

152 FERC ¶ 61,097
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Central New York Oil and Gas Company, L.L.C.

Docket No. RP15-742-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued July 31, 2015)

1. On March 30, 2015, Central New York Oil and Gas Company, L.L.C. (CNYOG) filed a petition for declaratory order (Petition) pursuant to Rule 207(a)(2)¹ of the Commission's Rules of Practice and Procedure. CNYOG seeks a ruling that the Most Favored Nations (MFN) rights in ten pre-existing, non-conforming firm transportation agreements under Rate Schedules MARC I Firm Transportation Service (FTS) and Firm Wheeling Service (FWS) would not be triggered by potential transactions with other shippers for firm transportation under Rate Schedule FTS-2. As discussed below, we grant CNYOG's Petition and find that transactions under Rate Schedule FTS-2 would not trigger the MFN rights of the non-conforming agreements on file with the Commission.

I. Petition

2. According to the Petition, CNYOG operates a linear pipeline system consisting of the North Lateral, the Stagecoach Storage Facility, the South Lateral, and the MARC I Line.² The North lateral runs from the Stagecoach storage field north to an interconnect with Millennium Pipeline Company, LLC (Millennium), the South lateral runs from the Stagecoach storage facility south to an interconnect with Tennessee Gas Pipeline Company (Tennessee), and the MARC I Line runs between Tennessee and an interconnect with Transcontinental Gas Pipe Line Corporation (Transco).

¹ 18 C.F.R. § 385.207(a)(2) (2014).

² See p. 7 of the Petition for a map of the configuration of CNYOG's facilities.

3. CNYOG provides firm wheeling service pursuant to three separate rate schedules.³ CNYOG states that it has two rate zones: (1) the North-South Lateral zone (for service on the North Lateral, the Stagecoach Storage Facility, and the South Lateral); and (2) the MARC I Hub zone. CNYOG provides service in the 29-mile North-South Lateral zone pursuant to Rate Schedule FWS and service in the 30-mile MARC I zone pursuant to Rate Schedule MARC I FTS.⁴ CNYOG states that Rate Schedules FWS and MARC I FTS offer flexible, bidirectional service to multiple primary receipt and delivery points in their respective zones but do not allow service in the other zone. The shippers under these rate schedules are not required to allocate their mainline contract demand to designated primary receipt and delivery points, but are given primary point rights up to their mainline contract demand at all points.

4. In 2014, CNYOG introduced a new Rate Schedule FTS-2, under which a customer may contract for firm transportation rights along a single specified primary flow path which may include both rate zones, with the shippers' primary point rights limited to their mainline contract demand. CNYOG states that the single primary flow path rights provided under Rate Schedule FTS-2 are not comparable to the bidirectional service, with primary point rights in excess of mainline contract demand, provided for under Rate Schedules FWS and MARC I FTS.⁵

5. CNYOG states that as an inducement for shippers to anchor service under Rate Schedules FWS and MARC I FTS when each was first proposed, CNYOG agreed to include an MFN clause in the original shippers' service agreements, which gives the shipper the right to a lower reservation rate if CNYOG enters into certain agreements under the same rate schedule at a lower rate. According to CNYOG, the MFN clause offered was the same for all shippers under each rate schedule, with only nominal differences between the clause for MARC I FTS shippers and for FWS shippers.⁶ For MARC I FTS shippers, the MFN clause reads, in its entirety:

³ CNYOG provides storage service and interruptible wheeling service pursuant to market-based rates.

⁴ Shippers wishing to use Stagecoach Storage Facility may transport their gas either via the North-South Lateral zone or via an interconnection with a line owned and operated by Tennessee Gas Pipeline Company.

⁵ Petition at 1, 10.

⁶ Petition at 9. According to CNYOG, the only material differences between the two MFN provisions are "the specifics about the different projects to which they apply, the different rate schedules to which they are confined, and, for the MARC I FTS

(continued...)

