

135 FERC ¶ 61,220
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Transwestern Pipeline Company

Docket No. RP11-2106-000

ORDER ACCEPTING TARIFF RECORD

(Issued June 10, 2011)

1. On May 11, 2011, Transwestern Pipeline Company (Transwestern) filed proposed revised tariff language to establish the circumstances in which it may seek a discount-type adjustment to recourse rates based upon negotiated rate agreements.¹ The proposed tariff record is accepted, effective June 11, 2011.

Details of the Filing

2. Transwestern proposes to place this tariff language into its tariff. This language states:

31.2 Discount-Type Adjustments

A discount-type adjustment to recourse rates for negotiated rate agreements shall be allowed to the extent that Transporter can meet the standards required of an affiliate discount-type adjustment, including requiring that Transporter shall have the burden of proving that any discount granted is required to meet competition. Transporter shall be required to demonstrate that any such discount-type adjustment for negotiated rate agreements does not have an adverse impact on its recourse rate shippers by:

(1) demonstrating that, in the absence of Transporter's entering into such negotiated rate agreement providing for such discount, Transporter would

¹ Transwestern Pipeline Company, LLC's FERC NGA Gas Tariff, Baseline, 31.2, Discounting, 1.0.0.

not have been able to contract for such capacity at any higher rate, and that recourse rates would otherwise be as high or higher than recourse rates which result after applying the discount adjustment; or

(2) making another comparable showing that the negotiated rate discount contributes more fixed costs to the system than could have been achieved without the discount.

Transporter may also seek to include in a discount-type adjustment for negotiated rate agreements that were converted from pre-existing discounted Part 284 agreements to negotiated rate agreements. Such adjustment would be based on the greater of: (i) the negotiated rate revenues received; or (ii) the discounted recourse rate revenues which otherwise would have been received.

3. Transwestern states that under Commission policy, "there is no per se rule against discount-type adjustments to recourse rates to reflect negotiated rate[s]; however, a pipeline's negotiated rate proposal must protect the recourse rate-paying shippers against inappropriate cost shifting."² Transwestern states that it seeks to include similar tariff language that has been approved in several recent orders that set forth the circumstances in which the pipeline may seek discount-type adjustments to its recourse rates in connection with negotiated rate agreements.

Notice and Comments

4. Public notice of Transwestern's filing was issued on May 16, 2011. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2011). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2011), all timely filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted.

5. The American Gas Association (AGA) opposes the revised tariff record and requests that the Commission suspend Transwestern's filing for a full five months. AGA argues that tariff provisions, such as those proposed in the instant proceeding and in *Columbia Gulf*,³ would allow discount adjustments for negotiated rate agreements in circumstances beyond what was originally contemplated in the Commission's *Alternative*

² Transwestern Transmittal at 1-2 (citing *Wyoming Interstate Company, Ltd.*, 117 FERC ¶ 61,150 at P 14 (2006) (*WIC*)).

³ *Columbia Gulf Transmission Co.*, 133 FERC ¶ 61,078 (2010) (*Columbia Gulf*).

*Rate Policy Statement.*⁴ AGA asserts that there the Commission explained that the fundamental predicate for permitting a pipeline with market power to charge a negotiated rate is that capacity must be available from the pipeline at a cost-based recourse rate and that under its negotiated rate program customers electing the recourse rate should be no worse off as a result of a pipeline's use of negotiated rates.

6. AGA asserts that the Commission has accepted tariff provisions with similar lax requirements for discount-type adjustments for negotiated rate agreements in *Columbia Gulf* and in *Kinder Morgan Interstate Gas Transmission*, FERC Docket No. RP11-1542-000 (Dec. 15, 2010) (Delegated Letter Order). AGA argues that the Commission cannot continue with this new interpretation of the *Alternative Rate Policy Statement* without subjecting its new policy interpretation to notice and comment procedures under the Administrative Procedures Act (APA). AGA states that the courts have found that “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself; through the process of notice and comment rulemaking.”⁵ AGA states that under the APA, agencies are required to engage in notice and comment rulemaking procedures before formulating regulations and while courts will generally show substantial deference to an agency's interpretation of its own regulations, an agency must follow notice and comment procedures when it substantially changes its interpretation.

7. AGA contends that because of the significant policy implications involved in accepting Transwestern's tariff provisions, the Commission must institute a generic proceeding and afford all interested persons notice and an opportunity to be heard. AGA argues that the Commission should provide generic guidance on its policies before it permits any more pipelines to seek discount-type adjustments for negotiated rate agreements.

Discussion

8. The Commission accepts Transwestern's proposed tariff records because the proposed language is consistent with the tariff provisions that the Commission accepted

⁴ 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, *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066 (1996), *pet. for review denied*, *Burlington Resources Oil & Gas Co. v. FERC*, Nos. 96-1160, *et al.*, 1998 U.S. App. LEXIS 20697 (D.C. Cir. July 20, 1998) (Alternative Rate Policy Statement).

⁵ *Paralyzed Veterans of Amer., et al. v. D.C. Arena LP*, 117 F.3d 579, 586 (D.C. Cir. 1997).

in *WIC*, *Columbia Gulf*, and most recently in *REX*⁶. In *Tennessee*⁷, the Commission fully addressed its policies regarding discounted adjustments for negotiated rate transactions, and explained its reasons and caveats for accepting tariff language such as the instant tariff language submitted by Transwestern here. AGA's protest in the *Tennessee* proceeding is identical to the one it has made in the instant proceeding. Accordingly, given the disposition in *Tennessee*, the Commission will not here act on AGA's objections to reject the instant tariff language for like reasons. The Commission stresses, however, as stated in *Tennessee* and *Columbia Gulf*, the Commission's acceptance of the instant tariff language does not guarantee the pipeline the right to make a discount-type adjustment, but only establishes the burden of proof the pipeline must satisfy in order to obtain a discount-type adjustment consistent with the policy in *WIC* and *Columbia Gulf*.⁸ Consistent with *Tennessee*, the Commission finds that the burden set forth in Transwestern's proposed tariff language provides a balanced and reasonable framework for considering the issue of discount-type adjustments for negotiated rates in Transwestern's future general Natural Gas Act section 4 rate cases. Accordingly, as the Commission also has explained elsewhere, it will address requests for discount-like adjustment involving negotiated rates as they arise in particular rate filings.⁹

The Commission orders:

The tariff record set forth in footnote 1 is accepted to be effective June 11, 2011.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁶ *Rockies Express Pipeline LLC*, 135 FERC ¶ 61,026 (2011) (*REX*).

⁷ *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 (2011) (*Tennessee*).

⁸ *Tennessee*, 135 FERC ¶ 61,208 at P 208; *Columbia Gulf*, 133 FERC ¶ 61,078 at P 15.

⁹ *Id.*