

111 FERC ¶61,376
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Natural Gas Pipeline Company of America

Docket No. RP99-176-109

ORDER ON CLARIFICATION AND REHEARING

(Issued June 8, 2005)

1. Natural Gas Pipeline Company of America (Natural) requests clarification of a March 30, 2005 director's letter order in Docket No. RP99-176-106 concerning two negotiated rate agreements (agreements or contracts). Specifically, Natural questions whether the agreements should be viewed as non-conforming agreements and therefore are not required to be filed and included on Section 50 of its General Terms and Conditions (GT&C). Alternatively, Natural seeks rehearing of the letter order in order to eliminate the reference to these two contracts as non-conforming agreements. As more fully discussed below, the Commission clarifies that the March 30, 2005 letter order correctly identified the agreements as non-conforming. As such, the Commission directs Natural to list the agreements in its tariff. Accordingly, the Commission denies the requested clarification and the request for rehearing. This decision benefits the public because it correctly clarifies the Commission's treatment of non-conforming negotiated rate agreements as it relates to the agreements addressed by this order and future agreements containing provisions that are not in a pipeline's *pro forma* service agreement and affect the substantive rights of a party.

Background

2. On February 1, 2005, Natural filed two new negotiated rate agreements between Natural and Nicor Gas Company (Nicor) for firm transportation service under Rate Schedule FTS. In addition, Natural filed Original Sheet No. 26D.06 to its FERC Gas Tariff, Sixth Revised Volume No. 1, to add the two Agreements to its list of negotiated rate agreements entered into pursuant to Section 49 of Natural's GT&C. Under the agreements Natural would provide firm transportation service to Nicor of up to 40,000 and 20,000 dth per day, respectively, for the period beginning April 1, 2005 through March 31, 2008. Natural requested an effective date of April 1, 2005 for the proposed

tariff sheet. Natural stated that the agreements follow the format of the form of service agreement in its tariff, with the exception of additional language set forth in Exhibit D to each agreement.

3. Natural stated that Articles 1 through 4 of Exhibit D set forth the specific negotiated rates agreed with Nicor, including the receipt and delivery points to which the relevant negotiated rates will apply. Natural asserted that, since section 49 of its GT&C authorizes it to enter into negotiated rate transactions, Article 1 through 4 did not constitute deviations from its tariff, but are simply necessary statements of the rate parameters negotiated with the shipper. Natural stated that Articles 5 and 6 of Exhibit D to each agreement contained other provisions “which literally ‘deviate’ from the form of service agreement in Natural’s tariff, but which Natural believes do not constitute ‘material’ deviations under section 154.112(b) of the Commission’s regulations.” For example, it stated that Article 5 contained contractual rollover and right of first refusal (ROFR) provisions consistent with section 22.4 of its GT&C, and Article 6 contained other provisions which Natural described as “boilerplate” and stated the Commission had approved in other agreements. Natural therefore concluded that these provisions should either not be considered deviations from the form of service agreement or at least not be considered material deviations, but in any event the Commission should approve the agreements.

4. The Director of the Office of Markets, Tariffs and Rates issued an unpublished letter on March 30, 2005, accepting the negotiated rate agreements for filing as non-conforming and the revised tariff sheet to become effective April 1, 2005, as proposed. The letter order determined that “the additional non-conforming language is consistent with provisions previously accepted by unpublished letter orders addressing other negotiated rate agreements Natural filed in Docket Nos., RP99-176-101, RP99-176-099, and RP99-176-092.” The letter order concluded that the agreements in the instant proceeding and the related tariff sheet were acceptable because the agreements provide service in a manner consistent with the FTS provisions in Natural’s tariff and do not create a risk of undue discrimination against other shippers on Natural’s system. The letter order did not require Natural to include these agreements in the list of non-conforming contracts set out at section 50 of Natural’s GT&C.

Request for Clarification/Rehearing

5. In its request for clarification, Natural states that confusion has been created by the March 30, 2005 letter order’s characterization of the two contracts at issue in this proceeding as non-conforming contracts, even though the letter order did not require Natural to revise its tariff sheet listing its non-conforming contracts. Further, Natural states that the letter order seems to be inconsistent with prior letter orders issued on April 8, 2004 in Docket No. RP99-176-099 and on August 31, 2004 in Docket No. RP99-

176-101 in which virtually identical provisions were accepted without the non-conforming label and without any indication of a further filing requirement.¹

6. In addition, Natural states that the March 30, 2005 letter order did not specify which provisions of the agreement are non-conforming or explain why. Natural contends that the only provisions in the two negotiated rate agreements that depart from the form of service agreement are provisions that cover (1) rollover rights and (2) boilerplate language. Natural believes that the rollover right provisions could not have been a basis for labeling the contracts as non-conforming because Natural has clear tariff authority to enter into contractual provisions on a non-discriminatory basis defining rollover rights as set out at section 22.4 of its GT&C. Natural argues that inclusion in a contract of a provision allowed by the tariff cannot make that agreement non-conforming.²

7. Natural states that the boilerplate provisions, as recognized in the prior letter orders cited above, are materially consistent with the GT&C and do not give rise to any risk of discrimination with respect to any service and therefore should not be considered as creating any material deviation or a non-conforming contract. Natural explains that these provisions essentially cover administrative aspects of the negotiated rate contracting process (*i.e.*, creating and administering the negotiated rate contracts). Natural states that these provisions closely track corresponding sections of its tariff and cover matters such as: definitions, notifications, no third party beneficiary, conformance to law, effect of tariff and governing law, etc. Natural states that these provisions deal with administrative matters and do not affect the type of service a customer receives, but for the most part are included in the contract to reflect corresponding aspects of Natural's tariff.

