

121 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Stingray Pipeline Company, L.L.C.

Docket Nos. RP07-120-000 and 001
Docket No. RP07-145-000
Not Consolidated

ORDER ON FURTHER REVIEW

(Issued November 29, 2007)

1. On December 22, 2006, Stingray Pipeline Company, L.L.C., (Stingray) filed 174 currently effective non-conforming and potentially non-conforming service agreements in Docket No. RP07-120-000 for Commission approval and tariff sheets¹ listing the agreements as non-conforming. On January 25, 2007, Stingray filed a non-conforming reserve dedication agreement in Docket No. RP07-145-000 that it inadvertently omitted from its original filing, as well as a Substitute Original Sheet No. 208 including that agreement on its list of non-conforming agreements.

2. On January 19, 2007, the Commission issued a letter order² in Docket Nos. RP07-120-000 and 001 accepting the filed agreements, effective on their respective effective dates, subject to further review and order of the Commission. The Commission also accepted the revised tariff sheets effective January 21, 2007, as proposed, subject to further review by the Commission, with the exception of Tenth Revised Sheet No. 2, which the Commission rejected as moot. On February 21, 2007, the Commission issued a letter order³ accepting the reserve dedication agreement filed in Docket No. RP07-145-000, subject to further review by the Commission. In that order, the Commission also

¹ Tenth Revised Sheet No. 2 and Original Sheet Nos. 205-208 to its FERC Gas Tariff, Third Revised Volume No. 1.

² *Stingray Pipeline Co., L.L.C.*, 118 FERC ¶ 61,040 (2007).

³ *Stingray Pipeline Co., L.L.C.*, 118 FERC ¶ 61,145 (2007).

accepted Stingray's Substitute Original Sheet No. 208 effective January 21, 2007, as proposed.⁴

3. The Commission's review of the subject agreements is now complete. Based on this review, we will accept Stingray's agreements and revised tariff sheets, effective as proposed, subject to the conditions set forth in the discussion below.

Details of Filing

4. Stingray filed its currently effective non-conforming and potentially non-conforming service agreements for Commission approval. They include 54 Rate Schedule ITS service agreements plus amendments, one Rate Schedule FTS service agreement plus amendments, 69 discount rate agreements plus amendments, 41 reserve dedication or discount commodity rate agreements plus amendments; and 10 letter agreements or assignment agreements. The agreements reflect various effective dates, with the earliest being March 23, 1989. Stingray includes with its filing various appendices summarizing the potentially non-conforming elements in each agreement. For each non-conforming provision, Stingray explains how it deviates from its respective *pro forma* service agreement, the effect the provision has on the rights of the parties, and why each deviation, to the extent it is a deviation at all, does not change the conditions under which Stingray provides service and does not present a risk of undue discrimination. Stingray also provides redlined copies of each agreement showing specifically where the agreement deviates from the respective *pro forma* service agreement that was effective at the time each agreement was executed.⁵

5. Stingray states the instant filing is part of a continuing effort by Enbridge, Inc., and Enbridge Energy Partners, L.P., (collectively, Enbridge) to standardize and clarify Stingray's tariff provisions and procedures for implementing discounted rate

⁴ Substitute Original Sheet No. 208 superceded Original Sheet No. 208, which the Commission accepted in its January 19, 2007, order in Docket Nos. RP07-120-000 and 001.

⁵ Stingray explains that there are certain exceptions where the service agreements were redlined against the current form of service agreement for the service in question. One agreement was redlined against the form of service agreement that became effective just after the agreement was executed. Stingray notes that in the cases where it did not include a redlined version of the agreement, no related *pro forma* agreement existed at the time it executed the agreement.

transactions.⁶ Stingray states that these filings are the result of its review of all of its service agreements and discount and reserve dedication agreements that were in effect as of the date of these filings. Stingray notes that nearly all of these agreements have been in effect for a number of years and that most of the agreements have been in effect since before Enbridge operated the Stingray system.

