

127 FERC ¶ 61,193
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

May 29, 2009

In Reply Refer To:
Transcontinental Gas Pipe Line Company, LLC
Docket No. RP96-359-041

Transcontinental Gas Pipe Line Company, LLC
P.O. Box 1396
Houston, TX 77251-1396

Attention: Marg Camardello
Manager, Tariffs and Certificates

Reference: Amendments to Three Negotiated Rate Agreements under the Potomac
Expansion Project

Dear Ms. Camardello:

1. On April 30, 2009, Transcontinental Gas Pipe Line Company, LLC (Transco) filed three executed amendments to negotiated rate service agreements pertaining to Rate Schedule FT transportation service under Transco's Potomac Expansion Project. The amendments revise Exhibit C to the Potomac service agreements to provide for a negotiated rate and the terms of such rate. The Commission accepts these amendments effective May 1, 2009, as proposed, subject to the condition discussed below in this order.
2. In the instant filing, Transco submits amendments to (1) the May 16, 2007 service agreement between Transco and Washington Gas Light Company; (2) the May 15, 2007 service agreement between Transco and Baltimore Gas and Electric Company; and (3) the May 14, 2007 service agreement between Transco and Columbia Gas of Virginia, Inc., (collectively, Potomac Amendments) all of which provide for negotiated rates to be effective May 1, 2009.

3. Transco submits these amendments pursuant to section 53 of the General Terms and Conditions of its FERC Gas Tariff, permitting Transco to negotiate rates consistent with the Commission's Alternative Rate Policy Statement.¹ Transco states that the amendments contain the: (1) respective negotiated rates and all applicable charges; (2) termination date of such negotiated rates; (3) exact legal name of the customers; and (4) applicable rate schedule for service. Transco avers that the receipt and delivery points, quantity of gas to be transported, and agreed upon termination date of the service agreements are also included in the agreements.

4. In addition, Transco asserts that as part of the negotiated rate, the parties have agreed in Exhibit C to the Potomac service agreements, as revised by the Potomac Amendments, to the following limitation provision:

Buyer agrees not to file or cause to be filed with the FERC any action, claim, complaint, or other pleading under Section 5 of the NGA [Natural Gas Act], or support or participate in any such proceeding initiated by any other party, requesting a change to or in any way opposing the negotiated Daily Reservation Rate set forth above.

Transco submits that this provision is not a material deviation from its form of service agreement. Transco argues that the provision is an integral part of the negotiated rate itself, because the provision precludes a buyer from attempting to modify, during the term of the negotiated rate, the rate agreed upon by the parties. Transco maintains that the Commission has found that such a stipulation in a negotiated rate agreement is reasonable to assure that there is rate certainty and that both parties receive the benefit of their bargain for the term of the rate agreement.² Because the Potomac service agreements provide, in Section 1 of Article V, that the parties shall specify provisions governing the negotiated rate and term on Exhibit C, Transco alleges that the inclusion of this stipulation related to implementing the negotiated rate represents nothing more than filling in the blank on Exhibit C with the appropriate negotiated rate-related information.

¹ See *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996), *reh'g and clarification denied*, 75 FERC ¶ 61,024 (1996), *reh'g denied*, 75 FERC ¶ 61,066 (1996), *pet. 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). (Alternative Rate Policy Statement).

² Citing *Gulf South Pipeline Co.*, 118 FERC ¶ 61,262 (2007).

Therefore, Transco contends that this term does not constitute a non-conforming provision³ and does not affect the character of the firm transportation service provided under the Potomac service agreements.

5. Public notice of Transco's filing was issued on May 4, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2008)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2008)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late interventions at this stage of the proceeding will not disrupt the proceeding or place additional burdens on the existing parties. No protests or adverse comments were filed.

6. The Commission accepts Transco's filing, subject to the condition that Transco submit a revised tariff sheet including these three agreements in its list of non-conforming contracts. The Commission determines that the provisions in the subject agreements waiving the shippers' rights under NGA section 5 to seek a change in the negotiated rates are material deviations, because they are not set forth in Transco's form of service agreement. The Commission has defined a material deviation as "any provision of 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."⁴ The Commission rejects Transco's contention that the section 5 waiver provisions may be included in the blank in Transco's Form of Service Agreement for filling in the provisions of the negotiated rate, because they are an integral part of the negotiated rate. As the Commission has previously held, "While the Section 5 waiver provision is related to the negotiated rate, it does not define the rate, and thus does not qualify for inclusion in a blank for filling in the rate."⁵ In addition, Transco's reliance on the November 2004 order in *Columbia Gulf* is misplaced. On rehearing of that order, the Commission clarified that "the waiver of section 5 rights

³ Citing *Columbia Gulf Transmission Corp.*, 109 FERC ¶ 61,152, at P 15 (2004) (*Columbia Gulf*), for the proposition that inclusion in a negotiated rate agreement of a clause appropriately restricting a shipper's Section 5 rights does not require a pipeline to list the agreement as a non-conforming agreement.

⁴ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001).

⁵ *Gulf South Pipeline Co.*, 115 FERC ¶ 61,123, at P 5 (2006).

provision at issue is a non-conforming clause that is a material deviation from the pipeline's form of service agreement and as such must be reviewed to determine whether it is a permissible deviation."⁶

7. In *ANR Pipeline Company*, the Commission determined that material deviations from the Form of Service Agreement in a pipeline's generally applicable tariff fall into two general categories – those that must be prohibited because they present a significant potential for discrimination among shippers and those that can be permitted without substantial risk of discrimination.⁷ The Commission has held that section 5 waiver provisions in negotiated rate agreements of the type at issue here are permissible deviations, which provide rate certainty and do not result in the customer receiving a different quality of service from that provided other customers under the tariff.⁸ However, Transco must file, within 15 days of the date of this order, a revised tariff sheet identifying the Potomac FT service agreements amended herein as non-conforming service agreements. If Transco desires to include similar section 5 waiver provisions in future negotiated rate agreements without having to file them as material deviations, it may revise its exhibit to its Form of Service Agreements for negotiated rates to include an appropriate section 5 waiver provision.⁹

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶ *Columbia Gulf Transmission Corp.*, 111 FERC ¶ 61,262, at P 10 (2005).

⁷ See *ANR Pipeline Co.*, 97 FERC ¶ 61,222 (2001); 97 FERC ¶ 61,223 (2001); 97 FERC ¶ 61,224 (2001).

⁸ *Gulf South Pipeline Co.*, 115 FERC ¶ 61,123, at P 6 (2006).

⁹ *Gulf South Pipeline Co.*, 118 FERC ¶ 61,262 (2007).