

156 FERC ¶ 61,079
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gulf South Pipeline Company, LP

Docket No. RP16-961-000

ORDER ACCEPTING TARIFF RECORDS SUBJECT TO CONDITIONS

(Issued July 29, 2016)

1. On May 20, 2016, Gulf South Pipeline Company, LP (Gulf South) filed tariff records¹ pursuant to section 4 of the Natural Gas Act (NGA) to revise its *pro forma* letter agreements for both discounted and negotiated rate agreements. Gulf South proposes (1) to add a clause stating that the discounted or negotiated rate was required by competition (competition clause) and (2) to allow for multiple rate agreements within a single service agreement. For the reasons discussed below, the Commission accepts the tariff records, effective August 1, 2016, subject to Gulf South making a compliance filing to remove the competition clause and modify the multiple rate agreement provision.

I. Proposal

A. Competition Clause

2. Gulf South proposes to add to its *pro forma* letter agreements for discounted and negotiated rates a clause stating that the agreed upon rate was necessary to meet competition. The proposed competition clause states:

Customer agrees that it has competitive alternatives to Gulf South's system, the rate(s) negotiated with Gulf South herein reflect the market rate for pipeline capacity at this time, and the rate is necessary to meet competition and for Customer to contract for transportation capacity on Gulf South's system.

¹ Gulf South Pipeline Company, LP, FERC NGA Gas Tariff, Tariffs, [Section 7.8, Form of Agmt - Firm Services Disc Rates Ltr Agmt, 9.0.3](#); [Section 7.10, Firm Services Neg Rate Letter Agmt, 8.0.3](#).

3. Gulf South claims that the competition clause is consistent with Commission policy which: (1) allows pipelines to discount rates on a nondiscriminatory basis, in order to meet competition;² (2) recognizes that selective discounting benefits all customers by allowing the pipeline to maximize throughput and thus spread its fixed costs across more units of service;³ and (3) requires pipelines that offer negotiated rates to permit shippers the option of using traditional cost-of-service recourse rates in lieu of negotiated rates for any particular service.⁴ Gulf South further states that the competition clause will not change its burden of requiring it to show that discounted or negotiated rates were required to meet competition.⁵

4. Gulf South states that it is appropriate to include the competition clause in its *pro forma* letter agreements because it will not agree to enter into either a discounted or negotiated rate agreement that is not necessary to meet competition. Gulf South further states that due to the option to contract for capacity under Gulf South's recourse rates, no customer will be required to execute a discounted or negotiated rate letter agreement if it does not agree that the rates are necessary to meet competition. In addition, Gulf South states that its customers are economically sophisticated and will not agree to rates that are not reflective of the competitive market and not justified on an economic basis. Finally, Gulf South states that the competition clause recognizes the pipe-on-pipe competition that currently exists within its pipeline footprint.

B. Multiple Rate Agreement Provision

5. Gulf South states that on April 1, 2016, it implemented a fuel tracker mechanism, which was filed pursuant to the requirements of its currently effective rate settlement.⁶ Gulf South also states that under Commission policy, pipelines are at risk for fuel

² Gulf South Transmittal Letter at 2 (citing *Policy for Selective Discounting by Natural Gas Pipelines*, 109 FERC ¶ 61,202, at P 2 (2004) (Selective Discounting NOI)).

³ *Id.* at 2 (citing *Regulations of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665, at 31,544 (1985)).

⁴ *Id.* at 3 (citing *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,238-42 (1996)).

⁵ *Id.* at 2, 3 (citing Selective Discounting NOI, 109 FERC ¶ 61,202 at P 7; *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208, at P 203 (2011)).

⁶ The Commission approved the settlement in *Gulf South Pipeline Co., LP*, 153 FERC ¶ 61,326 (2015). The Commission approved the fuel tracker, subject to condition, in *Gulf South Pipeline Co., LP*, 154 FERC ¶ 61,115 (2016).

discounts given between rate cases and discount-type adjustments in fuel tracking mechanisms are not permitted. Accordingly, Gulf South proposes to add the following language to its *pro forma* letter agreement for negotiated rates:

Negotiated fuel rates must be contracted under a separate Negotiated Rate Letter Agreement. If the negotiated rate under this letter agreement is limited to specific components, insert here. For example: “Fuel Negotiated Rate Letter Agreement.”

6. In addition, Gulf South proposes to permit parties to enter into multiple discounted and negotiated rate letter agreements associated with a single service agreement by including the following language in its *pro forma* letter agreements for both discounted and negotiated rates:

The parties may enter into multiple negotiated rate and discounted rate letter agreements under the same Contract to address different rates or rate components.

