

145 FERC ¶ 61,149
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Alliance Pipeline L.P.

Docket No. RP13-355-001

ORDER ON REHEARING

(Issued November 19, 2013)

1. On December 28, 2012, the Commission issued an order accepting and suspending Alliance Pipeline L.P.'s (Alliance) tariff records reflecting an approximate four percent increase in its negotiated reservation charges.¹ The December 28, 2012 Order also directed Alliance to submit revised reservation charge crediting provisions or show cause why it should not be required to do so. With respect to the rate increase, the order directed Alliance to remove the costs of the Tioga Lateral from its mainline negotiated rates. On January 23, 2013, Alliance submitted a request for rehearing of the December 28, 2012 Order and a response to the show cause order. As discussed below, this order grants rehearing with respect to the Tioga Lateral issue.²

Background

2. On November 30, 2012, in Docket No. RP13-355-000, Alliance submitted revised tariff records reflecting changes to its Table of Negotiated Rate Transactions. Alliance stated that it provides firm transportation service under Rate Schedule FT-1 for its existing shippers, all of which have agreed to pay negotiated rates. Alliance further stated that these negotiated rate agreements provide that changes in Alliance's costs and billing determinants will be reflected in its negotiated rates from time to time. Alliance

¹ *Alliance Pipeline, L.P.*, 141 FERC ¶ 61,260 (2012) (December 28, 2012 Order).

² Issues concerning Alliance's reservation charge crediting provisions will be addressed in a separate order. On September 23, 2013, the Director of the Office of Pipeline Regulation issued a data request to Alliance directing it to provide further information on the occurrence of *force majeure* and non-*force majeure* events on Alliance's system.

explained that the tariff sheets set forth the essential elements of Alliance's Rate Schedule FT-1 negotiated rate transactions, including the rates to be charged.

3. On January 25, 2012, Alliance filed an application under section 7(c) of the Natural Gas Act (NGA) for a certificate of public convenience and necessity authorizing it to construct the Tioga Lateral Project. The Tioga Lateral is designed to connect natural gas production from the Bakken shale formation in Eastern Montana and Western North Dakota to Alliance's mainline. In a September 20, 2012 Commission Order (September Certificate Order), the Commission issued a certificate of public convenience and necessity authorizing Alliance to construct and operate the Tioga Lateral and approved Alliance's request to charge incremental recourse rates for the Tioga Lateral. Alliance has yet to place the Tioga Lateral into service or submit a tariff filing to include the incremental Tioga Lateral rates on its Statement of Rates in its tariff.

4. The December 28, 2012 Order found that the Commission was unable to identify whether or not any cost costs related to the Tioga Lateral had been included in the mainline rates recoverable from Alliance's negotiated rate shippers, and directed Alliance to submit a compliance filing identifying whether any costs associated with the Tioga Lateral were included in the mainline rates recoverable from its negotiated rate shippers. To the extent costs associated with Tioga Lateral were included in the mainline rates recoverable from its negotiated rate shippers, the December 28, 2012 Order directed Alliance to submit revised tariff records removing such costs. The December 28, 2012 Order found that the incremental Tioga Lateral costs should not be recovered from negotiated rate shippers taking only mainline service.

Request for Rehearing

5. Alliance contends that the Commission erred in suspending the proposed negotiated rates and requiring it to remove any costs associated with the Tioga Lateral from the rates charged to its legacy negotiated rate shippers. Alliance argues that the Commission has no authority to review or suspend the negotiated rates because the negotiated rates are not subject to review under NGA section 4.

6. Alliance claims that Commission review of the January 1, 2013 negotiated rates under section 4 of the NGA is barred under settled precedent. Alliance states that in a December 31, 2007 order,³ the Commission rejected a protest by Iberdrola Renewables, Inc. (Iberdrola) requesting that the Commission review certain costs underlying proposed negotiated rates. The December 31, 2007 Order rejected Iberdrola's protest and found that it would not review the level of the proposed negotiated rates nor the method by which they are calculated in a NGA section 4 proceeding. Alliance states that in

³ *Alliance Pipeline L.P.*, 121 FERC ¶ 61,309 (2007) (December 31, 2007 Order).

Iberdrola v. FERC,⁴ the court affirmed the Commission's conclusion that the Alliance legacy shippers are not contractually entitled to NGA section 4 review of the agreed-upon methodology for revising the negotiated rates when the resulting rate adjustments are filed.

7. Alliance argues that inclusion of the Tioga Lateral costs is consistent with the negotiated "Rate Principles" attached to each legacy shipper's negotiated rate agreement, and these Rate Principles govern the calculation of the negotiated rates.⁵ Alliance explains that Rate Principle 7 provides that the rate base used in computing the negotiated rates "will include, among other things, actual capital costs."⁶ Alliance notes that nothing in the "Rate Principles" provides for incremental pricing of any capital costs, including the Tioga Lateral capital costs.