If, prior to and up to five years after the In-Service Date of the MARC I Hub Line, Seller enters into an FTSA (excluding Interim FTS Service authorized under Seller's Tariff) with any other FTS shipper –

(a) for a Maximum Daily Firm Transportation Quantity (“MDFTQ”) of Firm Transportation Service equal to or less than Customer's MDFTQ, or

(b) for a term equal to or less than the term of Customer's FTS Agreement,

at a Reservation rate less than Customer's Reservation rate, Seller shall notify Customer within five (5) Business Days, and, unless Customer notifies Seller within five (5) Business Days that Customer does not want to revise its rates or terms and conditions of service, then Seller will revise Customer's FTS Agreement to reduce Customer's Reservation rate to equal such lower Reservation rate effective as of the date of such FTS Agreement with such other FTS shipper. This paragraph shall not apply to the first 100,000 Dth/Day of firm transportation capacity sold by Seller on the MARC I Hub Line.⁷

CNYOG states that the rate schedules and general terms and conditions of its FERC tariff do not include or otherwise address MFN clauses, and that the Commission approved the agreements containing the clauses as non-conforming.⁸

6. CNYOG states that it is in the process of adding a new “Wilmot-to-Transco Project” that would connect the gathering system of Access Midstream to Transco through a new receipt point on MARC I Hub Line.⁹ CNYOG states that pursuant to an

Agreement, an exception for the 100,000 Dth/day that the anchor shippers turned back before the MARC I project commenced service.”

⁷ Petition at Ex. A; Protest at 10.

⁸ Petition at 9-10. *CNYOG*, 136 FERC ¶ 61,224 (2011) (accepting FWS contracts); *CNYOG*, Docket No. RP13-173-000 (Nov. 16, 2012) (delegated letter order) (accepting MARC I FTS contracts).

⁹ Petition at 11.

open season for the Wilmot-to-Transco Project, it has reached a precedent agreement with an anchor shipper, Chief Oil & Gas (Chief), for service under Rate Schedule FTS-2.¹⁰ According to CNYOG, the rate for which Chief has subscribed for service under Rate Schedule FTS-2 is less than the negotiated reservation rate in the MARC I FTS agreements containing MFN clauses. CNYOG further states that while it does not believe the FTS-2 agreement with Chief would trigger the MFN clauses in the MARC I FTS agreements, it seeks a declaratory order from the Commission to that effect to remove any uncertainty. CNYOG also states that because the MFN clauses in both the FWS and the MARC I FTS agreements are similar and raise the same potential for dispute, CNYOG seeks a declaratory order that FTS-2 agreements do not trigger the MFN clauses of either the FWS rate schedule agreements or the MARC I FTS rate schedule agreements.¹¹

II. Notice and Responsive Pleadings

7. Public notice of CNYOG's Petition was issued on April 1, 2015, allowing for protests to be filed by April 13, 2015.¹² Pursuant to Rule 214,¹³ all timely-filed motions to intervene and any unopposed motions to intervene filed out-of-time 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.

8. Anadarko Energy Services Company and MMGS Inc. (Protesters), two of the MARC I FTS anchor shippers, filed a joint protest. They argue that the Commission should not exercise jurisdiction over this contract question and in the alternative, that the Commission should deny the petition based on the plain language of the MFN provision.¹⁴ According to the Protesters, the plain language of the MFN provision in the MARC I FTS agreements was meant to include all firm service, or at the very least all firm service on the MARC I Line.

¹⁰ Petition at 11.

¹¹ Petition at 12.

¹² See 18 C.F.R. § 154.210 (2014).

¹³ 18 C.F.R. § 385.214 (2014).

¹⁴ Protesters note that their arguments are based on the MARC I FTS agreements, and are not meant to address the MFN provisions for FWS shippers. Protest at 2 & n.6.

9. On April 21, 2015, Chief and CNYOG filed separate answers to the protest. On April 27, 2015, Protesters filed a joint answer to the answers. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁵ prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept all three answers, as they have provided information that assisted our decision-making process.

10. Chief filed a brief answer, in which it confirms that a favorable Commission order is a necessary precondition of it reaching a final agreement with CNYOG. As such, Chief urges the Commission to grant the petition on an expedited basis. Otherwise, Chief takes no position on the underlying issues.