7. Gulf South explains that under its proposal, Gulf South and a shipper could, for example, agree to discounted reservation rates, which would be set forth in a discounted rate letter agreement, and a negotiated fuel rate, which would be set forth in a negotiated rate letter agreement. Gulf South states that the proposed language establishes a clear method for separating negotiated fuel rates, which cannot be discount adjusted, from other rate components, which may be eligible for a discount adjustment.

8. Finally, Gulf South proposes to clarify that the phrase “including but not limited to surcharges,” which is used to describe the charges that are not included in a customer’s stated discounted and negotiated rate, is not limited to surcharges.

II. Notice of Filing, Interventions, and Protests

9. Public notice of Gulf South’s filing was issued on May 23, 2016. Interventions and protests were due as provided in section 154.210 of the Commission’s regulations.⁷ On June 1, 2016, Atmos Energy Corporation (Atmos), Distributor Coalition,⁸ Indicated

⁷ 18 C.F.R. § 154.210 (2015).

⁸ Distributor Coalition consists of: CenterPoint Energy Resources Corporation; Mobile Gas Service Corporation; Willmut Gas Company; and the City of Vicksburg, Mississippi.

Shippers,⁹ and United Municipal Distributors Group (UMDG)¹⁰ filed protests. Pursuant to Rule 214,¹¹ 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.

10. On June 7, 2016, Gulf South filed an answer to the protests. On June 10, 2016, Distributor Coalition filed a reply to Gulf South's answer. Rule 213(a)(2) prohibits answers to protests or answers unless otherwise ordered by a decisional authority.¹² The Commission accepts Gulf South's and Distributor Coalition's answers as they aided in the decision-making process.

III. Discussion

A. Competition Clause

1. Protests

11. Protestors request that the Commission reject Gulf South's proposed competition clause. They argue that Gulf South's proposed competition clause is an attempt to shift the pipeline's burden of proof in an NGA general section 4 rate case with respect to discount adjustments to its rate design volumes, which would keep the pipeline whole for the discounts.¹³ Protestors also argue that the competition clause is an attempt by Gulf

⁹ Indicated Shippers consist of: Anadarko Energy Services Company; Chesapeake Energy Marketing, L.L.C.; Chevron Natural Gas; ConocoPhillips Company; ExxonMobil Gas & Power Marketing Company; Petrohawk Energy Corporation; and Shell Energy North America (US), L.P.

¹⁰ United Municipal Distributors Group consists of: City of Brewton, Alabama; Town of Century, Florida; Utilities Board of the Town of Citronelle, Alabama; City of Fairhope, Alabama; Utilities Board of the City of Foley, Alabama; North Baldwin Utilities, Alabama; Okaloosa Gas District, Florida; City of Pascagoula, Mississippi; City of Pensacola, Florida; and South Alabama Gas District, Alabama.

¹¹ 18 C.F.R. § 385.214 (2015).

¹² 18 C.F.R. § 385.213(a)(2) (2015).

¹³ Indicated Shippers Protest at 3; Atmos Protest at 3-4 (citing *Texas Gas Transmission LLC*, 138 FERC ¶ 61,175 (2012) (*Texas Gas*)); UMDG Protest at 2-3; Distributor Coalition Protest at 5.

South to exert market power.¹⁴ They further argue that it is contrary to Commission policy which: (1) requires a comprehensive analysis of discount requests, market conditions, competition, alternative fuels, end-user characteristics, costs of providing service;¹⁵ and (2) requires pipelines to show that a discount adjustment does not have an adverse impact on recourse rate shippers.¹⁶

12. Protestors argue that the language of the competition clause does not necessarily reflect the shippers' perspective for agreeing to a discounted or negotiated rate. For example, Distributor Coalition notes that anchor shippers for a new construction project may not have had alternative options for the capacity, or a shipper may agree to a negotiated rate based on anticipated market rates for capacity over the entire length of that negotiated agreement. Protestors also note that negotiated rates may be the result of a settlement of an NGA general section 4 rate case or the resolution of a commercial dispute.¹⁷ In addition, Distributor Coalition states that the issue of billing determinant adjustments for negotiated and discounted rate contracts was highly contested in Gulf South's recent NGA general section 4 rate case, prior to the settlement of the proceeding in Docket No. RP15-65-000.

13. Distributor Coalition further notes that Gulf South and individual customers are not precluded from agreeing that a particular contract was entered into for competitive purposes but the tariff provision would limit the execution of discounted or negotiated rate agreements in other legitimate situations. Finally, Distributor Coalition suggests that if the Commission wishes to consider allowing competition clauses, it should do so in a rulemaking proceeding.