8. Alliance argues that the December 28, 2012 Order constituted an improper summary rejection of the proposed tariff records. Alliance contends that, although the December 28, 2012 Order stated the Commission "accepts and suspends" the proposed tariff records, because the Commission directed Alliance to submit revised tariff records removing the Tioga Lateral costs from the negotiated rates, the Commission effectively rejected Alliance's proposed tariff records. Alliance submits that a summary rejection is appropriate only in a case where a filing is either patently deficient in form or a substantive nullity. Further, Alliance argues that in rejecting the proposed tariff records implementing the negotiated rates, the Commission failed to establish that the proposed negotiated rates were unjust and unreasonable.⁷

9. Alliance further argues that the Commission erred in attaching a refund condition to the proposed negotiated rates. Alliance states that the Commission has no authority to order refunds in this proceeding. Alliance explains that the Commission's statutory basis for its suspension and refund authority is section 4 of the NGA, but Alliance's approved

⁴ *Iberdrola Renewables v. FERC*, 597 F.3d 1299, 1305 (D.C. Cir. 2010) (*Iberdrola*).

⁵ Rehearing Request at 15.

⁶ Exhibit A of Rehearing Request.

⁷ Rehearing at 18, noting that the Commission "must first establish that the proposed or existing rate is unjust and unreasonable. It is only after this antecedent showing has been made that the Commission properly can illustrate that its alternative rate proposal is both just and reasonable." *Consolidated Edison Co. of New York, Inc. v. FERC*, 315 F.3d 316, 319-20 (D.C. Cir. 2003); "Complex" *Consolidated Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992, 1001 (D.C. Cir.1999).

negotiated rates are not subject to *de novo* NGA section 4 review, and Alliance's tariff also precludes the imposition of refunds.⁸

Discussion

10. On rehearing Alliance asserts the Commission erred in requiring the Tioga Lateral costs be removed from the negotiated rates. Upon further review, the Commission will grant Alliance's request for rehearing on the issue of the inclusion of the Tioga Lateral costs in the negotiated rates. Alliance is correct that the court in *Iberdrola* found that the negotiated rate contracts in this proceeding are not subject to review under section 4 of the NGA. The court stated:

By selecting a negotiated rate, Iberdrola's predecessor intentionally avoided section 4 review to obtain greater rate flexibility and (at the time) lower rates. FERC's requirement that Alliance offer the recourse rate gave Iberdrola the choice of a FERC-reviewed rate. Iberdrola's predecessor rejected that option, and Iberdrola raises no argument that persuades us to part company from the well-established rule that freely negotiated rates are presumed just and reasonable.⁹

Thus, the Commission should not have suspended the filing subject to refund and modification because it was precisely the type of section 4 review and action that was prohibited by the court in *Iberdrola*. Moreover, the Commission's finding in the September Certificate Order that the Tioga Lateral should be subject to incremental rate treatment for purposes of Alliance's recourse rates has no bearing on how those costs are treated under the governing Rate Principles for the negotiated rate shippers.

11. If the shippers in this proceeding believe that the Tioga Lateral costs are not appropriately included in their negotiated rates, then the remedy is not section 4 review, which they sought here, but rather a breach of contract action or a section 5 complaint with the corresponding burden of proof. As the court stated in *Iberdrola* in response to an argument that Alliance might have manipulated rates to artificially increase them:

⁸ Section 39.9 of Alliance's tariff provides as follows: "Transporter shall not be required to refund to a Shipper any amounts collected for service to which Negotiated Rates apply, unless Transporter and Shipper agree otherwise."

⁹ *Iberdrola Renewables v. FERC*, 597 F.3d 1304-05 (D.C. Cir. 2010).

But even this possibility does not entitle Iberdrola to the section 4 review its predecessor bargained away. Nonetheless, Iberdrola is not without a remedy. Iberdrola can always obtain relief from the courts in a breach of contract action. Likewise, Iberdrola can always challenge a rate change it thinks unreasonable in a section 5 action. At the end of the day, Iberdrola wants more than the FERC scrutiny of Alliance's new rate available in a section 5 challenge. Iberdrola wants the section 4 review that its predecessor failed to include in its contract with Alliance. We cannot vitiate a properly executed contract, which one party now regrets having entered.¹⁰

Accordingly, Alliance's rehearing request is granted and its rates are effective January 1, 2013, without condition. This decision is without prejudice to the shippers in this proceeding exercising their rights under the negotiated rate contracts consistent with the *Iberdrola* decision.

The Commission orders:

Alliance's request for rehearing on the Tioga Lateral issue is granted as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰ *Iberdrola Renewables v. FERC*, 597 F.3d 1305 (D.C. Cir. 2010).