6. Specifically, Stingray explains that its agreements fall into the following six main categories: (1) 10 Rate Schedule ITS service agreements, including related amendments, dated between March 23, 1989, and September 17, 1993; (2) 44 Rate Schedule ITS service agreements and one Rate Schedule FTS service agreement, including related amendments, dated between September 18, 1993, and May 1, 2006; (3) nine Rate Schedule ITS discount agreements and one Rate Schedule FTS discount agreement, including related amendments, dated between February 1, 1995, and July 22, 1998, and that provide for discounts at specific receipt and delivery points;⁷ (4) 59 Rate Schedule ITS discount agreements, including related amendments, dated between November 1, 1999, and April 1, 2006, which though dissimilar in format to the previous group of discount agreements, are substantively similar in content; (5) 41 reserve dedication or discount commodity rate agreements, including related amendments, that Stingray asserts contains provisions similar to the discount agreements in the third and fourth categories; and (6) 10 letter agreements or assignment agreements, which Stingray asserts are informational in nature, do not alter the substantive rights under the related contract, and include contract provisions similar to the discount agreements discussed above.

7. Stingray states that most of the agreements included with this filing have been in effect for a long period of time, and the parties have made significant long-term commercial decisions in reliance on these agreements. It asserts that Stingray and the shippers under these agreements have relied on the existence of these agreements to make important market and investment decisions and, therefore, modifying these agreements at this late date could cause significant economic harm to the parties. Stingray adds that the Commission has approved various contracts in the past on the basis of the significant

⁶ Stingray is fully owned by Starfish Pipeline Company, L.L.C., a limited liability company owned 50 percent by Enbridge Offshore (Gas Transmission) L.L.C. and 50 percent by MarkWest Energy Partners, L.P. Stingray states that Enbridge acquired its interest in Starfish on December 31, 2004.

⁷ Stingray asserts the Commission routinely approves similar discount provisions in agreements (citing *Northern Natural Gas Co.*, 110 FERC ¶ 61,321 (2005); *El Paso Natural Gas Co.*, 109 FERC ¶ 61,146 (2004); *Gulfstream Natural Gas Transmission System, L.L.C.*, 108 FERC ¶ 61,294, at P 7 (2004); and *ANR Pipeline Co.*, 102 FERC ¶ 61,235 (2003)) finding that the provisions do not constitute a material deviation, and present no risk of undue discrimination among shippers.

reliance interest that the contracting parties had in their long-standing contractual arrangements.⁸ Stingray submits that while the subject agreements contain deviations from its applicable form of service agreements, the deviations are either not material, or they do not change the conditions under which service is provided and do not present a risk of undue discrimination.

8. Stingray requests that the Commission accept these non-conforming agreements for filing. Stingray requests that, should the Commission find any agreements to be non-conforming, it grant any and all waivers necessary to allow the agreements to remain in effect as of their respective effective dates and to remain in effect in accordance with their respective terms. Stingray includes with its filing revised tariff sheets to include these agreements on a list of non-conforming agreements it proposes to include as section 35 of its GT&C. Stingray requests the Commission accept the revised tariff sheets effective January 21, 2007.

Discussion

9. Section 154.1(d) of the Commission's regulations requires the pipeline to file a contract which materially deviates for the pipeline's form of service agreement.⁹ In *Columbia Gas Transmission Corporation*, issued on November 21, 2001,¹⁰ the Commission clarified that a material deviation is any provision in a service agreement that: (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties.¹¹ However, not all material deviations are impermissible. As explained in *Columbia*, provisions that materially deviate from the corresponding *pro forma* service agreement fall into two general categories: (1) provisions the Commission must prohibit because they present a

⁸ Stingray cites: *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,010 (2001); and *ANR Pipeline Co.*, 98 FERC ¶ 61,247, at 62,002 (2002).

⁹ 18 CFR §154.1(d) (2006).

¹⁰ 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia*). See also *ANR Pipeline Co.*, 97 FERC ¶ 61,224, at 62,022 (2001) (*ANR*).

