

136 FERC ¶ 61,105  
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.

Gas Transmission Northwest Corporation

Docket No. RP10-901-000

ORDER ACCEPTING SERVICE AGREEMENTS, SUBJECT TO CONDITION

(Issued August 15, 2011)

1. On June 29, 2010, Gas Transmission Northwest Corporation (GTN) filed 107 currently effective, potentially non-conforming service agreements, as well as revised tariff sheets<sup>1</sup> listing the agreements, for approval with the Commission. On July 29, 2010, the Commission issued a letter order accepting the agreements, effective on their respective effective dates, subject to further review and order of the Commission.<sup>2</sup> The July 29 Order also accepted the revised tariff sheets, effective August 1, 2010, subject to further review by the Commission.

2. The Commission has completed its review of the subject agreements. As a result, we will require GTN to either provide further information describing certain non-conforming provisions or revise its tariff and *pro forma* service agreement to offer a provision to all shippers on a nondiscriminatory basis, as discussed below.

---

<sup>1</sup> Original Sheet Nos. 29C and 29D to its FERC Gas Tariff, Third Revised Volume No. 1-A.

<sup>2</sup> *Gas Transmission Northwest Corp.*, 132 FERC ¶ 61,081 (2010) (July 29 Order).

### **Details of the Filing**

3. GTN observes that in the Commission's 2008 order in *Southern Star Central Gas Pipeline, Inc.*,<sup>3</sup> the Commission provided further guidance regarding what the Commission considers a material deviation from a *pro forma* agreement. Based on the Commission finding in *Southern Star* that pipelines identify and submit previously unfiled non-conforming agreements,<sup>4</sup> GTN states it conducted a review of its currently effective agreements under Rate Schedules FTS-1, ITS-1, AIS-1, and PS-1 by comparing the effective agreements to the respective *pro forma* agreement in effect at the time of execution. GTN states the agreements executed prior to July 25, 2003, were compared to the standards set forth in *Columbia*<sup>5</sup> and agreements executed on or after July 25, 2003, were compared to the standards set forth in the *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 (2003).

4. GTN states that all the filed agreements contain deviations from the *pro forma* agreement in effect as of the execution date of the agreements. However, GTN states that the deviations identified in the accompanying agreements are not material, do not substantially affect the rights of parties, and/or are now moot, and do not present a risk of undue discrimination. The 107 agreements consist of (1) 20 Rate Schedule FTS-1 service agreements; (2) 45 Rate Schedule PS-1 agreements; (3) 38 Rate Schedule AIS-1 service agreements; and (4) four Rate Schedule ITS-1 service agreements. GTN requests that to the extent the Commission finds any of the agreements non-conforming, the Commission accept the agreements and grant any waivers necessary to allow each of the agreements to be effective as of their respective effective dates, and permit them to remain in effect in accordance with their respective terms.

### **Protests and Answers**

5. Notice of GTN's filing was issued on July 1, 2010. On July 12, 2010, Sierra Pacific Power Company (Sierra) filed a protest, and on July 15, 2010, GTN moved for leave to answer, and filed an answer to Sierra's protest. On July 21, 2010, Iberdrola Renewables, Inc. (Iberdrola) also filed a motion for leave to answer and an answer to

---

<sup>3</sup> 125 FERC ¶ 61,082 (2008) (*Southern Star*).

<sup>4</sup> *Id.* at 61,485.

<sup>5</sup> *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001) (*Columbia*).

Sierra's protest. On July 23, 2010, Sierra filed a motion for leave to reply and reply to the GTN and Iberdrola answers.

6. Sierra protests two contracts that it claims contain non-conforming provisions that affect the substantive rights of parties: Contract No. 7828, which contains non-conforming sections 8.1-8.9, providing the shipper with the right to increase its contract quantity in increments up to an additional 45,000 Dth/d, and Contract No. 2857, which contains a non-conforming section 2.5, allowing the shipper to reduce its contract quantity in the event of a bypass.

7. Sierra asserts that the Commission has found that a shipper's right to reduce its contract quantity before the expiration of the agreement is a valuable right, since it could enable the shipper to avoid significant liability for future reservation charges<sup>6</sup> and that as the Commission explained in *ANR Pipeline Co.*, 97 FERC ¶ 61,224 (2001) (*ANR*), a non-conforming provision allowing a shipper to adjust its contract quantity is impermissible unless offered to all similarly situated shippers. Sierra points out that the Commission explained that "requiring pipelines to file generally applicable tariff provisions setting forth the conditions under which they will offer contract demand reduction rights is the best means of assuring that those rights will be negotiated in a not unduly discriminatory manner."<sup>7</sup> Sierra further maintains that the Commission has also found provisions that allow a shipper to increase its contract quantity are unduly discriminatory.<sup>8</sup>

