

130 FERC ¶ 61,074
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

January 28, 2010

In Reply Refer To:
Millennium Pipeline Company, L.L.C.
Docket No. RP10-272-000

Millennium Pipeline Company, L.L.C.
One Blue Hill Plaza, Seventh Floor
P.O. Box 1565
Pearl River, NY 10965

Attention: Gary A. Kruse
Vice President – General Counsel & Secretary

Reference: Revisions to Penalty Provisions

Dear Mr. Kruse:

1. On December 29, 2009, Millennium Pipeline Company, L.L.C. (Millennium) filed revised tariff sheets¹ to modify section 19 “Penalties” of the General Terms and Conditions (GT&C) of its tariff. Millennium proposes to increase from \$10.00 per Dth to the greater of \$25.00 per Dth or three times the midpoint of the range of prices reported for the Texas Eastern M-3 Citygate Index Price as published in *Platts Gas Daily* (*Platts Gas Daily* M3 price) penalties charged during Critical Days² applicable to: (i) Shippers

¹ See Appendix for a listing of the revised tariff sheets.

² Section 19.7 of Millennium’s GT&C, proposed to be renumbered as section 19.8, provides, in part, that:

A “Critical Day” will be declared by Transporter whenever Transporter, in Transporter’s reasonable discretion, determines (based on criteria such as weather forecasts, line pack, pipeline pressures, horsepower availability, system supply and demand, and other operational circumstances) that operating conditions have severely deteriorated such that Transporter faces a threat to its system integrity and/or to Transporter’s ability to meet its firm service obligations.

taking unauthorized overruns of more than 103 percent of Transportation Demand (section 19.1, Takes in Excess of Transportation Demand) and (ii) Shipper violations of an order to interrupt where a Shipper takes or delivers gas in excess of 103 percent of the sum of the lowered Scheduled Daily Receipt Quantity or Scheduled Daily Delivery quantity as set forth in the interruption order (section 19.2, Failure to Interrupt Service) or an Operational Flow Order (Operational Flow Order)³ (section 19.3, Failure to Comply with Operational Flow Orders). Millennium also proposes new Daily Delivery Point Scheduling Penalties (section 19.5, Delivery Point Scheduling Penalty) that will be applicable on both Critical Days and non-Critical Days to ensure that shipper takes match nominated and scheduled quantities. The Commission conditionally accepts Millennium's revised tariff sheets effective February 1, 2010, as discussed below.

2. The proposed daily delivery point scheduling penalty provision would authorize Millennium to assess penalties on any day when the volume of gas delivered to a Shipper exceeds the Shipper's scheduled quantities by a margin of 1,000 Dth or 5 percent (3 percent on a Critical Day) whichever is greater. Scheduling penalties would be assessed at the IT-1 (Interruptible Transportation Service) rate on non-Critical Days. On Critical Days the penalty increases to \$25.00 per Dth or three times the *Platts Gas Daily M3* price whichever is greater.⁴

3. Finally, Millennium proposes to make conforming amendments to clarify the penalty provisions in section 19 of the GT&C of its tariff. These include clarifications to the penalty crediting mechanism, declaration of Critical Days and OFOs, and that shippers will not be subject to multiple penalties. Further, Millennium is proposing a

³ Section 17.1(a) of Millennium's GTC provides that:

Transporter, in its reasonable discretion, shall have the right to issue Operational Flow Orders as specified in this Section upon determination by Transporter that action is required in order to alleviate conditions which threaten the integrity of Transporter's system, to maintain pipeline operations at the pressures required to provide reliable firm services, to have adequate supplies in the system to deliver on demand (including injection of gas into the mainline and providing line pack), to maintain firm service to all Shippers and for all firm services, and to maintain the system in balance for the foregoing purposes. To the extent feasible, Transporter shall attempt to direct such OFOs to those Shippers causing the condition that necessitates issuance of the OFO.

⁴ Texas Eastern M-3 Citygate Index Price is currently used as a standard for spot prices calculated in Millennium's tariff. See Millennium's GT&C section 1.39 (definition of "Spot Market Price").

new section 19.10(a) to clarify that to the extent Critical Day penalties are not achieving Shipper discipline on Millennium's system, or to the extent necessary to deal with sudden, unexpected and catastrophic events on its system, Millennium may implement an OFO on a Critical Day to alleviate conditions threatening the integrity of Millennium's system. Millennium, when reasonably feasible, will post notices on its Electronic Bulletin Board (EBB) informing Shippers of actions that may be taken to avoid the issuance of a Critical Day, or minimize the sequential issuance of Critical Days.⁵ Millennium also proposes a number of minor clarifying and conforming changes to the GT&C set forth in its tariff, as detailed on page 6 of the transmittal letter to its filing.