¹¹ Later in *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 at P 32 (2003) (2003 Policy Statement), the Commission stated “[s]ince there would appear to be no reason for the parties to use language different from that in the form of service agreement other than to affect the substantive right of the parties, this effectively means that all language that is different from the form of service agreement should be filed with the Commission.”

significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination.¹²

10. The Commission has completed its review of Stingray's currently effective non-conforming and potentially non-conforming service agreements. The Commission finds that all of the agreements contain provisions that deviate from Stingray's respective *pro forma* service agreements, and are thus non-conforming. The Commission finds that the vast majority of material deviations identified in Stingray's agreements are permissible, since they are either allowed under Stingray's generally applicable tariff, or are administrative or non-substantive in nature and pose no threat of undue discrimination among shippers. The Commission, however, finds that certain material deviations warrant further examination, as discussed below.

Retroactive Billing

11. Certain agreements contain a back-billing provision.¹³ Specifically, the provision states that a discount is available if the shipper or shipper's affiliate transports all natural gas produced from a specified block or blocks on Stingray's system. The provision continues, however, that if this condition is violated, or if the shipper affiliate constructs or begins to construct an alternate pipeline for transportation from the specified block or blocks, then Stingray may terminate the agreement and rebill the shipper for all volumes transported from the specified block or blocks at the maximum rate specified in Stingray's tariff from the initial effective date of the agreement. Stingray contends that section 13.6(a)(i) to (vii) of its GT&C allows Stingray to condition discounts on the specifications stipulated in the provision, and thus the provisions conform to Stingray's tariff and do not pose a risk of undue discrimination. Stingray also recognizes that the amount it would require a shipper to pay under these circumstances may be inconsistent with the Commission's May 10, 2006, order¹⁴ which rejected a similar provision from a form of reserve dedication agreement proposed by Stingray. Stingray argues, however, that the agreements containing this provision have been in effect for a significant period of time and the parties have relied on the agreement's effectiveness in making commercial decisions regarding the level and duration of discount and other similar commercial valuation decisions.

¹² *Columbia* at 62,003. *ANR* at 62,024.

¹³ In general, each material deviation identified and discussed in this order is included in many of the 175 service agreements filed. We will not identify all agreements that include each of the deviations discussed. To see what agreements they are included in, see the provision summary tables included with Stingray's transmittal.

¹⁴ *Stingray Pipeline Co., L.L.C.*, 115 FERC ¶ 61,161 at P 7, *order on clarification and compliance filing*, 117 FERC ¶ 61,028 (2006) (*Stingray*).

12. The subject provision would allow Stingray, in case of a shipper violation, to retroactively charge the difference between the pipeline's then-effective maximum tariff rate and the discounted rate for all volumes transported from the effective date of the respective agreement to the date of violation, including volumes that the shipper transported that were not in violation of the provision. In *Stingray*, the Commission rejected this provision as not being just and reasonable, arguing that it constituted an unreasonable penalty. The Commission required Stingray to remove any contract language allowing for the retroactive assessment of penalties and only allowed the assessment to be prospective in case of violation. Consistent with Commission findings in that order, we will reject the provision from Stingray's subject agreements. Even though many of the agreements that contain this provision have been in effect a long time, and even though Stingray argues that parties have relied on the agreement's effectiveness in making commercial decisions regarding the level and duration of discount and other similar commercial valuation decisions, it does not obviate the fact that the retroactive assessment of such charges is an unreasonable penalty that is not just and reasonable. For this reason, we direct Stingray to remove any retroactive billing provisions from all relevant agreements and file the revised agreements for Commission approval.

MDQ Reduction

13. Stingray's Rate Schedule FTS Service Agreement with Ashland Exploration, Inc., contains a contract demand reduction provision. Specifically, the provision provides the shipper with the right to reduce its contractual MDQ beginning the first day of any month upon ten days advance written notice to Stingray prior to the first day of the month. Stingray acknowledges that its Rate Schedule FTS does not provide shippers with the ability to unilaterally decrease its MDQ during the course of the agreement, but argues that the agreement has been in effect for a significant period of time and the parties have relied on the effectiveness of this agreement in making commercial decisions regarding the level and duration of the discount and other similar commercial valuation decisions.