8. Sierra also takes issue with GTN's assertion that the Commission in a *Texas Eastern* order has previously accepted similar deviations that were part of long-standing agreements upon which parties had relied.<sup>9</sup> Sierra states *Texas Eastern* is distinguishable in that the non-conforming provisions at issue here present a significant risk of undue discrimination, are being protested, GTN offers no explanation why these agreements were not filed in 1995, after the Commission issued Order 582, or in 2001, after the Commission issued its decision in *Columbia* and that GTN offers no explanation why it

---

<sup>6</sup> *TransColorado Gas Transmission Co.*, 121 FERC ¶ 61,217 at P 9 (2007).

<sup>7</sup> *Id.*

<sup>8</sup> *MarkWest Pioneer, L.L.C.*, 126 FERC ¶ 61,305 (2009).

<sup>9</sup> *Texas Eastern Transmission, LP*, 119 FERC ¶ 61,337 (2007) (*Texas Eastern*).

cannot offer all similarly situated shippers the same flexibility that it already allows under these two contracts. Therefore, Sierra requests that the Commission direct GTN to amend its tariff to allow all similarly situated shippers the same flexibility to adjust their contract quantities that GTN currently allows the two shippers under Contract Nos. 7828 and 2857.

9. In its answer, GTN contends that the two provisions challenged by Sierra were executed well before the Commission's November 21, 2001 clarifying order in *Columbia*. GTN maintains that the issue here is how the Commission treats non-conforming provisions contained in contracts executed years before the Commission clarified its material deviation policy and associated filing requirements in *Columbia*.<sup>10</sup> GTN asserts that in *Texas Eastern* the Commission approved a contractual reduction right in three contracts executed in 1997, finding that they were contained in contracts executed years before *Columbia* clarified the Commission's policy regarding non-conforming agreements and the parties had a longstanding reliance on those contracts. GTN posits that because the Commission may come to a different conclusion with respect to such provisions for contracts executed after the Commission's clarifying order in *Columbia*, is not determinative here.

10. GTN points out that both contracts were executed as part of an expansion, and both contracts were filed and approved as part of the same certificate proceeding. GTN notes that the Commission discussed the contracts and approved the applications (including the contracts) in orders issued January 12, 1995<sup>11</sup> and June 1, 1995.<sup>12</sup> Consequently, GTN argues that parties were on notice at that time of the provisions of the agreements and had an opportunity to protest or otherwise complain about the provisions but failed to do so.

11. In its answer, Iberdrola argues that Commission policy set forth in *Texas Eastern* is directly applicable to the Iberdrola service agreement and the Maximum Daily Quantity (MDQ) increase provisions therein. It maintains that it has performed and relied

---

<sup>10</sup> GTN states that Contract No. 7828 with Iberdrola represents a continuation, through assignments, of an identical contract originally executed by Diamond Energy, Inc. on February 24, 1995. Contract No. 2857 was entered into on July 29, 1994.

<sup>11</sup> *Pacific Gas Transmission Co.*, 70 FERC ¶ 61,016, at 61,046-47 (1995).

<sup>12</sup> *Pacific Gas Transmission Co.*, 71 FERC ¶ 61,268, at 62,072 (1995).

upon the Iberdrola service agreement since 1999. In addition, Iberdrola asserts that the Commission has held that it is permissible under its negotiated rate policy for a service agreement to set forth the rate that will be charged if the shipper elects to take additional capacity at a future date<sup>13</sup> and that the provisions of its agreement simply provide that Iberdrola may request additional capacity and if such capacity is contracted, the agreement sets forth the rate for that capacity. Iberdrola posits there is nothing in the service agreement that provides a preferential right to capacity or otherwise would prejudice or discriminate for or against another shipper or potential shipper on GTN.

12. Sierra responds that it appreciates the practical difficulties presented when a pipeline such as GTN has entered into binding contracts based upon an understanding of the prohibition against undue discrimination that the Commission does not currently share. However, it asserts that it is unclear why GTN cannot now offer to all similarly situated shippers the same MDQ flexibility that it has been providing two favored shippers for many years. At a minimum, Sierra maintains GTN should be directed to explain whether and to what extent implementation of the discriminatory provisions could degrade existing firm services.