4. Millennium asserts that having gained experience during its first year of operation, it is concerned that the penalties currently in effect in its FERC Gas Tariff may be insufficient to deter Shipper conduct that poses a threat to efficient and reliable system operation.⁶

5. Notice of Millennium's filing was issued on January 4, 2010, with interventions and protests due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2009). Pursuant to Rule 214, 18 C.F.R. §385.214 (2009)), all timely motions to intervene and any motions to intervene out-of-time filed before the 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 existing parties. Virginia Power Energy Marketing, Inc. (VPEM) filed a protest to the filing. Millennium filed an answer to the protest.⁷ The protest and answer are discussed below.

6. VPEM argues that Millennium's proposal for new daily scheduling penalties should be rejected until such time as Navigates, Millennium's new EBB system, is fully operational. VPEM asserts that Navigates is currently unable to provide shippers with data about the imbalance and overrun status of each shipper in conflict with section 284.12(b)(2)(v) of the Commission's regulations.⁸ VPEM argues that Millennium seeks authority to impose daily scheduling penalties for behavior that cannot be effectively

⁵ See proposed GT&C section 19.10(b).

⁶ Transmittal Letter at 1.

⁷ While the Commission's Rules of Practice and Procedure generally prohibit answers to protests, the Commission will accept Millennium's answer to allow a fuller understanding of the issues. See 18 C.F.R. § 385.213 (a)(2) (2009).

⁸ 18 C.F.R. 284.12(b)(2)(v) (2009). Section 284.12(b)(2)(v) provides, in part, that:

A pipeline with penalty provisions in its tariff must provide to shippers, on a timely basis, as much information as possible about the imbalance and overrun status of each shipper and the imbalance of the pipeline's system.

monitored by either the pipeline or the shippers. VPEM further argues the failure of Navigates to provide timely and accurate data is the reason that Columbia Gas Transmission, LLC's (Columbia), Millennium's operator, own scheduling penalties accepted by the Commission remain inactive.

7. VPEM asserts that the Commission is already informed and fully aware of Navigates issues from other proceedings, and it would be premature and improper for the Commission to approve new daily scheduling penalties before Navigates problems are resolved. VPEM asserts that shippers have no way of discovering relevant flaws or defects in Navigates functionality since this aspect of the system is not in use. VPEM further asserts that the manner in which Navigates provides data to shippers, and the quality and timeliness of that data, are critical components of Millennium's penalty structure, a point recognized in section 284.12(b)(2)(v) of the Commission's regulations.

8. VPEM asserts that its approach will make more efficient use of the time and resources of the Commission and parties, and allow for full evaluation of any such proposal. VPEM further asserts that Millennium is free to re-file its proposal when Navigates is fully operational and Millennium will not be harmed because Millennium has not identified any existing harmful shipper conduct that requires immediate action as confirmed in Millennium's recent filings with the Commission.

9. In its answer, Millennium responds that VPEM's assertion that Navigates system is currently unable to provide shippers with data about the imbalance and overrun status of each shipper is incorrect. Millennium asserts that it currently provides all shippers with accurate and timely volumetric data. Millennium states that Columbia has confirmed to Millennium that Millennium's shippers have been consistently provided timely and accurate information related to their deliveries and imbalances. Millennium further asserts such data which includes measurement information for point operators as well as imbalance information at the contract, daily, and activity level, is more than sufficient information for shippers to evaluate their nominations, flows, imbalances, and overruns to minimize their exposure to penalties.

10. Millennium argues that VPEM does not identify any specific issue with Navigates as used for Millennium and has not indicated to Millennium any specific concern with the information supplied by Navigates that would merit VPEM's statements or the rejection of this filing. Millennium further argues that Columbia's decision to request suspension of its scheduling penalty provisions in its Docket No. RP10-108-000 waiver petition was intended to give shippers additional time to gain familiarity with the EBB, and was not based on Navigates functionality.⁹

⁹ Citing Columbia's October 30, 2009 petition for waiver in Docket No. RP10-108-000 at 1 & Attachment A.