III. Discussion

A. Jurisdiction

1. Petition

11. In the Petition CNYOG asserts that the Commission has jurisdiction under the NGA over its declaratory order request because CNYOG's facilities and services are subject to our exclusive jurisdiction, the Commission authorized the MFN clauses as acceptable material deviations from CNYOG's *pro forma* tariff agreements, the MFN agreements are on file with the Commission and the Commission has the special expertise to determine how the "public interest in competitive and efficient natural gas transportation may be affected by the interpretation of the MFN Agreements."¹⁶ CNYOG also argues that the Commission should assert primary jurisdiction here for the same reasons it did in *REX*,¹⁷ which it claims is controlling in this case. According to CNYOG, in *REX* the Commission asserted jurisdiction over a dispute relating to certain MFN clauses because the Commission found it had special expertise to interpret the terms of the pipeline's FERC tariff, the MFN clauses affected FERC approved and regulated rates and thus were central to the Commission's regulatory responsibilities, and the MFN clauses needed a uniform interpretation.¹⁸

¹⁵ 18 C.F.R. § 385.213(a)(2) (2014).

¹⁶ Petition at 3.

¹⁷ *Rockies Express Pipeline LLC*, 145 FERC ¶ 61,179 (2013) (*REX*).

¹⁸ Petition at 3(citing *REX*, 145 FERC ¶ 61,179 at PP 30-31).

2. Protest

12. As noted, the Protesters argue that the Commission should not assert jurisdiction over CNYOG's Petition. According to the Protesters, the Commission has concurrent jurisdiction with the courts over contract interpretation, and pursuant to precedent will only exercise its concurrent jurisdiction if required under the following three-factor analysis set forth in *Ark. La. Gas Co. v. Hall*¹⁹: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.²⁰

13. Protesters assert that because the facts here are more akin to those addressed in *Arkla* than in *REX*, the requisite analysis should lead the Commission to decline to assert jurisdiction in this case. Protesters argue that in *REX*, the Commission found that the reason for the dispute, and the key factor for the Commission's decision to assert jurisdiction, was that there was a conflict in language between the service agreement at issue and *REX*'s tariff, an issue not present here. Protesters further claim that as in *Arkla*, the instant proceeding involves a simple contract dispute that does not require any special expertise. Protesters also argue that there is no need for uniformity of interpretation, "because MFN clauses may differ from pipeline to pipeline, and even from agreement to agreement."²¹ Finally, Protesters claim that the Commission satisfied its regulatory responsibility as to whether the MFN provision would affect a jurisdictional rate when it accepted the MFN clause as a non-conforming contract provision.²²

3. Answer

14. In its answer, CNYOG claims that the Commission should assert jurisdiction consistent with *REX*. CNYOG claims that the issues of whether the MFN clauses in agreements under two separate rate schedules are triggered by a lower rate for a customer under a third rate schedule, and the applicability of the MFN agreements to other rate schedules and whether the service under those rate schedules are comparable, involve questions on which the Commission has special expertise. CNYOG also claims that

¹⁹ 7 FERC ¶ 61,175, at p. 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*)).

²⁰ Protest at 6 (quoting *REX*, 145 FERC ¶ 61,179 at P 30).

²¹ Protest at 8.

²² Protest at 8.

contrary to Protesters' claim that there is no need for uniformity here because MFN clauses may differ from pipeline to pipeline and agreement to agreement, there is a need to ensure uniformity over the actual contractual provisions at issue. CNYOG further claims that the fact the Commission approved the MFN clauses previously does not answer the question of whether those provisions affect a Commission regulated rate in terms of their applicability to agreements under a new and separate rate schedule. Finally, CNYOG argues that this case is distinguishable from *Arkla*, which it states involved only one customer and one MFN clause and where "the case had already been tried and appealed for five years throughout the state court system."²³ Here, by contrast, CNYOG notes that it is seeking Commission guidance and certainty before a dispute arises so as to further the public interests in developing pipeline infrastructure and providing new and additional services.