Discussion

8. As noted by Natural in its request for clarification, the March 30, 2005 letter order accepted the agreements at issue as non-conforming but no further filing requirement was specified. Upon further review, the Commission finds that the letter order correctly characterized the agreements as non-conforming but should have required Natural to make a further filing. Therefore, the Commission clarifies that Natural is required to list

¹ However, the decision in an October 28, 2003 unpublished letter order in Docket No. RP99-176-092 is consistent with the decision in the March 30, 2005 letter order since the subject contract was accepted as a non-conforming agreement because the FTS agreement provides service in a manner consistent with the FTS service described in Natural's tariff and does not create a risk of undue discrimination against other shippers. Similarly, no further filing was required in that proceeding.

² Motion for Clarification at 5 (*citing TransColorado Gas Transmission Company*, 109 FERC ¶ 61,117 at P 11 and 12 (2004) (provisions with rollover rights accepted and contracts specifically not required to be filed as non-conforming)).

the agreements as non-conforming in Section 50 of Natural's GT&C. Accordingly, we deny Natural's rehearing request that the Commission eliminate the reference to these two contracts as non-conforming agreements.

9. Sections 154.1(d) and 154.112(b) of the Commission's regulations require pipelines to file any contracts which "deviate in any material aspect from the form of service agreement" in the pipeline's tariff. Section 154.112(b) also requires that "such non-conforming agreements must be referenced in FERC Volume 1" of the pipeline's tariff. The Commission has defined a material deviation as "any provision of a service agreement which goes beyond the filling in of the spaces in the form of service agreement with the appropriate information provided for in the tariff and that affects the substantive rights of the parties."³

10. The Commission agrees with Natural that Articles 1 through 5 of Exhibit D to the two negotiated rate agreements do not constitute material deviations. Articles 1 through 4 set forth the negotiated rate agreed to pursuant to Section 49 of Natural's GT&C, and Article 5 is authorized by section 22.4 of Natural's GT&C, pursuant to which Natural may negotiate contractual rollover and ROFR provisions on a non-discriminatory basis. However, Article 6 of Exhibit D does contain material deviations from Natural's form of service agreement and tariff. For example, Section 6.5 of Article 6, provides that any entity which shall succeed by purchase, merger, or consolidation to title to the properties of Natural or Nicor shall be entitled to the rights and subject to the obligations of its predecessor in title, but no other assignment by Nicor shall be effective as to Natural unless Natural agrees. Neither Natural's form of service agreement nor its tariff contains any similar provision. Thus, this provision goes beyond filling in blanks in the form of service agreement with appropriate information provided for in the tariff. It also clearly affects the substantive rights of the parties. As such, this provision constitutes a material deviation, rendering the instant two contracts with Nicor non-conforming. Thus, pursuant to section 154.112(b) of the Commission's regulations, Natural must reference these two contracts in FERC Volume 1 of its tariff. The Commission accordingly requires Natural to file revised tariff sheets to include these agreements with Nicor in the list of nonconforming contracts set forth in section 50 of its GT&C.

11. While the Commission finds that Article 6 of Exhibit D to the two agreements contains material deviations, those material deviations do not present a significant risk of undue discrimination. As Natural states, the provisions do not affect the quality of service received by Nicor or other shippers, but are essentially administrative in nature.⁴ Accordingly, although the provisions are non-conforming, the Commission finds that they are permissible material deviations. Natural suggests that such administrative

³ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 at 62,002 (2001).

⁴ *Id.* at 62,004. *ANR Pipeline Co.*, 97 FERC ¶ 61,075 (2001).

contractual provisions should not be considered of sufficient importance to be considered material deviations or to require that the contracts be listed in its tariff as non-conforming. However, the Commission will continue to treat any deviation affecting the substantive rights of the parties as a material deviation and require that pipelines file such contracts for Commission approval and list them in their tariff as non-conforming.

12. There is no objective standard for distinguishing between those deviations affecting the substantive rights of the parties that are too minor to require Commission review and such deviations that are sufficiently important to require Commission review. Natural and other pipelines can minimize the number of contracts that they must file for Commission approval, and list in their tariff as non-conforming, by amending their form of service agreements to include provisions governing all issues that are typically addressed in the service agreements, including, for example, the issue of when the contract may be assigned.

13. Finally, as Natural points out in its request for clarification, virtually identical provisions in Docket Nos. RP99-176-099 and RP99-176-101 were accepted without the non-conforming label and without any indication of a further filing requirement. In addition, the contract in Docket No. RP99-176-092 was accepted as a non-conforming agreement, but no further filing was required. Consistent with the discussion above, Natural must file revised tariff sheets to include the contracts approved in those dockets in its list of non-conforming contracts in section 50 of its GT&C. These decisions have caused confusion and are inconsistent. To resolve the inconsistency in these prior proceedings and for future proceedings, the Commission clarifies that when an agreement is found to contain a provision that is non-conforming because it is not in the form of service agreement and affects the substantive rights of the parties, the provision is a material deviation and thus renders the agreement to be a non-conforming agreement. And, if the Commission accepts the non-conforming agreement as containing provisions with a permissible material deviation, the pipeline must make an additional filing to list the agreement as non-conforming.

The Commission orders:

- (A) Natural's requests for clarification and rehearing are denied.

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(B) Natural is directed to file and include on section 50 of its GT&C all of the non-conforming negotiated rate agreements discussed above.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.