

131 FERC ¶ 61,092
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 30, 2010

In Reply Refer To:
North Baja Pipeline, LLC
Docket No. RP10-560-000

North Baja Pipeline, LLC
717 Texas Street, Room 25120
Houston, TX 77002

Attention: John A. Roscher,
Director, Rates and Tariffs

Reference: Non-Conforming Service Agreements

Ladies and Gentlemen:

1. On March 31, 2010, North Baja Pipeline, LLC (North Baja) filed in Docket No. RP10-560-000 firm transportation service (FTS-1) agreements with Termoelectrica de Mexicali (Termoelectrica)¹ and Sempra LNG Marketing Corp (Sempra)² and an interruptible transportation service agreement (ITS-1) with MGI Supply Limited (MGI).³ North Baja also filed a revised tariff sheet revising its list of non-conforming contracts to include the contracts filed in this proceeding.⁴ North Baja states that these service agreements contain potentially non-conforming provisions, and requests that the Commission accept the tariff sheet to be effective April 30, 2010, and to accept the service agreements such that they may be effective for their entire terms. As discussed

¹ FTS-1 Agreement No. A004F1 (Termoelectrica Agreement).

² FTS-1 Agreement Nos. A016F2 and A016F3 (Sempra Agreements).

³ ITS-1 Agreement No. A003I1 (MGI Agreement).

⁴ Second Revised Sheet No. 9A to FERC Gas Tariff, Original Volume No. 1.

below, the Termoelectrica Agreement and MGI Agreement are accepted as requested, and the Sempra Agreements are accepted subject to the conditions described herein. The revised tariff sheet is accepted, effective April 30, 2010.⁵

2. North Baja states that the MGI Agreement contains a deviation in section 1.3 from the *pro forma* service agreement that requires the shipper to reimburse North Baja for certain filing fees within ten days of receipt of “an original invoice” rather than within ten days of receipt of notice from North Baja as provided in the ITS-1 *pro forma* service agreement.

3. North Baja states that the Termoelectrica Agreement contains several deviations from the *pro forma* service agreement, including (1) modification to the language in section 7.3 related to indemnification of North Baja by the shipper and requiring the shipper to hold North Baja harmless for the shipper’s failure to receive or deliver gas; (2) language relating to the minimum pressure for deliveries at the interconnect with the Gasoducto Bajanorte system; (3) a provision in section 3.2 tying the effective date of the agreement to North Baja’s ability to provide the shipper the agreed upon “MDQ on a sustained basis;” and (4) a warranty provision in section 7.2 concerning upstream and downstream transportation arrangements.⁶

4. North Baja explains that the Sempra Agreements also contain multiple deviations from the *pro forma* service agreement, including (1) a modification to section 6.4 providing that the negotiated rate “shall be subject to the Mobile-Sierra Doctrine’s ‘Public Interest Standard[;]’” (2) modification to section 7.9 referencing additional provisions in exhibits A and B containing, among other terms, language related to a minimum Btu for purposes of calculating the maximum daily quantity (MDQ) and

⁵ North Baja requested an April 30, 2010 effective date for the filed tariff sheet, which provided the Commission one day less than the 30-day notice required by section 4(d) of the Natural Gas Act and the Commission’s regulations. 18 C.F.R. § 154.207 (2009). The Commission grants waiver of the 30-day notice requirement to allow the sheet to become effective as proposed.

⁶ Specifically, North Baja quotes the potentially non-conforming provision in 7.2, “[North Baja] and Shipper agree that supply of gas for delivery to [North Baja] and market for gas receipt from [North Baja], and any upstream or downstream transportation arrangements necessary to effectuate such delivery and receipt are the exclusive responsibility of shipper.”

evergreen options;⁷ (3) the omission of the evergreen language in section 3.1 that appears in the FTS-1 *pro forma* service agreement; (4) different language than the *pro forma* service agreement relating to pressure levels at the point of delivery;⁸ and (5) a new section 8.0 relating to assignment rights that North Baja states clarifies the intended meaning of the assignment provision in section 32 of the General Terms and Conditions (GT&C) of North Baja's tariff.

5. North Baja states that each one of the filed agreements also contains additional deviations which are clerical or immaterial in nature, such as additional factual material in recitals clauses and changes in the manner in which the agreement references the GT&C.

6. North Baja asserts that the deviations identified in the agreements are permissible deviations because the deviations do not substantially affect the rights of the parties or are moot, and accordingly do not present a risk of undue discrimination.

7. Notice of North Baja's filing was issued on April 1, 2010. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2009), 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 intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties.