13. Sierra finds it difficult to interpret the Commission's order in *Texas Eastern* to mandate uncritical acceptance of any and all discriminatory contracts signed prior to the November 21, 2001 order in *Columbia*, and GTN's argument that *Texas Eastern* "summarily disposes" of Sierra's concerns should be rejected in favor of a fact specific determination based upon the unique circumstances of each case. Sierra also observes that in the certificate order cited by GTN, the Commission approved proposed rates for the Medford Extension with no discussion of the issues presented by Sierra's protest. Consequently, Sierra contends that it does not appear that the Commission intended to pre-judge issues that were not presented for decision in the certificate proceeding but are presented here.

### **Discussion**

14. Section 154.1(d) of the Commission's regulations requires pipelines to file with the Commission contracts that materially deviate from the pipeline's form of service agreements.<sup>14</sup> In *Columbia*, the Commission explained that a material deviation is any

---

<sup>13</sup> *Citing ANR*, 97 FERC at 62,117.

<sup>14</sup> 18 C.F.R. §154.1(d) (2011).

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.<sup>15</sup> In the 2003 Policy Statement, the Commission clarified that “[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.”<sup>16</sup>

15. However, not all material deviations are impermissible. As the Commission explained in *Columbia*, provisions that materially deviate from the corresponding *pro forma* service agreement fall into two general categories: (1) provisions the Commission must 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.<sup>17</sup>

16. The Commission has completed its review of the 107 currently effective non-conforming and potentially non-conforming service agreements filed by GTN. The Commission finds that GTN’s agreements contain material deviations from GTN’s respective *pro forma* service agreements, and thus are non-conforming. Many of the material deviations identified in these 107 agreements are permissible since they are either allowed under GTN’s generally applicable tariff, or are administrative or non-substantive in nature, and pose no threat of undue discrimination among shippers. However, the Commission finds that the material deviations in three of the contracts warrant further examination, as discussed below.

---

<sup>15</sup> *Columbia*, 97 FERC at 62,002; *ANR* 97 FERC at 62,022.

<sup>16</sup> *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 32 (2003) (2003 Policy Statement).

<sup>17</sup> *Columbia*, 97 FERC at 62,003; *ANR*, 97 FERC at 62,024.

**Option Quantity – Contract No. 7828**

17. Pacific Gas Transmission<sup>18</sup> executed Contract No. 7828 with Diamond Energy on February 24, 1995, and it filed the agreement as part of its March 3, 1995 amendment to an application for a certificate to construct the Medford Extension. That contract has since been assigned to Iberdrola. The Commission issued a certificate for that project on June 1, 1995.<sup>19</sup> Section 8 of Contract No. 7828 provides the shipper with the option, through October 31, 2025, to increase its contract quantity in increments up to an additional 45,000 Dth/d at its primary receipt and delivery points up to a total quantity of 90,000 Dth/d, and sets forth the rate for that capacity. If the shipper exercises its option, the agreement states GTN and the shipper “shall promptly agree on the timing and other requirements, if any, necessary to provide the firm transportation service associated with such Option Quantity.” GTN’s tariff does not provide an option for shippers to increase capacity on a not unduly discriminatory basis. Therefore, the provision is a material deviation providing a substantial right to the shipper.

18. GTN requests that this provision be grandfathered as part of a longstanding agreement relied upon by the parties. The Commission has recognized that it may be equitable to allow a material deviation to remain in effect if it is part of a longstanding agreement relied upon by the parties and entered into prior to the clarification of the standards governing non-conforming agreements in *Columbia* in November 2001.<sup>20</sup> Factors to be considered in deciding whether to grandfather a provision include the following: (1) Whether the shipper reasonably relied to its detriment on the legality of the provision when it entered into the contract such that it will now suffer irreparable harm if the provision is removed; (2) the remedies which are currently available to the shipper to put itself in the position it would have been if it had known when the contract was originally executed that the provision was illegal; (3) whether other shippers are harmed by a continuation of the provision; (4) whether the Commission was aware of the contract when it was originally entered into and did not require it to be modified; and (5) whether the provisions will continue indefinitely or will terminate at some date certain.

---

<sup>18</sup> GTN’s predecessor in interest and name. For the remainder of this order we will refer to GTN for both entities.

<sup>19</sup> *Pacific Gas Transmission Co.*, 71 FERC ¶ 61,268 (1995).

<sup>20</sup> *Texas Eastern*, 119 FERC ¶ 61,337 at P 11; *Columbia*, 97 FERC at 62,010.