11. Millennium states that Columbia has also confirmed that Navigates is fully programmed and capable of implementing scheduling penalties for Millennium. Millennium asserts that to the extent information regarding overruns and imbalances cannot be provided through electronic metering due to problems with Navigates, Millennium's tariff provides that daily scheduling penalties will not be assessed.¹⁰ Millennium further asserts that, with the exception of nominal daily scheduling penalties, the penalties in GT&C section 19 only apply during periods when the operational integrity of Millennium's system is threatened. Millennium asserts, in Order No. 637,¹¹ the Commission stated that, during critical periods, pipelines nevertheless will be permitted to impose penalties on shippers when real-time metering, and/or timely reporting of shippers' imbalance status is not available. Millennium argues that, therefore, any problems with Navigates should not affect Millennium's right to impose its proposed penalty provisions. Finally, Millennium argues that, for the most part, its proposed tariff revisions simply revise the level of penalties and VPEM's protest seems to be an attack on the existence of the penalties already approved by the Commission and not on the level of the penalties being proposed.

12. The Commission rejects VPEM's argument that Millennium's proposal be rejected due to problems with Navigates as vague, speculative, and unsupported. Millennium states that it currently provides all its shippers with accurate and timely data which is sufficient for shippers to minimize their exposure to penalties. As Millennium points out, VPEM has failed to identify a specific problem with the use of Navigates on the Millennium system.¹²

13. VPEM asserts that Columbia's scheduling penalties remain inactive due to the failure of Navigates to provide accurate and timely data. However, in the pending

¹⁰ Citing proposed GT&C section 19.5(c) which states that the proposed scheduling penalty does not apply to delivery points and/or meters that lack electronic metering capability.

¹¹ Citing *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,317 (Order No. 637), *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099 (Order No. 637-A), *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

¹² When scheduling penalties are implemented on Millennium's system, if a shipper identifies a specific Navigates problem for which some relief may be required it may make an appropriate filing with the Commission.

proceeding in Docket No. RP10-108-000, Columbia, in the petition for waiver of its scheduling penalties (at 1), states that the waiver is sought to give shippers additional time to become familiar with the new EBB. Further, if the information cannot be provided by electronic metering, proposed section 19.5(c) provides that the scheduling penalty will not be assessed for the applicable delivery point and/or meter.

14. In any case, as Millennium points out, except for nominal penalties, the scheduling penalties will only apply during critical periods when the operational integrity of Millennium's system is threatened. With respect to imposition of penalties during critical periods, as those in this case, the Commission, in Order No. 637, stated that during such critical periods it would permit pipelines to impose penalties on shippers when real time metering and/or timely reporting of the shippers' imbalance status is not available.¹³ The Commission reasoned that "[t]he need to maintain system integrity during critical days is of sufficient importance that the Commission does not want to limit the pipelines' ability to deter conduct that may be harmful to other shippers even if it cannot provide current information."¹⁴

15. With respect to the necessary support for Millennium's proposal, VPEM argues that Millennium has failed to provide any reason to increase existing penalties or impose new daily scheduling penalties. VPEM contends that Millennium did not impose any penalties on its system last year¹⁵ indicating that there is no problem with the existing penalty provisions. VPEM further contends that Millennium fails to provide a non-speculative specific problem that it believes will develop in the future in order to justify its request to act prospectively to deter harmful conduct on its system. VPEM asserts that Millennium does not explain what specific experience during its first year of operation has caused Millennium to have a concern. VPEM further asserts that, with regard to future conduct, Millennium has made no showing that its shippers will behave in ways that are detrimental to reliability or system operations.

16. VPEM argues that Millennium's filing is devoid of any demonstration that new penalties are "necessary and appropriate" and should be rejected as contrary to Commission policy and precedent.¹⁶ VPEM also cites section 284.12(b)(2)(v) of the Commission's regulations which states, in part, that:

¹³ Order No. 637 at 31,317.

¹⁴ *Id.*

¹⁵ VPEM cites Docket No. RP10-284 in which it asserts Millennium reported that it did not collect any penalties for the 2008-2009 contract year and, therefore, had no Penalty Revenue Credits to report to the Commission.

¹⁶ *Citing* Order No. 637 at 31,314 (2000).

A pipeline may include in its tariff transportation penalties only to the extent necessary to prevent the impairment of reliable service. Pipelines may not retain net penalty revenues, but must credit them to shippers in a manner to be prescribed in the pipeline's tariff.

