

137 FERC ¶ 61,118
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

November 10, 2011

In Reply Refer To:
Millennium Pipeline Company, L.L.C.
Docket No. RP12-20-000

Millennium Pipeline Company, L.L.C.
One Blue Hill Plaza, Seventh Floor
P.O. Box 1565
Pearl River, New York 10965

Attention: Gary A. Kruse
Vice President - General Counsel and Secretary

Reference: Non-Conforming Negotiated Rate Agreement, and Negotiated Rate
Agreements

Ladies and Gentlemen:

1. On October 13, 2011, Millennium Pipeline Company, L.L.C., (Millennium) filed revised tariff records¹ to set forth the terms of two conforming negotiated rate service agreements. Both those agreements are for service under Rate Schedule FT-1. One of the conforming service agreements (Contract No. 27912) is with Southwestern Energy Services Company (Southwestern) and the second (Contract No. 30554) is with WPX Energy Marketing, LLC (WPX). Millennium also filed a non-conforming negotiated rate agreement for backhaul service under Rate Schedule BH-1 (WPX BH-1 Agreement), together with a revised tariff record to include the WPX BH-1 Agreement in its list of non-conforming service agreements.²

¹ See Appendix.

² Millennium also added a new Original Volume No. 1.1 and updated the Table of Contents to the Tariff.

2. Millennium requests waiver of the Commission's 30-day notice period to allow its requested effective date of November 1, 2011, for its revised tariff records. We grant waiver of the notice period and conditionally accept Millennium's revised tariff records effective November 1, 2011, subject to Millennium filing further explanations with adequate support and revised tariff records, within 30 days of the date this order issues, consistent with the discussion below.

3. Section 34.11 of the General Terms and Conditions (GT&C) of Millennium's Tariff provides that "[w]ith respect to Negotiated Rate arrangements, unless Transporter executes and files a non-conforming service agreement, Transporter will file with the Commission a tariff section stating the exact legal name of the shipper, the negotiated rate, the rate schedule, the receipt and delivery points, the contract quantities, and where applicable, any Negotiated Rate formula." Section 34.11 also requires that "[a]ny such filed tariff section will contain a statement that the Negotiated Rate agreement does not deviate in any material aspect from the Form of Agreement in the tariff for the applicable rate schedule." Pursuant to GT&C section 34.11, Millennium has submitted for filing two tariff records concerning Contract Nos. 27912 and 30554 which it states contain the information required by its Tariff.

4. Pursuant to Contract No. 27912, Southwestern will pay a negotiated reservation charge of \$0.50/dth/day under Rate Schedule FT-1, plus all applicable commodity charges, the Commission's annual charge adjustment, and all other surcharges in effect from time to time under Rate Schedule FT-1 of Millennium's Tariff. All charges other than the reservation charge may not cumulatively exceed \$0.0075/dth/day. If Millennium is required by law to collect surcharges in excess of \$0.0075/dth/day, it will apply a credit equal to the aggregate surcharges in excess of \$0.0075/dth/day in the preceding month on Southwestern's current monthly invoice. Any credit provided for under the negotiated rate that remains unpaid at the expiration of the service agreement will be returned to Southwestern within sixty (60) days of the expiration of the service agreement. The transportation contract demand for this contract is 25,000 Dth per day. Millennium states that this contract contains no material deviations.

5. Under contract 30554, WPX will pay a negotiated reservation charge of \$0.38/dth/day under Rate Schedule FT-1 of Millennium's Tariff, plus all applicable commodity charges, the Commission's annual charge adjustment, and all other surcharges in effect from time to time under Rate Schedule FT-1 of Millennium's Tariff. The negotiated reservation charge will be effective throughout the entire term of the agreement for service under Rate Schedule FT-1, regardless of any subsequent changes to Millennium's maximum reservation charge. The transportation contract demand for this contract is 70,000 Dth per day. Millennium states that this contract contains no material deviations.

6. The WPX BH-1 Agreement is for an initial term of two years (November 1, 2011 through October 31, 2013). As permitted by section 7 of the form of service agreement for service under Rate Schedule BH-1, WPX has the option of up to four extensions (renewals) of two years each. WPX must provide 12 months notice of its intent to extend the contract. The capacity for each extension may not be in excess of the capacity that was for the term ending prior to extension period unless Millennium determines that such capacity is available for the all remaining extension terms. Pursuant to a September 30, 2011 letter agreement (letter agreement), attached to the WPX BH-1 Agreement, the negotiated reservation charge is \$0.10/dth/day under Rate Schedule BH-1 for the initial term and \$0.05/dth/day for any renewals. The transportation contract demand for this contract is 40,000 Dth per day.

