

132 FERC ¶ 61,001
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

July 1, 2010

In Reply Refer To:
Maritimes & Northeast Pipeline, L.L.C.
Docket No. RP10-826-000

Maritimes & Northeast Pipeline, L.L.C.
M&N Management Company
890 Winter Street, Suite 300
Waltham, MA 02451

Attention: Joseph F. McHugh, Director
Rates & Regulatory Affairs

Reference: Original Sheet Nos. 9.01a, 9.01b, 9Y, and 9Z to Maritimes' FERC Gas
Tariff, First Revised Volume No. 1.

Dear Mr. McHugh:

1. On June 4, 2010, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) filed the above referenced tariff sheets describing the negotiated rate transactions that it entered into with Pengrowth U.S. Corporation (Pengrowth) and Emera Energy Services, Inc. (Emera). Maritimes states that the tariff sheets are being filed in compliance with the terms and conditions of the Stipulation and Agreement (Settlement) approved by the Commission's April 30, 2010 letter order in Docket No. RP09-809-000, *et al.*¹ Maritimes also states that both negotiated rate agreements contain a material deviation from Maritimes' tariff. For the reasons discussed below, the Commission accepts the proposed tariff sheets, effective May 1, 2010, as requested, subject to Maritimes filing within 30 days of the date of this order a generically applicable tariff provision offering a similar contractual right of first refusal to other firm shippers pursuant to not unduly discriminatory conditions.

2. In the April 2010 Order, the Commission approved the Settlement, which resolved all issues set for hearing by two previous Commission orders involving a general rate

¹ *Maritimes & Northeast Pipeline, L.L.C.*, 131 FERC ¶ 61,095 (2010) (April 2010 Order).

case filing made by Maritimes on July 1, 2009.² As part of the Settlement, Maritimes agreed to negotiated rates with Pengrowth and Emera, two of its long-term firm recourse rate customers. The Settlement included *pro forma* tariff sheets containing the terms of each negotiated rate agreement. The Settlement also required Maritimes to file within 20 days of the Settlement's effective date, tariff sheets identical in substance to the *pro forma* tariff sheets included in the negotiated rate agreements for Commission approval, to become effective retroactively as of May 1, 2010.

3. Public notice of Maritimes' filing was issued on June 7, 2010. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2010). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2010), all timely filed motions to intervene and any motion 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. No protests or adverse comments were received.

4. Maritimes states that it is submitting this filing in compliance with the Settlement and pursuant to section 24 (Negotiated Rates) of the General Terms and Conditions of its tariff. Maritimes also states that both negotiated rate agreements contain a provision that constitutes a material deviation from its tariff. The relevant provision states that the negotiated rate agreement shall be considered a "ROFR Agreement" for all purposes under Maritimes' tariff. Under Maritimes' tariff, a "ROFR Agreement" is entitled to a right of first refusal and is reserved for firm service agreements with a term of service of twelve consecutive months or more at the applicable maximum rate.³

5. Maritimes states that the material deviation provision was agreed to as part of the overall Settlement in order to replicate in the negotiated rate agreements the same right of first refusal the customers have under their existing long-term firm service agreements to which these negotiated rate agreements now apply. Maritimes requests that the Commission accept the provisions as permissible deviations in light of the mutual agreement of the parties to the Settlement and the Commission's approval of the Settlement in the April 2010 Order.

6. As discussed below, the Commission accepts the proposed tariff sheets, to be effective May 1, 2010, as proposed, subject to conditions. In *Columbia Gas Transmission Corp.*,⁴ the Commission clarified that a material deviation is any provision

² *Maritimes & Northeast Pipeline, L.L.C.*, 128 FERC ¶ 61,109 (2009) and *Maritimes & Northeast Pipeline, L.L.C.*, 130 FERC ¶ 61,035 (2010).

³ See Sixth Revised Sheet No. 210 to Maritimes' FERC Gas Tariff, First Revised Volume No. 1.

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

in a transportation service agreement that (a) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff, and (b) affects the substantive rights of the parties. However, not all material deviations are impermissible. If the Commission finds that such deviation does not constitute a substantial risk of undue discrimination, the Commission may permit the deviation.⁵ Therefore, there are two general categories of material deviations: (a) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers, and (b) provisions the Commission can permit without a substantial risk of undue discrimination. If the former is true, the pipeline may only apply the provision pursuant to a generally applicable tariff provision setting forth the conditions under which the provision will be offered.

7. Maritimes seeks to include in the negotiated rate agreements a provision entitling Pengrowth and Emera to a right of first refusal though their negotiated rate agreements do not otherwise qualify for a right of first refusal because they are not at the applicable maximum tariff rate. Maritimes concedes that this provision is a material deviation. Previously, the Commission has permitted pipelines to negotiate rights of first refusal with customers who would not otherwise qualify for the regulatory right of first refusal set forth in the tariff (a contractual right of first refusal). However, the pipeline may only do so if its tariff contains a provision offering to negotiate contractual right of first refusals on a not unduly discriminatory basis.⁶ Accordingly, the negotiated rate agreements are accepted, subject to Maritimes, within 30 days of the date of this order, filing generally applicable tariff provisions to offer a similar provision to other firm shippers pursuant to not unduly discriminatory conditions.⁷

By direction of the Commission.

Kimberly D. Bose,
Secretary.

⁵ *Columbia*, 97 FERC ¶ 61,221 at 62,004.

⁶ *Texas Eastern Transmission, LP*, 109 FERC ¶ 61,145 (2004); *Algonquin Gas Transmission, LLC*, 110 FERC ¶ 61,249 (2005).

⁷ Maritimes' March 19, 2010 filing of the Settlement contained no mention of the material deviation in the Pengrowth and Emera negotiated rate agreements except in a footnote on the *pro forma* tariff sheet describing the negotiated rate agreements. If a pipeline agrees as part of a settlement to include a material deviation in service agreements with particular customers, it should highlight that fact in the transmittal letter accompanying the Settlement and/or in the explanatory statement describing the Settlement.