

131 FERC ¶ 61,091
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

April 30, 2010

In Reply Refer To:
Tuscarora Gas Transmission Company
Docket No. RP10-559-000

Tuscarora Gas Transmission Company
717 Texas Street, Room 25120
Houston, TX 77002

Attention: John A. Roscher
Director, Rates & Tariffs

Reference: Non-Conforming Service Agreement

Ladies and Gentlemen:

1. On March 31, 2010, Tuscarora Gas Transmission Company (Tuscarora) filed two (2) potentially non-conforming transportation service agreements¹ (TSAs) along with tariff sheets² listing the agreements as non-conforming. Tuscarora states that these agreements contain several deviations from the *pro forma* service agreement in effect as of the execution date of the agreement. Tuscarora requests that the Commission accept the agreements and the tariff sheets effective April 30, 2010. The Commission will accept the agreements and the tariff sheets as conditioned below to be effective April 30, 2010.

2. Tuscarora states that the CDC Agreement contains several deviations from the *pro forma* service agreement. Tuscarora specifies three deviations: (1) a

¹ California Dept. of Corrections FT No. F021 (CDC Agreement) and Barrick Goldstrike Mines, Inc. FT No. F074 (Barrick Agreement).

² Original Sheet No. 7 to FERC Gas Tariff, First Revised Volume No. 1; Sheets 8-9 to FERC Gas Tariff, First Revised Volume No. 1 (The addition of sheet No. 7 required a revision to the succeeding tariff sheet, which now becomes Sheet Nos. 8-9).

modification in Article VII providing that the agreement will be interpreted according to California law instead of Nevada law, as provided in the *pro forma* service agreement; (2) a modification of a sentence in § 1.2³ which conditioned Tuscarora's obligations under the agreement upon its completion of facilities necessary to provide service; and (3) a modification in Article II of the agreement which tied the effective date of the agreement to the commencement date, as defined in the General Terms & Conditions of Tuscarora's tariff.

3. Tuscarora states that the Barrick Agreement contains two deviations from the *pro forma* service agreement: (1) in § 1.1, the agreement provides for the shipper's maximum transmission quantity (MTQ) to step down after the first ten years of the contract;⁴ and (2) a modification of a sentence in § 1.2 of the agreement identical to the modification in the CDC Agreement.⁵

4. The instant filing was noticed 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 of the Commission's Rules of Practice and Procedure,⁶ all timely filed notices of intervention and motions to intervene and any motions to intervene out of time filed before issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. No protest or comments were filed.

5. If a pipeline and a shipper enter into a contract that materially deviates from the pipeline's form of service agreement, the Commission's regulations require the pipeline to file the contract containing the material deviations with the

³ The sentence in the *pro forma* service agreement reads: "[t]ransporter's obligations hereunder shall be subject to the installation of all necessary facilities." The sentence as modified reads: "[t]ransporter's obligation to transport and deliver natural gas under this Agreement is conditional upon Transporter placing into service the facilities necessary to provide service to the Shipper."

⁴ The agreement provides that the shipper's MTQ for the first ten years of the contract is 20,000 Dth/d of capacity and that the shipper's MTQ for the following five years is 10,000 Dth/d.

⁵ See footnote 3.

⁶ 18 C.F.R. § 385.214 (2009).

Commission.⁷ In *Columbia Gas Transmission Corporation*,⁸ the Commission clarified that a material deviation is any provision in a TSA 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.⁹

6. In its filing, Tuscarora states that the deviations in the CDC Agreement should be accepted by the Commission because none of the deviations change the conditions under which service is being provided or present a risk of undue discrimination. Specifically, Tuscarora states that it was not aware that choice of law would be considered a material deviation when the contract was negotiated in 2001. With regard to the other two deviations in the CDC Agreement, Tuscarora states that these deviations are now moot because both of the provisions were rendered moot when Tuscarora began providing service under the agreement.¹⁰

7. The Commission finds that the choice of law provision is a material deviation from the *pro forma* service agreement. However, as set forth above, the Commission finds that this deviation is permissible because Tuscarora entered into this agreement prior to the Commission's clarification of the material deviation standard and the parties have relied on this provision for a substantial period of time.¹¹ Accordingly, the Commission will permit this deviation until the end of the agreement term.¹²

⁷ 18 C.F.R. §154.1(d) (2009).