17. VPEM argues that, as the Commission stated in Order No. 637, pipelines are required to “narrowly design penalties to deter only conduct that is actually harmful to the system.”¹⁷ VPEM asserts that, in *Columbia*,¹⁸ where the Commission accepted a similar scheduling penalty, Columbia, unlike Millennium, provided evidence of a pattern of historical shipper behavior as the predicate for proposing necessary and appropriate scheduling penalties upon which the Commission clearly relied. VPEM further asserts that the Commission specifically noted that the pipeline had made a demonstration of a “potential threat to reliable service” and that such a demonstration was sufficient.¹⁹ VPEM argues that in this case, Millennium has made no attempt to demonstrate that harmful behavior has indeed occurred or will occur in the future and must still make a showing that a non-speculative existing or future problem exists. VPEM further argues that statements of concern without a corresponding explanation of the specific “potential threat to reliable service” are insufficient justification for the increased penalties and new penalties proposed by Millennium.

18. Millennium asserts that as volumes transported on its system increase, Millennium is concerned that there might be more need to control shipper behavior within the parameters approved by the Commission. Millennium further asserts that its concurrently submitted filing in Docket No. RP10-284-000, required by Millennium’s tariff, informing the Commission that no penalties had been assessed in Millennium’s first year of operation, says absolutely nothing about the behavior of shippers on its system or its concerns with future problems that might occur. Finally, Millennium contends that the Commission has recognized the necessity of encouraging shipper discipline generally and has determined that a nominal, non-critical day scheduling penalty set at a pipeline’s rate for IT (Interruptible Transportation) service, as Millennium has proposed in the instant proceeding, is a reasonable method to provide an incentive for shipper's to schedule accurately, and to compensate the pipeline for its lost opportunity costs.

19. The Commission finds that Millennium has fully supported its filing and rejects VPEM’s argument Millennium has failed to provide adequate reason to increase its existing penalties or impose new scheduling penalties. It is not necessary for the pipeline

¹⁷ *Id.*

¹⁸ *Columbia Gas Transmission Corp.*, 119 FERC ¶ 61,267 (2007); *order on reh’g*, 124 FERC ¶ 61,122 (2008) (*Columbia*).

¹⁹ *Citing* 119 FERC ¶ 61,267 at P 26.

to demonstrate actual harm or impairment of reliable service. As the Commission expressly stated, in a portion of *Columbia* relied upon by VPEM, in response to similar arguments that Columbia had not adequately supported its proposed scheduling penalties:

Columbia Gas is not required to show actual impairment of service, only a potential threat to reliable service. The potential adverse effects of scheduling variances on system reliability are self-evident when a Critical Day has been declared. Columbia Gas has shown the conduct to be deterred has the potential to cause operational problems which may threaten its system's integrity and reliability of service. There is no need for Columbia Gas to show particular examples of shipper violations or general shipper behavior causing operational stress on its system. During critical periods, when a shipper schedules quantities of gas greater than the actual takes, or schedules quantities of gas less than actual takes, Columbia Gas has less operational control over its system and may experience increased operational risk.²⁰

20. In this case, as in *Columbia*, the potential threat of scheduling variances during critical periods to reliable service is self-evident. With respect to the proposed scheduling penalties for non-critical periods, Commission policy permits a nominal scheduling penalty at the IT (Interruptible Transportation) rate level for non-critical days, when scheduling variances will not have an operational effect on the pipeline, to provide an incentive to schedule accurately and to compensate the pipeline for its lost opportunity costs.²¹ Therefore, a showing of operational harm is not required for implementation of this nominal non-critical period scheduling penalty.

21. Further, Millennium asserts that its current penalties are insufficient to prevent shipper misconduct which presents a threat to efficient and reliable system operation. Millennium reports that no penalties were assessed during its first year of operation. However, Millennium (answer at 6) asserts that as volumes on its system increase there might be more need to control shipper behavior. As VPEM itself recognizes (at 7-8), the Commission has determined that it is "entirely appropriate for pipelines to anticipate problems and take action to forestall them, rather than waiting until such problems occur."²² With respect to its existing Critical Day penalties, Millennium only proposes

²⁰ 119 FERC ¶ 61,267 at P 26.

