intend to bar Discovery from granting an advance waiver of its tariff that applies for a temporary, prospective period. They argue that Commission precedent indicates that the Commission did not intend to ban an advance waiver. If the Commission denies clarification, they seek rehearing.

Discussion

9. As discussed below, the Commission grants Discovery's and Indicated Shippers' requests for rehearing of the March 31, 2005 Order and accepts Discovery's April 15, 2005 compliance filing, as it relates to the updated gas price indices.

Rehearing and Clarification

10. Discovery argues that limiting the waiver authority to specific past defaults will lead to inefficient results. Discovery indicates that the originally proposed language from GT&C section 23.1 is needed in order for Discovery to provide transportation services to its shippers on a more cost effective and efficient basis. It asserts that the language is intended to allow Discovery the flexibility to work with its shippers to fashion solutions to unique, but foreseeable operational problems that may arise from time to time. Without such flexibility, Discovery states that it will be difficult for Discovery to attract incremental volumes to its system when competing with other jurisdictional pipelines and

⁸ *Price Discovery in Natural Gas and Electric Markets, et al.*, 109 FERC ¶ 61,184 (2004) (November 19, 2004 Order).

non-jurisdictional gathering systems that do not have similar restrictions. Furthermore, Discovery states that the originally proposed waiver provision also benefits shippers because Discovery will be able to use the flexibility to manage unique, but foreseeable events to avert production facility shut-ins and to maintain the flow of gas to the nation's energy market.

11. Discovery also argues that the Commission's existing filing requirement for public disclosure protects shippers from undue discrimination. Discovery indicates that the Commission's current filing requirements ensure that the Commission, its staff and all current potential shippers on Discovery's system will be aware of any waiver of Discovery's rights or a shipper's obligations under Discovery's tariff.⁹ Discovery is required to post any and all waivers that it grants to its shippers on its website within 24 hours of the occurrence. Also, any waiver granted by Discovery as part of a service agreement must be filed with the Commission for approval as a non-conforming agreement available for public review.

12. Indicated Shippers argue that Commission precedent supports the Commission's intent not to ban an advance waiver. They assert that there is a distinction between on-going waivers that would result in non-conforming contract provisions that the Commission prohibits, and advance waivers that are needed to prevent interruption of services. They assert that the Commission has consistently prohibited a pipeline from implementing waiver provisions that amounted to negotiating special service conditions, resulting in undue discrimination among shippers.¹⁰ Indicated Shippers state that the Commission prohibited ongoing waivers in the past to ensure against negotiated service conditions, but not against advance waivers. They state that advance waivers are needed to accommodate situations where factors beyond a shipper's control prevent the shipper from complying with a tariff requirement for a short-term period.

13. We grant rehearing and clarification. In the March 31, 2005 Order, the Commission directed Discovery to limit its waiver provision because it believed that the proposed language in the tariff sheet was too broad and would have the potential for unduly discriminatory application.¹¹ The Commission relied on past cases where it rejected broad waiver language that was being used to provide permanent waivers of tariff provisions to negotiate transportation agreements with negotiated terms and conditions of service, contrary to Commission's policy. In such cases, the Commission

⁹ 18 C.F.R. §§ 154.1(d) and 358.5(c)(4) (2004).

¹⁰ *Citing Northern Border*, 110 FERC ¶ 61,203; *CenterPoint*, 104 FERC ¶ 61,281.

¹¹ March 31, 2005 Order, 110 FERC ¶ 61,401 at P 5.

held that pipelines should only use waiver provisions to waive past occurrences such as past defaults.¹² The Commission has been concerned that such broad waiver provisions could be interpreted as granting the pipeline unfettered discretion to include non-conforming material terms and conditions into its transportation agreements without seeking Commission approval for those changes or without including language specifically authorizing such provision in its tariff.