4. Determination

15. The Commission will exercise its jurisdiction over this dispute concerning the referenced MFN provisions. In cases of contract interpretation, the Commission has concurrent jurisdiction with the courts.²⁴ In determining whether to assert its primary jurisdiction over disputes concerning jurisdictional contracts, the Commission considers three factors: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.²⁵ Whether to exercise primary jurisdiction is a matter solely within the Commission's discretion.²⁶ Based on these factors, the Commission exercises its discretion to exert primary jurisdiction over the contractual dispute raised by CNYOG's Petition. First, the Commission has special expertise to interpret the disputed MFN clause and its applicability to agreements under different rate schedules, particularly as the parties' contentions on this issue include arguments as to whether service under Rate Schedule FTS-2 is comparable to service under Rate Schedules MARC I FTS and Rate Schedule

²³ CNYOG Answer at 5 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 575 (1981)).

²⁴ *Kentucky Utilities Co.*, 109 FERC ¶ 61,033, at PP 14-16 (2004), *reh'g denied*, 110 FERC ¶ 61,285 (2005); *Portland General Elec. Co.*, 72 FERC ¶ 61,009, at 61,021 (1995).

²⁵ *Arkla*, 7 FERC ¶ 61,175 at 61,322.

²⁶ *Portland General Elec. Co.*, 72 FERC ¶ 61,009 at 61,021-22.

FWS. Second, there is a need for uniformity in the application of the MFN clauses to multiple shippers on CNYOG's system that have the same or similar clauses in their contracts. Third, as we said in *REX*, because a MFN clause affects Commission regulated rates, the Petition raises issues that are central to the regulatory responsibilities of the Commission.²⁷ Moreover, expedited resolution of this issue by the Commission will assist the parties in making investment decisions concerning construction of facilities that CNYOG hopes to place in service by October 1, 2015.

B. Contract Interpretation

1. Petition

16. CNYOG requests a declaratory order that the agreements under Rate Schedule FTS-2 do not trigger the MFN clause in either the FWS or MARC I FTS Rate Schedule MFN agreements. CNYOG claims that a service agreement under Rate Schedule FTS-2 should not trigger the MFN clause in any existing agreements because: (1) the text of the MFN agreements shows that the parties did not intend for MFN rights to extend to different rate schedules; (2) service on Rate Schedule FTS-2 is not comparable to Rate Schedules FWS and MARC I FTS; and (3) the public interest and policy supports such a finding.²⁸

17. As to the first point, CNYOG asserts that the MFN clause may only be triggered by certain agreements under the same rate schedule, not by agreements entered into under a new rate and different rate schedule. CNYOG argues that “[e]ach MFN clause is part of an agreement that is expressly subject to a specific rate schedule, and that rate schedule is confined to its own rate zone.”²⁹ In particular, CNYOG notes, each agreement incorporates the terms of its assigned rate schedule, and section 2(e) of each rate schedule prohibits using the service in connection with other rate schedules.

18. CNYOG also claims that the Rate Schedule FTS-2 agreements do not trigger the MFN clause because service under Rate Schedule FTS-2 is not comparable to service under Rate Schedule MARC I FTS.³⁰ According to CNYOG, the FWS and MARC I FTS Rate Schedules offer enhanced flexible multiple primary point rights and bi-directional

²⁷ See *REX*, 145 FERC ¶ 61,179 at P 31.

²⁸ Petition at 12.

²⁹ Petition at 13.

³⁰ Petition at 14.

service, while Rate Schedule FTS-2 offers “a more traditional, single primary flow path.” As a result, all service nominated by FWS and MARC I FTS shippers within their mainline contract demand is treated as primary firm service with the highest scheduling priority. However, service nominated by FTS-2 shippers not using their primary points is treated as secondary firm service with a lower scheduling priority than service nominated by the FWS and MARC I FTS shippers. CNYOG argues that, therefore, Rate Schedule FTS-2 is a necessarily inferior service to Rate Schedules FWS and MARC I FTS, and should be priced lower. Accordingly, CNYOG concludes that “any comparison of rates for firm contract quantities under a MARC I FTS agreement should only be with rates under the MARC I FTS Rate Schedule, not with rates under a new and different rate schedule with different characteristics.