14. In *ANR*,¹⁵ the Commission found that contract provisions allowing shippers to unilaterally adjust their contractual MDQs during the term of the contract offer too much potential for undue discrimination among shippers, unless the pipeline offers the provision to all shippers through a provision in its generally applicable tariff. The Commission directed ANR to either remove the provision from its agreement or offer it to all shippers in a not unduly discriminatory manner through its generally applicable tariff. Consistent with Commission findings in *ANR*, we also find that Stingray's contract demand reduction provision with Ashland Exploration has too much potential for undue discrimination among shippers. Accordingly, Stingray must either remove this provision

¹⁵ *ANR Pipeline Co.*, 97 FERC ¶ 61,224, at 62,025 (2001).

from its agreement with Ashland Exploration, or it must file revised tariff sheets proposing the non-discriminatory conditions pursuant to which it proposes to offer such provisions to all shippers on its system.

Suspension of Discount during Capacity Release

15. Paragraph 9 of Stingray's FTS Service Agreement with Ashland Exploration provides that if the shipper releases any of the capacity under the discounted agreement, the discount provisions of the agreement "shall immediately be suspended and of no force or effect with respect to such released capacity concurrent with the period of the release." Stingray states that it and the shipper entered into the discount agreement before the Commission pronounced such conditions null and void as an impediment to a secondary capacity market through capacity release, citing *Natural*.¹⁶ Stingray asserts that it has not enforced this provision since Enbridge acquired the pipeline, and believes it has never been enforced. Stingray states it will not attempt to enforce this provision. We agree that this provision represents an impermissible material deviation since it contravenes the Commission's policy. Accordingly, we direct Stingray to remove this provision from its FTS Service Agreement with Ashland Exploration and file the revised agreement for Commission approval.

Assignment of Discounts in Exchange for Reserve Commitments

16. Section 13.6(a)(vi) of the GT&C of Stingray's tariff provides that it may agree to provide a shipper a discounted rate applicable to production reserves which the shipper commits or dedicates to be transported on Stingray's system. Stingray's tariff also includes a *pro forma* Reserve Dedication Agreement for use when Stingray provides such a discount for interruptible service under Stingray's Rate Schedule ITS. Section 4.3(a) of the *pro forma* Reserve Dedication Agreement provides that any entity to whom the shipper subsequently sells or assigns the dedicated reserves will be entitled to the shipper's rights under the Agreement. Section 4.3(b) provides that no sale or assignment of a shipper's interest in a dedicated reserve shall be effective without the prior written consent of Stingray, with that consent subject to: (1) the party acquiring the dedicated reserves from the shipper acquiring sufficient transportation capacity on Stingray's system to transport the reserves; (2) the assignee notifying Stingray of its intent to accept

¹⁶ *Natural Gas Pipeline Co. of America*, 77 FERC ¶ 61,028 (1996), where the Commission held that "once discounts for particular delivery points or movements of gas have been agreed upon, Natural may not enter into agreements that allow it to cancel or alter the discount between it and the releasing shipper because the shipper chooses to release the capacity in question. To the extent that Natural and its customers have entered into any such agreements, the Commission declares null and void the restrictions on capacity release."

a discounted transportation rate from Stingray for the dedicated reserves, consistent with the discount that the original shipper received from Stingray for that reserve; (3) certain creditworthiness standards; (4) Stingray and the assignee executing a transportation service agreement, which shall include the discounted transportation rate associated with that reserve; and, (5) Stingray and the assignee executing a new reserve dedication agreement.