²¹ 119 FERC ¶ 61,267 at P 29, *See also Natural Gas Pipeline Co. of America*, 103 FERC ¶ 61,174, at P 63 (2003).

²² *Columbia Gas Transmission Corp.*, 115 FERC ¶ 61,134, at P 15 (2006). As Millennium notes (answer at 7), VPEM asserts without support that the facts in that case are distinguishable from the facts in this case. However, the protestors' argument in that

(continued...)

an increase in the level of these penalties and not to modify the conduct to which the penalties apply. The Commission has previously accepted Millennium's Critical Day penalties which penalize that conduct harmful to the system and subject to the penalties permissible under Order No. 637.²³ The Commission found, in *Columbia Gas Transmission Corp.*, 115 FERC ¶ 61,134 at P 9, that the limitation to prevent impairment of reliable service in the Commission's regulation was directed to the intended purpose of the penalty but the Commission expressly found in Order No. 637-A at 31,608-31,609 penalties may be imposed during critical periods. As the Commission stated with respect to similar penalty increases to existing penalties considered in that order:

The Commission's primary concern with respect to penalties such as those at issue here, which only apply to conduct that is harmful to the system, is that the penalties be high enough to act as an effective deterrent to the harmful conduct. Since such conduct risks harm to other customers, as well as the pipeline, the Commission believes that significant penalties for such conduct are appropriate and consistent with Order No. 637. The Commission finds that Columbia Gas has provided adequate support for its proposed penalty levels equal to three times the commodity price of gas.²⁴

22. With respect to the similar substantial level permitted in that case for Critical Day penalties the Commission further stated that:

under the statutory scheme set forth in the Natural Gas Act, the pipeline has the initiative through a section 4 filing to propose rates, terms, and conditions for the service it provides.[²⁵] If the pipeline shows that its proposal is just and reasonable, the Commission must accept it, regardless of whether other rates, terms, or conditions might also be just and reasonable.[²⁶] The level of penalties must be intended to prevent shipper behavior that could threaten the pipeline's operational integrity in the absence of such penalties. The shipper behavior which is deterred has a

case, similar to VPEN's argument here, that Columbia had failed to provide examples generally of shipper behavior or operational stress was rejected by the Commission.

²³ See *Millennium Pipeline Company, L.L.C.*, 125 FERC ¶ 61,119 (2008). That order accepted tariff sheets to comply with the Commission's orders in *Millennium Pipeline Company, L.L.C., et al.*, 117 FERC ¶ 61,319 (2006), *order on reh'g*, 119 FERC ¶ 61,173 (2007).

²⁴ 115 FERC ¶ 61,134 at P 12.

²⁵ See *United Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

²⁶ See *Western Resources, Inc. v. FERC*, 9 F.3d 1568 at 1578 (D.C. Cir. 1993).

potential negative impact on the system and other shippers on the system and it is of critical importance that the level be sufficient to deter such conduct. The pipeline must have penalty provisions in place which are at a sufficient level to prevent impairment of reliable service. The level of penalties necessary to deter the conduct is a matter of the exercise of reasonable judgment. The level of penalties to deter impairment of reliable service approved in this case is similar to that proposed by other pipelines and approved by the Commission. Finally, the penalties charged to the offending shippers are credited to the non-offending shippers who were not responsible for the actions which threatened the system.²⁷

23. Based on its first year of actual operations and the potential conditions resulting from increased volumes, Millennium has determined in its reasonable judgment that the proposed penalties are necessary to deter conduct which could threaten its system's operational integrity. The Commission finds that the proposed penalties have been shown to be just and reasonable.

24. However, Millennium is directed, within 15 days of the date of this order, to file a Revised Sheet No. 233 to change "19.6 Penalty Crediting Mechanism" to "19.7 Penalty Crediting Mechanism". Accordingly, the revised tariff sheets referenced in the Appendix are accepted effective February 1, 2010, subject to conditions.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁷ 115 FERC ¶ 61,134 at P 22.

Appendix

Millennium Pipeline Company, L.L.C.

**FERC Gas Tariff
Original Volume No. 1**

Tariff Sheets Accepted Conditionally Effective February 1, 2010

Third Revised Sheet No. 51
Second Revised Sheet No. 162
First Revised Sheet No. 217
Third Revised Sheet No. 231
Second Revised Sheet No. 232
Second Revised Sheet No. 233
First Revised Sheet No. 234
First Revised Sheet No. 235
Sheet No. 236