19. Third, CNYOG argues that offering a less flexible service like Rate Schedule FTS-2 serves public policy goals by allowing CNYOG to operate at closer to full capacity. CNYOG argues that it is in a geographic area, the Marcellus Shale, that is both relatively competitive, necessitating negotiated rate agreements, but also dynamic, necessitating new projects like the Wilmot-to-Transco project. CNYOG suggests that such new projects benefit existing shippers, but could not happen without financial commitments from shippers like Chief.³¹

2. Protest

20. According to the Protesters, should the Commission decide to exercise jurisdiction, it should deny the declaratory order because the plain language of the MARC I FTS agreements indicates that the FTS-2 agreement would trigger the MFN clause of the MARC I FTS agreements. Protesters note that in *REX* the Commission found that the applicable contract was ambiguous due to a conflict between MFN language in the service agreement and MFN language in the tariff.³² Protesters assert that the Commission’s decision there was thus highly fact specific based on a conflict between the subject agreements and the tariff. Protesters claim here the contract language is straightforward and unambiguous, as there is no contract /tariff conflict question because the language in question is all in the MARC I FTS agreements.³³

21. Protesters challenge CNYOG’s claim that all references to “FTS” in the MFN provision pertain only to MARC I FTS, and thus cannot be triggered by an agreement

³¹ Petition at 17.

³² Protest at 9.

³³ Protest at 9-10.

under a different rate schedule. Protesters contend that the agreements' first reference to the MARC I Hub Line "simply ties to the date the MFN provision goes into effect," and does not "limit[] the MFN to MARC I FTS transport."³⁴ Protesters contend that the exclusionary reference to "the first 100,000 Dth/Day of firm transportation capacity sold by Seller on the MARC I Hub Line," by "obvious inference," means that "the MFN provision applies to all firm transport." Protesters also claim that a review of CNYOG's tariff indicates that the terms "FTSA" and "Firm Transportation Service Agreement," are "used in relation to the form of service agreements under both Rate Schedule MARC I FTS and Rate Schedule FTS-2."³⁵ They also note that the tariff does not define "FTS" and "Firm Transportation Service," but again, uses those terms in sections 5.0, 5.5, and 5.7 to refer to both Rate Schedules MARC I FTS and FTS-2. Finally, Protesters argue that the reference in the final sentence of the MFN clause to the MARC I Line would be a superfluous and meaningless phrase unless one concludes that FTS naturally refers to all firm service, not just MARC I FTS service.³⁶

22. Protesters also challenge CNYOG's claim that MARC I FTS service is superior to FTS-2 service as illusory.³⁷ They argue that section 6.4.3 of the CNYOG tariff gives Rate Schedules MARC I FTS and FTS-2 the same priority level,³⁸ and that CNYOG will provide service under Rate Schedule FTS-2 on the same facilities it provides MARC I FTS service. Accordingly, Protesters argue, MARC I FTS shippers will compete for scheduling priority with FTS-2 shippers paying a heavily discounted rate. Protesters assert that the fact FTS-2 service will be provided on one-hundred percent of the MARC I facilities distinguishes it from *REX*. Protesters argue that, if CNYOG's argument were followed, the "pipeline could simply invent a 'new service' using 100 percent of existing facilities by fabricating nuances that evade negotiated contract rights like MFN provisions."³⁹

³⁴ Protest at 10.

³⁵ Protest at 11.

³⁶ Protest at 11-12.

³⁷ Protest at 12.

³⁸ Protest at 12.

³⁹ Protest at 13.

23. In addition, Protesters claim that because CNYOG drafted the agreement, any drafting inconsistencies should be resolved against the drafter.⁴⁰ Similarly, Protesters argue that CNYOG's certificate filing serves as "extrinsic evidence that also undercuts CNYOG's position," because in that proceeding, CNYOG stated that the MFN provision was designed to protect "the initial shippers *vis-a-vis* future shippers should the capacity of the MARC I Facilities be increased in the future, e.g., by addition of compression or looping."⁴¹