⁸ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001) (*Columbia*).

⁹ In *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 27 (2003), 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.” *Id.* P 32.

¹⁰ The deviations, as noted above, condition Tuscarora's obligations on the construction of necessary facilities and change the effective date of the agreement in order to match the commencement date. As service has been provided under the contract for some time, Tuscarora argues that these provisions are moot.

¹¹ See *Columbia*, 97 FERC ¶ 61,221, at 62,001 (2001).

¹² See *Texas Eastern Transmission, LP*, 119 FERC ¶ 61,337 at P 11 (2007).

8. Tuscarora states that the deviations in the Barrick Agreement should be accepted by the Commission because they do not change the conditions under which service is being provided or present a risk of undue discrimination. Specifically, Tuscarora states that the deviation in this agreement simply reflects the shipper's level of firm capacity commitment and should be approved. Tuscarora also contends that this provision is distinguishable from similar provisions which the Commission has rejected in that this provision does not provide one of the parties with the discretion to elect a capacity reduction. In this agreement, Tuscarora states, the capacity was fixed and negotiated at the outset of the agreement. Tuscarora also contends that the provision in the Barrick Agreement conditioning its obligations on the construction of necessary facilities has been rendered moot because it has been providing service under the agreement for some time.

9. The Commission finds that the provision in the Barrick Agreement allowing the shipper to step down its MTQ after the first ten years of the agreement is an impermissible deviation from the form of service agreement. Although Tuscarora contends that this language differs from other provisions that the Commission has found to be a material deviation because the instant language does not permit shippers the option to reduce its quantities, the fact remains that this provision constitutes a valuable right. The option to negotiate, at the outset, a reduction in quantity at a specific time is a valuable right. In the Barrick Agreement, this valuable right was offered to one shipper but was not generally available to all other shippers. Therefore, consistent with our findings in *Questar*¹³, we find this provision which allowed Barrick to reduce quantities after the first ten years of the agreement to be an impermissible deviation. Therefore, the contract must either be revised to conform to the existing Form of Service Agreement, or Tuscarora must provide this substantive right to all firm shippers by filing revised tariff sheets (1) reflecting this valuable right of decreasing contract quantity in the General Terms and Conditions of its tariff, and, (2) amending its Form of Service Agreement under Rate Schedule FTS-1 to include blank lines to fill in specific time periods and the option of decreasing contract quantity for those periods. Tuscarora's compliance filing must be made 30 days from the date of this order.

10. Lastly, the CDC Agreement and the Barrick Agreement contain provisions which Tuscarora argues are moot because each provision concerned issues that were resolved when Tuscarora began providing service under the agreements.

¹³ See *Questar Pipeline Co.*, 131 FERC ¶ 61,011 (2010).

First, both the CDC and the Barrick Agreement contain an identical provision which conditions Tuscarora's obligations under the agreements on the construction and the in-service date of the facilities necessary to provide service. The Commission finds that this deviation is permissible because it simply reflects a special circumstance under which the contracts were executed, namely that the contracts were entered into before the new facilities were in service.¹⁴

Furthermore, the provision is moot because Tuscarora has already constructed and placed into service the subject facilities. Accordingly, this provision cannot affect the rights of parties and therefore is not a material deviation. Second, the CDC Agreement contains a provision which modifies the effective date of agreement so as to match the commencement date, as defined in the General Terms and Conditions of Tuscarora's tariff. This provision is also moot because Tuscarora has been providing service under the agreement and therefore, the provision could not affect the rights of the parties.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

¹⁴ See *Tennessee Gas Pipeline Co.*, 121 FERC ¶ 61,116, at p 11 (2007), and *Egan Hub Storage, LLC*, 127 FERC ¶ 61,002, at P4 (2009).