7. Millennium asserts that the letter agreement, which contains terms which it is authorized to negotiate pursuant to section 10, "Further Agreement" of its BH-1 form of service agreement, also includes a section entitled "Changes to Capacity" which contains potentially non-conforming provisions.³ That section gives WPX the right to adjust its contract demand annually during each renewal period by giving Millennium notice no later than May 1 of each year of the amount of capacity it will need for the next year commencing November 1. In no event will WPX be entitled to capacity under its BH-1 contract that exceeds the lesser of 40,000 Dth per day or the capacity during the same annual period under WPX's FT-1 contract.

8. Public notice of the filing was issued on October 17, 2011. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.⁴

³ The "Changes to Capacity" section provides that:

Beginning with the first year of the first renewal period, Shipper will have the right annually to adjust the capacity reserved under the BH-1 Agreement, by giving Millennium notice no later than May 1 of each year of the amount of capacity that Shipper will need for the next year that commences on the following November 1, provided that if such amount is an increase over the then current capacity, Millennium will not be obligated to honor the adjustment request to the extent, and only to the extent, of such increase unless capacity sufficient to do so is available for the next year and all subsequent renewal terms. In no event will Shipper be entitled to capacity under the BH-1 Agreement that exceeds the lesser of 40,000 dth/day or the capacity during the same annual period under Shipper's FT-1 Agreement designated as Transporter's Contract Number 30554.

⁴ 18 C.F.R. § 154.210 (2011).

Pursuant to Rule 214,⁵ 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. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

9. We conditionally accept Millennium's revised tariff records. Millennium's revised tariff records list and set forth the terms of Contract Nos. 27912 and 30554 as conforming negotiated rate agreements correctly. However, Millennium has not provided sufficient information for us to determine whether the "Changes to Capacity" section of the letter agreement attached to the WPX BH-1 Agreement (Contract No. 31235) constitutes a material deviation from its form of service agreement and, if so, whether the material deviation is permissible.

10. 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.⁶ In *Columbia Gas*, the Commission explained 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.⁷ The Commission generally prohibits material deviations that result in a shipper receiving a different quality of service than that offered other shippers under the pipeline's generally applicable tariff or that affect the quality of service received by others.⁸ However, if the Commission finds that a material deviation does not constitute a substantial risk of undue discrimination, the Commission may permit the deviation.⁹ In order to assist the Commission and interested parties in analyzing whether a material deviation is permissible, the *Negotiated Rate Policy Statement* requires that the pipeline clearly delineate differences between its negotiated contractual terms and that of its form of service agreement in redline/strikeout and "provide a detailed narrative outlining the terms of its negotiated rate contract, the manner in which such terms differ from its form

⁵ 18 C.F.R. § 385.214 (2011).

⁶ 18 C.F.R. § 154.1(d) (2011).

⁷ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia Gas*). See also *ANR Pipeline Co.*, 97 FERC ¶ 61,224, at 62,022 (2001) (*ANR*).

⁸ *Monroe Gas Storage Co., LLC*, 130 FERC ¶ 61,113, at P 28 (2010).

⁹ *Columbia Gas*, 97 FERC ¶ 61,221 at 62,003; *ANR*, 97 FERC ¶ 61,224 at 62,024.

of service agreement, the effect of such terms on the rights of the parties, and why such deviation does not present a risk of undue discrimination.”¹⁰

11. As required by the Commission, section 42 of Millennium’s GT&C lists the types of contractual provisions which may be included in Section 10, “Further Agreement”, of its form of service agreement for Rate Schedule BH-1 and other rate schedules.¹¹ That list includes references to the specific sections of Millennium’s tariff which authorize it to negotiate each particular type of provision which may be included in Section 10 of the *pro forma* service agreement. In its transmittal letter, Millennium states that the September 30, 2011 letter agreement attached to the WPX BH-1 Agreement contains terms it is authorized to negotiate pursuant to Section 10, “Further Agreement”, in its form of service agreement. However, Millennium states that the “Changes to Capacity” section in that letter agreement “contains potentially non-conforming provisions,”¹² and it does not claim that it negotiated the “Changes to Capacity” section pursuant to any of the tariff sections referenced in the GT&C section 42 list of contractual provisions permitted to be included in Section 10 of the service agreement. Millennium has also failed to provide any detailed narrative outlining the manner in which the provisions of the “Changes to Capacity” section differ from what its tariff permits to be included in Section 10 of the service agreement, the effect of such provisions on the rights of the parties, or why such deviations do not present a risk of undue discrimination.¹³