3. Answers of CNYOG and Protesters

24. In response to the claims that the MARC I FTS MFN clause is somehow ambiguous, CNYOG asserts that, to the contrary, the MFN clauses are confined by their terms to the MARC I FTS Rate Schedule. CNYOG notes that at the time that the MARC I FTS agreements were executed no other "FTS" service existed on CNYOG's system, and thus it is unreasonable to interpret the reference to "FTS" in the MFN clause to apply to all firm services. CNYOG argues that Protesters' reading of the use of the terms FTSA, FTS, and Firm Transportation Service, therefore is "overly broad" and "would have the absurd result of making other, otherwise very plain references in their service agreements ... unnecessarily ambiguous."⁴² CNYOG argues that if the parties had "intended the MFN clause to apply to 'all firm services,' they would have used those words."⁴³ CNYOG also asserts that the last sentence of the MFN clause in the MARC I FTS agreement, which excepts the first 100,000 Dth sold on the MARC I Hub Line, does not change this interpretation. Rather, CNYOG claims it is a specifically worded exception, and as a rule a more particular and specific clause of a contract should prevail over a more general clause.

25. CNYOG also contests Protesters' claim that ambiguities should be construed against the drafter, "because as in this case 'both parties were in a position to know what the words meant.'"⁴⁴ Finally, CNYOG argues that as a practical matter, FTS-2 service

⁴⁰ Protest at 13 (citing *Entergy Servs., Inc.*, 133 FERC ¶ 61,025, at P 24 (2010)).

⁴¹ Protest at 13 (citing CNYOG, Abbreviated Application for Certificate of Public Convenience and Necessity (MARC I Project) at 28, *Cent. NY. Oil & Gas Co. LLC*, Docket No. CP10-480-000 (Aug. 6, 2010)).

⁴² CNYOG Answer at 6.

⁴³ CNYOG Answer at 7.

⁴⁴ CNYOG Answer at 7 (citing *Entergy Servs.*, 133 FERC ¶ 61,025 at P 24).

does not diminish MARC I FTS service, nor is it a fabricated service, as Protesters allege; rather, CNYOG argues, FTS-2 is a less flexible service that, in Chief's case "is in only one direction for approximately half the length of the MARC I Line," and thus a demonstrably less valuable service than full MARC I FTS service.⁴⁵

26. In their answer, Protesters again argue that *Arkla* counsels against exercising jurisdiction, primarily because the Commission "must draw the line somewhere" between cases clearly affecting its central regulatory responsibilities, and matters of ordinary contract interpretation.⁴⁶ Protesters also argue that CNYOG's interpretation of the MFN provisions would provide a disincentive to anchor shippers. They allege that, under CNYOG's interpretation, "any pipeline could unilaterally fabricate a new rate schedule, at any time, in such a way as to avoid honoring an MFN provision."⁴⁷ Protesters argue that it is more reasonable to read their MFN provisions as covering possible expansions. Otherwise, they suggest, MFN customers would be incentivized to oppose all proposed new services, in order to preserve their MFN rights.

4. Determination

27. CNYOG's Petition requests Commission clarification of the MFN rights which apply to anchor MARC I FTS and FWS shippers pursuant to their respective non-conforming, negotiated rate agreements. Based upon a consideration of all the evidence, the Commission finds that the MFN rights are not triggered by the potential FTS-2 transactions. In our discussion below, we will focus on the MFN provisions in the Article VI, § 1 of the MARC I FTS shippers' contracts, because the only protests to CNYOG's petition were filed by MARC I FTS shippers. However, our reasoning and conclusions apply equally to the MFN provisions of the FWS shippers.

28. The MARC I FTS shippers' service agreements only provide MFN rights to those shippers, if CNYOG "enters into an *FTSA . . . with any other FTS shipper*"⁴⁸ satisfying certain conditions. Thus, CNYOG's execution of a service agreement with an FTS-2 shipper can only trigger the MARC I FTS shippers' MFN rights if an FTS-2 shipper is considered to be an "FTS shipper" with whom CNYOG has entered into an "FTSA" for purposes of the MFN provisions in the MARC I FTS shippers' service agreements.

⁴⁵ CNYOG Answer at 9.

⁴⁶ Protesters Answer at 3.

⁴⁷ Protesters Answer at 3.

⁴⁸ Emphasis supplied.

Therefore, resolution of the issues raised by CNYOG's petition for declaratory order turns on the proper interpretation of the phrase "FTS shipper" in the MFN provisions in the MARC I FTS shippers' service agreements.