17. The Commission approved Stingray's current *pro forma* Reserve Dedication Agreement in orders issued on May 30 and October 6, 2006.¹⁷ In those orders, the Commission held that Stingray could reasonably require that the shipper obtain Stingray's consent to the shipper's assignment of the reserves to another party, so that Stingray could, among other things, review the creditworthiness of that party. However, the Commission required Stingray to revise its originally proposed *pro forma* Reserve Dedication Agreement to provide that, if Stingray consents to the assignment of the reserves, it must also allow the shipper to assign its discounted rate agreement to the new owner of the reserves. The Commission found that the *pro forma* agreement, as described above, is consistent with this requirement.

18. Section 4 of Stingray's Rate Schedule IT throughput Discount Agreement with Nexen Petroleum Sales U.S.A., Inc. (Nexen) (formerly SOI/Shell Gas Trading; CXY Energy Marketing), effectuated on March 1, 1995, provides that the shipper will dedicate certain reserves to be transported on Stingray's system. Section 8.1 provides that: "Neither party may assign its interest under the Agreement without the prior written consent of the other parties hereto, which consent may not be unreasonably withheld, and any such assignment without the prior written consent of Stingray shall be void and of no force or effect. Notwithstanding the foregoing, either party may assign its rights to an affiliate without the prior written consent of the other party." Stingray has similar provisions in other agreements it included with its filing as well.

19. Stingray states that this provision applies to the discounted rate itself and does not apply to Nexen's underlying service agreement. Stingray states that, to the extent this provision restricts a shipper's ability to directly assign discounted rates given in exchange for a reserve dedication to a purchaser of those reserves, the provision may be inconsistent with the Commission's 2006 *Stingray* orders. However, Stingray asserts that, even if the Commission finds that the subject provision does not conform to its policy on the assignment of dedicated reserves, the Commission should approve the provision since the agreement has been in effect for a significant period of time and parties have relied on the agreement's effectiveness in making commercial decisions

¹⁷ *Stingray Pipeline Co., L.L.C.*, 115 FERC ¶ 61,161 (2006); *order on clarification and compliance filing*, 117 FERC ¶ 61,028 at P 10-11 (2006) (2006 *Stingray* orders).

regarding the level and duration of the discount and other similar commercial valuation decisions.

20. As set forth above, the Commission has held that Stingray may require shippers to obtain its consent to the assignment of a reserve dedication agreement and underlying service agreement to another party, so that Stingray can review such matters as the creditworthiness of the new shipper. However, assuming Stingray consents to the assignment of the underlying service agreement and reserve dedication, it must permit assignment of the discounted rate to the new owner of the dedicated reserves. Section 8.1 of the Nexen Discount Agreement is inconsistent with this policy, since Stingray states that the provision requires Stingray's consent to assignment of the discounted rate. Therefore, the Commission requires Stingray to modify Section 8.1 to be consistent with the policy described above, and make similar modifications to all agreements that contain such provision.

Waivers

21. As part of its filing, Stingray requests waivers to allow its agreements to remain in effect without modification. Section 154.601 of the Commission's regulations states that agreements intended to effect a change or revision of an executed service agreement on file with the Commission must be in the form of a superseding executed service agreement only. For several of its existing agreements, Stingray states that it filed an amendment to the agreement to reflect certain changes rather than filing a superseding agreement. Stingray requests that the Commission waive section 154.601 to permit its amendments to become effective as of the date of the amendment and to allow the amended contract to continue in effect for its stated term. Stingray states that it has procedures in place to ensure that all future amendments to service agreements comply with section 154.601. Stingray also requests any other waivers necessary so that its currently effective agreements can remain in effect for their respective terms and under their current terms and conditions.

22. For good cause shown, we grant Stingray all waivers necessary to have its agreements continue in effect, subject to the conditions discussed above.

The Commission orders:

(A) We accept Stingray's non-conforming agreements effective as of their respective effective dates, subject to the conditions set forth in the body of this order.

(B) For good cause shown, we grant Stingray all waivers necessary so that its currently effective agreements can remain in effect for their respective terms and under their current terms and conditions, subject to the above discussion.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.