19. Under the circumstances of this case, the Commission will permit the option quantity provision to be grandfathered. While the Commission has generally rejected contractual provisions in individual agreements that provide existing shippers with the right to unilaterally increase their contract quantity, we have in certain circumstances allowed shippers to have the option to increase their contract quantity in contracts associated with the construction of new capacity.<sup>21</sup> In addition, the certificate order approving the Medford Extension, in which the underlying contract with Diamond Energy was provided as market support for the expansion, authorized GTN to construct the Medford Extension with larger diameter pipe in order to provide Diamond Energy with the option to increase capacity at a later date and authorized GTN to charge Diamond Energy a rate based on the option to increase capacity, in part to recover some of the cost for installing the larger diameter pipe.<sup>22</sup> Thus, the shipper could reasonably rely on the legality of the option quantity provision. Removal of the provisions would take away some of the economic bargain agreed to by Diamond Energy as part of the construction of the Medford Extension and reflected in the rates designed to recover the construction costs. Finally, the option right applies solely to an increase in capacity on the Medford Lateral, a fairly discrete part of GTN's system and does not provide the shipper with broad rights to acquire mainline capacity. Therefore, this provision may be grandfathered as a longstanding agreement relied upon by the shipper as part of an expansion project executed prior to the Commission's clarification of its policy. However, GTN is reminded that, consistent with our rulings in *Columbia* and *Texas Eastern*, any new contracts containing such non-conforming provisions must be filed with, and approved by, the Commission before they may be placed into effect.

### **Contractual Reduction Right – Contract No. 2857**

20. GTN executed Contract No. 2857 on July 29, 1994 and filed the contract with the Commission on September 23, 1994 as part of a supplement to the certificate application for the Medford Extension. The Commission issued a certificate for the project on January 12, 1995.<sup>23</sup> Section 2.5 of Contract No. 2857 provides the shipper with the option to reduce its MDQ under the contract "if any existing customer or group of customers of Washington Water Power Company (WWP) should bypass WWP's

---

<sup>21</sup> See, e.g., *Texas Gas Transmission, LLC*, 123 FERC ¶ 61,118 (2009); *Entrega Gas Pipeline, Inc.*, 113 FERC ¶ 61,327 (2005).

<sup>22</sup> *Pacific Gas Transmission Co.*, 71 FERC ¶ 61,268.

<sup>23</sup> *Pacific Gas Transmission Co.*, 70 FERC ¶ 61,016.

facilities by means of a direct interconnection with the Medford Extension in order to serve gas needs previously served by WWP.” GTN’s tariff does not provide shippers with an MDQ reduction right in the event of a bypass. Therefore, the provision is a material deviation providing a substantial right to the shipper. GTN requests that this provision be grandfathered as part of a longstanding agreement relied upon by the parties.

21. Similar to the option quantity provision above, the Commission will allow the contractual reduction right to be grandfathered. The provision was included in the original service agreement executed in 1994 as part of an expansion project and the Commission issued a certificate for the project in 1995. Thus, the shipper could reasonably rely on the legality of the contract reduction provision. Removal of the provision would eliminate some of the economic bargain agreed to as part of the construction of the Medford Extension. In addition, the contract reduction right is a narrow right that applies specifically to the MDQ of this contract and to service and potential bypass on the Medford Extension. It does not provide the shipper with broad contract reduction rights across all of its contracts or due to bypass at other locations. Therefore, this provision may be grandfathered as a longstanding agreement relied upon by the shipper as part of an expansion project executed prior to the Commission’s clarification of its policy

#### **Pressure Commitments – Contract Nos. 179 and 7828**

22. Contracts Nos. 179 and 7828 contain minimum delivery pressure commitments by GTN in Exhibit A of the service agreements. Section 4.3 of GTN’s Form of Service Agreement for Rate Schedule FTS-1 states that GTN will deliver the gas “at the pressures existing in GTN’s system at the points of delivery.” Neither GTN’s tariff nor its form of service agreement appear to provide for the type of minimum pressure guarantee included in these contracts. In addition, the form of service agreement contains no blank for filling in a minimum pressure obligation. The minimum pressure provisions in these contracts relate to the operational conditions for transportation service on GTN and clearly affect the quality of service to be received by the shippers. Therefore, those provisions cannot be negotiated unless GTN’s tariff authorizes such negotiation with all its customers. Accordingly, GTN is directed to either explain to the Commission the special operational reasons necessitating the pressure commitments included in these specific agreements, remove the minimum pressure provision from these agreements, or revise its tariff to clearly provide for the negotiation of minimum pressure obligations within 60 days of the date of this order.

The Commission orders:

GTN's non-conforming service agreements are accepted to be effective as of their respective effective dates, subject to GTN, within 60 days of the date of this order, either (1) filing an explanation with the Commission detailing the unique operational need for the special pressure commitments in Contracts 179 and 7828; or (2) removing the minimum pressure provisions in Contracts 179 and 7828; or (3) filing to revise its generally applicable tariff or form of service agreement to clearly allow the negotiation of a minimum pressure obligation by all similarly situated shippers.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.