12. The “Changes to Capacity” section of the letter agreement gives WPX an annual right to decrease or increase its contract demand under its BH-1 service agreement, subject to various conditions. The Commission has held that such a right for a shipper to adjust its contract demand presents too much potential for discrimination unless it is

¹⁰ *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 33 (2003) (*Negotiated Rate Policy Statement*); see also *East Tennessee Natural Gas Co.*, 105 FERC ¶ 61,162, at P 16 (2003).

¹¹ *Millennium Pipeline Co., L.L.C.*, 129 FERC ¶ 61,089, at P 25-27 (2009).

¹² October 13, 2011 Transmittal Letter, at 4.

¹³ In its filing, Millennium redlined the entire September 30, 2011 letter agreement as a material deviation, instead of just redlining the “Changes to Capacity Section.” However, the other sections of the letter agreement either set forth WPX’s negotiated rate or provide for a right of first refusal (ROFR). Section 42 of the GT&C authorizes section 10 of the service agreement to include rates negotiated pursuant to section 34 of the GT&C and a contractual ROFR negotiated pursuant to section 4 of the GT&C. Therefore, these other provisions of the letter agreement are not material deviations and should not have been redlined.

offered in the pipeline's tariff pursuant to generally applicable conditions.¹⁴ Therefore, the "Changes to Capacity" section of the letter agreement is an impermissible material deviation, unless it is authorized by a provision in Millennium's tariff referenced in section 42 of Millennium's GT&C.

13. Based on the foregoing, the Commission directs Millennium to file revised tariff records with adequate support consistent with the discussion above, within 30 days of the date this order issues, to either: (1) identify the provision(s) of Millennium's generally applicable tariff that permits the "Changes to Capacity" section in the letter agreement; (2) remove the "Changes to Capacity" section from the letter agreement; or (3) modify its tariff to offer the rights contained in the "Changes to Capacity" section to all shippers on a not unduly discriminatory basis through a generally applicable tariff provision in its GT&C or revisions to its *pro forma* service agreement. Finally, Millennium is directed to file a revised tariff record to remove the erroneous reference to GT&C section 55 in the "Further Agreement" section in its form of service agreement and replace it with a reference to its current GT&C section 42.¹⁵

By direction of the Commission. Commissioner Spitzer is not participating.

Kimberly D. Bose,
Secretary.

cc: All Parties

¹⁴ *East Tennessee Natural Gas, LLC*, 109 FERC ¶ 61,232, at P 29 (2004).

¹⁵ Millennium states (at n. 6) that the reference to GT&C section 55 contained in the "Further Agreement" section of its *pro forma* service agreement, discussed above, was renumbered section 42 in the filing of its Tariff in electronic format pursuant to Order No. 714, but the reference to section 55 was unintentionally not revised.

Appendix

Millennium Pipeline Company, L.L.C.
Millennium Tariffs
FERC NGA Gas Tariff

Tariff Records to Become Effective November 1, 2011

Miscellaneous Forms, Non-Conforming Svc Agmts, 1.0.0;
Tariff, Original Volume No. 1.1, 0.0.0;
Table of Contents, , 0.0.0;
Negotiated Rate Svc Agmts, , 0.0.0;
Negotiated Rate SVC Agmt, Negotiated Rate Contract No. 27912 Southwestern
Energy, 0.0.0;
Negotiated Rate Svc Agmt, Negotiated Rate Svc Agmt Contract No. 30554 WPX
Energy, 0.0.0;
Non-Conforming Svc Agmts, , 0.0.0;
Neg / Non-Conf Svc Agmts, , 0.0.0;
Neg/Non-Conform Svc Agmt, Neg/Non-Conform Service Agmt Contract No. 31235
WPX Energy, 0.0.0