29. The Commission interprets service agreements pursuant to traditional rules of contract interpretation. A contract "is ambiguous when it is 'reasonably susceptible to different constructions or interpretations.'"⁴⁹ To determine whether a contract is ambiguous, the Commission looks to the four corners of the agreement and considers the entire instrument as a whole.⁵⁰ The Commission may consider extrinsic evidence if the terms of the contract are ambiguous.⁵¹ As discussed below, the phrase "FTS shipper" in the MARC I FTS shippers' service agreements is ambiguous because that phrase is not defined within the agreements or CNYOG's tariff and does not contain the "MARC I" modifier that would clearly limit phrase to covering only MARC I FTS shippers. Based upon a consideration of all the evidence, however, the Commission finds that the phrase "FTS shipper" does not include FTS-2 shippers and therefore the MARC I FTS agreements' MFN rights are not triggered by potential FTS-2 transactions.

30. Given the ambiguity in the MFN provisions, the Commission must look to extrinsic evidence to resolve the ambiguity. Protesters argue that the Commission should divine the intent of the parties at the time of execution as favoring an expansive reading of the phrase "FTS shipper." They note that in CNYOG's certificate filing for the MARC I project, CNYOG stated that the MFN provision was designed to protect "the initial shippers vis-a-vis future shippers should the capacity of the MARC I Facilities be increased in the future,"⁵² and thus they assert that the intent of the parties was that the MFN clause would apply to any future shippers on the MARC I Line, not that it would be limited to shippers taking service under Rate Schedule MARC I FTS.

31. As CNYOG points out, however, the precedent agreements the parties entered into before CNYOG applied for a certificate for the MARC I facilities supports its interpretation of the MFN provision. Those precedent agreements, like the MARC I FTS shippers' current service agreements, provided for the MFN to be triggered when CNYOG enters into "an FTSA ... with any other FTS shipper." While the current

⁴⁹ *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (1985) (citations omitted).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Protest at 13; *see also* Protesters Answer at 4.

service agreements and tariff do not define the terms “FTSA” and “FTS”, section 1 of the precedent agreements defines “FTS Agreement” or “FTSA” as “a Service Agreement for Firm Transportation Service under Service Provider’s MARC I FTS Rate Schedule,” and defines “Firm Transportation Service” as “service provided by Service Provider on a firm basis over the MARC I Hub Line pursuant to Service Provider’s MARC I FTS Rate Schedule.”

32. Based on the definition of “FTSA” in section 1 of the precedent agreements, the reference to “FTSA” in the precedent agreements’ MFN provision is reasonably interpreted to mean “a Service Agreement for Firm Transportation Service under Service Provider’s MARC I FTS Rate Schedule.” It follows that the parties to the precedent agreements intended the MFN to be triggered when CNYOG enters into “a Service Agreement for Firm Transportation Service under Service Provider’s MARC I FTS Rate Schedule . . . with any other FTS shipper.” In this context, the phrase “FTS shipper” is reasonably interpreted to refer only to a shipper under the MARC I FTS Rate Schedule, and not to an FTS-2 shipper with whom CNYOG has entered into a service agreement for service under the FTS-2 Rate Schedule.⁵³ The MFN provision in the MARC I FTS shippers’ current service agreements uses the same language as the MFN provision in their precedent agreements. Accordingly, it is reasonably interpreted to have the same meaning as the precedent agreement MFN provision.

33. Moreover, as CNYOG points out, if the parties to the service agreements had intended the MFN clause to apply to all firm services, present and future, they would have so specified. Instead the language specifically refers to the one and only rate schedule to which it could have applied at the time, Rate Schedule MARC I FTS, and incorporates that Rate Schedule into the agreement.

34. The differences between MARC I FTS service (and Rate Schedule FWS service) and FTS-2 service provide further compelling evidence in support of CNYOG’s claim that it did not intend at the time it entered into the MFN clauses to have them apply to all future firm services, and thus should not be required to offer the same rate to Protesters for their MARC I FTS service. As CNYOG points out, there are significant differences in the quality of firm service under Rate Schedules MARC I FTS and FWS, which provide primary firm, flexible, bidirectional service throughout their respective zones, as compared to Rate Schedule FTS-2, which provides primary firm service only along a

⁵³ There is nothing in the last sentence of the MARC I FTS MFN provision, stating that the MFN provision “shall not apply to the first 100,000 Dth/Day sold on the MARC I Line,” that compels us to alter this interpretation.

single flow path spanning one or both zones.⁵⁴ Shippers under Rate Schedules FWS and MARC I FTS receive “primary point capacity” up to their mainline contract demand at each and every point of receipt and delivery within their respective zones; shippers under Rate Schedule FTS-2 are limited to the primary points of receipt and delivery specified in their service agreements and the total amount of primary receipt and delivery point capacity FTS-2 shippers may contract for is capped by their mainline contract demand.