8. In *Columbia Gas*,⁹ 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. However, not all material deviations are impermissible. As explained in *Columbia Gas*, provisions that materially deviate from the corresponding *pro forma* service agreement fall into two general categories: (1) provisions the Commission must

⁷ North Baja states that although both Sempra Agreements contain the provision in section 7.9 referencing exhibits A and B, only the exhibits related to FTS-1 Agreement No. A016F3 contain the evergreen and minimum BTU provisions. In contrast, North Baja asserts that the exhibits to FTS-1 Agreement No. A016F2 does not contain any additional terms which "affect" the firm transportation service agreement.

⁸ North Baja represents that only FTS-1 Agreement No. A016F3 contains this provision.

⁹ *Columbia Gas Transmission, LLC*, 97 FERC ¶ 61,221 (2001) (*Columbia Gas*). See also *ANR Pipeline Co.*, 97 FERC ¶ 61,224 (2001) (*ANR*).

prohibit because they present a significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination.¹⁰

9. In the instant proceeding, the Commission finds that the MGI Agreement contains permissible material deviations. North Baja has identified section 1.3 of the MGI Agreement as requiring the shipper to reimburse North Baja for certain filing fees within ten days of receipt of “an original invoice” from North Baja, rather than within ten days of receipt of “notice” from North Baja as provided in the *pro forma* service agreement. The Commission finds that this provision does not pose an undue risk of discrimination and, thus, is permissible.

10. The Commission accepts the agreement with Termoelectrica Agreement as requested. North Baja has identified as a deviation the provision in section 3.2 tying the effective date of the agreement to North Baja’s ability to provide the shipper the agreed upon “MDQ on a sustained basis.” The Commission determines that provision is moot now that service has commenced and, thus, cannot affect the substantive rights of the parties. Thus, the provision is not a material deviation. The Commission also finds that the deviating language in section 7.3 related to indemnification and the warranty provisions in 7.2 do not afford different rights than those contained within the *pro forma* service agreement. Thus, these provisions are not material.

11. The Commission also finds that the provision in exhibit A relating to minimum pressure for deliveries at the interconnect with the Gasoducto Bajanorte system is a permissible material deviation because the provision is consistent with the *pro forma* service agreement which permits the parties to negotiate pressures at points of delivery and thus does not pose a risk of undue discrimination.¹¹

12. The Commission also accepts the Sempra Agreements subject to conditions. The Commission finds that the language in section 6.4 providing that the *Mobile Sierra* public interest standard applies is not material. The Commission further finds that section 3.1 of the service agreement omitting the evergreen language from the *pro forma* service agreement is not material because it is consistent with section 8.1 of the GT&C of North Baja’s tariff, which merely states that North Baja will “offer” evergreen provisions and implicitly gives the shipper the option to decline to include an evergreen provision.

¹⁰ *Columbia Gas*, 97 FERC at 62,002; *ANR*, 97 FERC at 62,022.

¹¹ Section 4.3 of North Baja’s *pro forma* service agreement provides, “*Unless otherwise agreed*, NBP shall deliver the gas to be transported hereunder to or for the account of Shipper at the pressures existing in NBP’s system at the point(s) of delivery” (emphasis added).

13. The pressure provision in exhibit A to FTS-1 Agreement No. A016F3 with Sempra is a permissible material deviation because the negotiated pressure is consistent with the *pro forma* service agreement provision permitting the parties to negotiate pressures at points of delivery. The minimum BTU provisions in exhibit A to the same agreement are also permissible because they are consistent with the range of Btu content allowed on North Baja's system. The Commission also finds that the evergreen provisions are permissible material deviations because section 8.1 of North Baja's tariff permits the negotiation of evergreen provisions.

14. However, the Commission finds that the assignment provision contained within section 8.0 of the FTS-1 Agreements with Sempra is an impermissible material deviation. North Baja represents and the provision provides that it "clarifies the intended meaning of § 32 of [North Baja's] GT&C" which contains similar, but slightly different, language concerning assignment rights. The provision in section 8 further states that it applies "notwithstanding anything in [North Baja's] tariff to the contrary...." North Baja cannot negotiate an assignment provision with a shipper that clarifies or imposes a particular interpretation of North Baja's tariff. To the extent that North Baja's tariff requires clarification, North Baja must modify its tariff to make the clearer language applicable to all shippers. Moreover, to the extent that North Baja asserts that the language does not change the rights of the shippers, there is no reason to include this language in the agreement. Thus, the Commission requires North Baja to renegotiate the agreements with Sempra to remove this assignment provision or to modify its tariff to make the clarifying language applicable to all shippers, within 30 days of the date of this order.¹²

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹² It appears that North Baja failed to timely file the subject service agreements in compliance with section 154.1(d) of the Commission's regulations. North Baja is reminded that it must submit required filings on a timely basis, or face possible sanctions by the Commission. See *Southern Star Central Gas Pipeline, Inc.*, 125 FERC ¶ 61,082 (2008).