14. However, the Commission's intent is to prevent negotiations for service agreements that reflect permanent waivers of tariff terms and conditions of service which may result in undue discrimination among shippers; not to prohibit waivers that apply for temporary periods for operational reasons on a case-by-case basis. We recognize the need for such advance waivers in situations of the type described by Indicated Shippers and Discovery. Therefore, while we continue to find that broad waiver language of the type Discovery initially proposed in this proceeding is inappropriate, we will permit pipelines to include in their tariffs provisions not only permitting waiver of the tariff to address past defaults but also permitting advance waivers to address specific, short-term operational problems. Moreover, the Commission's filing requirements and regulations give shippers adequate protection against undue discrimination. Under the Commission's Standards of Conduct, in section 358.5(c)(4),¹³ pipelines are required to post any and all waivers granted to shippers within 24 hours of the occurrence. Also, pursuant to section 154.1(d)¹⁴ of the Commission's regulations, any non-conforming contract must be filed with the Commission for approval.

15. Because the limitation on waiver authority directed in the March 31, 2005 Order would prohibit advance waivers of tariff provisions for temporary periods for operational reasons on a case-by-case basis as contemplated by Discovery and the Commission, we grant rehearing of the March 31, 2005 Order's requirement to limit waivers to past occurrences. Accordingly, the Commission directs Discovery to file revised tariff language in GT&C section 23.1 to permit not only waivers of past defaults but also advance waivers on a case-by-case basis for specific, temporary, operational problems.

Compliance Filing

16. Discovery submitted a compliance filing on April 15, 2005 in response to the March 31, 2005 Order. Discovery filed a revised tariff sheet, to be effective April 1,

¹² See *Northern Border*, 110 FERC ¶ 61,203 at P 4; and *CenterPoint*, 104 FERC ¶ 61,281 at P 48-50.

¹³ 18 C.F.R. § 358.5(c)(4) (2004).

¹⁴ 18 C.F.R. § 154.1(d) (2004).

2005, reflecting revised tariff language in GT&C section 23.1 clarifying that discretionary waivers would apply only “to any specific default that has already occurred.” Additionally, Discovery filed revised tariff sheets reflecting an updated description of the gas prices indices, as well as information demonstrating that the index points meet two of the conditions outlined in the November 19, 2004 Order: a minimum daily volume traded of 25,000 MMBtus/day on average within the 13 week review period, and an average number of eight or more transactions per week. The November 19, 2004 Order requires a company to meet at least one of three conditions.¹⁵

17. Public notice of the compliance filing was published in the *Federal Register*, 70 Fed. Reg. 22,012 (2005), providing for the filing of protests by April 27, 2005, in accordance with Rule 211 of the Commission’s Rules of Practice and Procedure.¹⁶ No protests were filed.

18. Interventions were filed out of time by BP America Production Company and BP Energy Company (collectively BP) and Chevron Texaco Natural Gas on May 2, 2005. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2004), 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 interventions at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

19. In light of our grant of rehearing, we will accept the tariff sheet reflecting the revised waiver tariff language¹⁷ subject to Discovery making changes consistent with the Commission’s discussion in this order.

20. The Commission also finds that Discovery’s compliance filing containing information on point liquidity satisfactorily complies with the March 31, 2005 Order and

¹⁵ The November 19, 2004 Order stated that weekly indices for gas should meet at least one of the following conditions on average for all weeks within a 90 day review period to demonstrate adequate liquidity: (1) Average daily volume traded of at least 25,000 MMBtus/day; (2) Average number of transactions of eight or more per week; and (3) Average number of counterparties of eight or more per week. November 19, 2004 Order, 109 FERC ¶ 61,184 at P 66.

¹⁶ 18 C.F.R. § 385.211 (2004).

¹⁷ First Revised Sheet No. 194.

demonstrates that Discovery has met the liquidity requirements of the November 19, 2004 Order. Therefore, the Commission accepts the filing as in compliance with the March 31, 2005 Order. Further, the revised descriptions of gas price indices on the other tariff sheets it filed¹⁸ are accepted as reasonable.

The Commission orders:

(A) Rehearing and clarification of the March 31, 2005 Order are granted to the extent set forth in the text above.

(B) Substitute First Revised Sheet No. 143 and Substitute Third Revised Sheet No. 144 are accepted effective April 1, 2005, as proposed.

(C) Substitute First Revised Sheet No. 194 is accepted, subject to Discovery filing revised tariff language, as directed in the text above, within 15 days of the date of issuance of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁸ Substitute First Revised Sheet No. 143 and Substitute Third Revised Sheet No. 144.