35. Although primary firm service scheduled by an FTS-2 shipper has the same scheduling priority as primary firm service scheduled by MARC I FTS and FWS shippers, we find that MARC I FTS and FWS services are clearly superior services in terms of rights and flexibility of service. Because shippers under Rate Schedules MARC I FTS and FWS have primary point scheduling rights for all points within the zone, every transaction they schedule will be treated as a primary firm service with the highest scheduling priority. Thus, MARC I FTS shippers, for example, may schedule service moving from any receipt point toward Tennessee or from any receipt toward Transco as primary firm service. This also enables them to release and/or segment capacity without forfeiting their primary scheduling rights. On the other hand, while service under Rate Schedule FTS-2 can span both rate zones, only the points specified in their service agreements have primary scheduling priorities. Therefore, FTS-2 shippers must schedule all other transactions as secondary firm service, with a lower scheduling priority than any service scheduled by a MARC I FTS shipper or an FWS shipper. Also, if a FTS-2 shipper releases or segments its capacity, the scheduling rights are not guaranteed to be primary and thus may be secondary to services under Rate Schedules MARC I FTS and FWS. Thus, services under Rate Schedules FWS and MARC I FTS are more valuable for most customers than services under Rate Schedule FTS-2, and we

⁵⁴ The tariff descriptions of the applicability and character of service in the two rate schedules support CNYOG’s assertion. *Compare* section 2 of Rate Schedule MARC I FTS (“Firm Transportation Service under this Rate Schedule provides the Customer with flexible, bi-directional, primary firm capacity rights on Seller’s MARC I Facilities. Customers are not required to allocate the Customer’s Maximum Daily Firm Transportation Quantity to designated primary receipt and primary delivery points;”) *with* section 2 of Rate Schedule FTS-2 (“Customer shall have the right to use the primary Point(s) of Receipt and Point(s) of Delivery, as specified in Customer’s Service Agreement, and other points on the portions of Seller’s pipeline system for which Customer has agreed to pay reservation charges on a secondary basis, subject to the service priorities set forth in Section 6.4.3 of the General Terms and Conditions of this FERC Gas Tariff. Customer shall have the right to request changes to its primary Point(s) of Receipt and primary Point(s) of Delivery, which Seller shall consider in its reasonable discretion subject to the availability of capacity at the requested point(s).”)

find that it is reasonable to interpret the MFN provision in the MARC I FTS and FWS service agreements as not being triggered by CNYOG's execution of service agreements for lower quality FTS-2 service. It is not unjust or unreasonable or unduly discriminatory for the rates for FWS and MARC I FTS services to continue reflect the higher value of those service, despite CNYOG's agreement to provide lower quality service at a lower rate.

36. Further, there is no evidence to suggest that CNYOG fabricated Rate Schedule FTS-2 as a means of avoiding the potential effect of the MFN clauses, or that Rate Schedule FTS-2 will decrease the viability of MARC I FTS service. Rate Schedule FTS-2 makes more firm transportation service on CNYOG's system available to the market and provides that service in a traditional single primary flow path with primary receipt point and delivery point capacity rights, and secondary rights at other point on a shipper's path. CNYOG states that Protesters will continue to have flexible, bi-directional rights at multiple primary points along the entire length of the MARC I Line and that it has sufficient capacity to provide both firm services. Protesters do not contest these claims.

37. Accordingly, we find that FTS-2 service is sufficiently different from FWS and MARC I FTS service that the MFN clauses on file cannot be read to cover FTS-2 service. We therefore grant CNYOG's Petition.

The Commission orders:

The Petition for declaratory order is hereby granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.