¹⁴ Indicated Shippers Protest at 2 (“the proposed language is a blatant demonstration of a pipeline exercising its market power to coerce a shipper into supporting a pipeline’s evidentiary burden regarding a discount adjustment in order to obtain a discount”); UMDG Protest at 6 (“tilting the playing field by inclusion of the competition clause in all negotiated rate agreements will undoubtedly result in higher proposed rates in future rate cases, and while those rate are under investigation [in an NGA general section 4 rate case] by the Commission give Gulf South greater leverage to extract concession from customers in settlement negotiations.”).

¹⁵ UMDG Protest at 3 (citing *Iroquois Gas Transmission System, L.P.*, 84 FERC ¶ 61,086 at 61,476-78 (1998) (*Iroquois*)).

¹⁶ Atmos Protest at 3-5 (citing *Texas Gas*, 138 FERC ¶ 61,175 at P 35 (2012) and *Tennessee Gas Pipeline Co.*, 81 FERC ¶ 61,207, at 61,880 (1997)); Distributor Coalition Protest at 7-8; UMDG Protest at n.7.

¹⁷ Atmos Protest at 5; Distributor Coalition Protest at 5-6.

2. Gulf South's Answer

14. Gulf South states that the addition of the competition clause to the *pro forma* letter agreements is not an attempt to change the existing burdens of proof under Commission policies for obtaining discount or discount-type adjustments in an NGA general section 4 rate cases. In addition, Gulf South notes that the right “to seek” a discount-type adjustment for negotiated rate agreements is not a “guarantee” that such an adjustment will be granted. Further, Gulf South states that the proposed competition clause will simply reflect the competitive circumstances that led to the discounted or negotiated rate in the parties’ service agreement “without prejudging the evidentiary weight to be given to the clause in a future rate case.”¹⁸

15. Gulf South argues that the Commission has recognized that, for non-affiliate discounts, the rebuttable presumption exists because there is no other financial incentive for the pipeline to offer such a discount absent the need to meet competition.¹⁹ Gulf South also argues that the Commission has previously held that the rates resulting from a transparent posting and bidding process met the burden of proof necessary to justify “even the higher burden associated with an affiliate discount.”²⁰ Gulf South clarifies that it does not intend to include the competition clause in a letter agreement if the discount is not offered for competitive purposes. To the extent a discount is offered for another purpose, Gulf South claims that it will remove the competition clause and file the letter agreement as a non-conforming agreement.

16. Gulf South claims that its discounted or below-maximum negotiated rates “are typically the result of a competitive open season or tariff-required auction, and reflect the competition that Gulf South must meet to sell its capacity.”²¹ In addition, Gulf South states that non-competitive discounted and below-maximum rate agreements are “the true exception, rather than the rule.”²² Further, Gulf South claims that the rates it typically obtains for much of its capacity are determined by the difference in the price of gas between the various receipt and delivery points on its system.

¹⁸ Gulf South Answer at 6.

¹⁹ *Id.* at 7 (citing *Policy for Selective Discounting By Natural Gas Pipelines*, 113 FERC ¶ 61,173, at P 107 (2005) (order denying rehearing)).

²⁰ *Id.* at 7 (citing *Koch Gateway Pipeline Co.*, 84 FERC ¶ 61,143, at 61,781, *reh'g denied*, 85 FERC ¶ 61,426 (1998)).

²¹ *Id.* at 2, 8.

²² *Id.* at 8.

17. Gulf South states that the Commission's discounting policy allows pipelines to discount to "meet competition" and the Commission has described a wide variety of circumstances in which discounting is permitted.²³ In addition, Gulf South states that the competition clause is not an exercise of market power because if it had market power, it would have been able to obtain the maximum recourse rate for its capacity.

18. Gulf South also states that waiting until the next rate case for the parties to document and analyze the competitive nature of a contract that was entered into, at times years before that rate case, "would put Gulf South at a disadvantaged position when the evidentiary trail has gone stale."²⁴ Gulf South states that the inclusion of the competition clause does not disadvantage either it or its customers as it is "merely a fact item that provides clarity on the parties' intent at the time of contracting."²⁵

19. In response to Distributor Coalition's suggestion that a rulemaking proceeding is the appropriate venue for addressing the Commission's policy, Gulf South argues that a rulemaking proceeding is unnecessary because the "Natural Gas Act provides Gulf South the right [to] propose changes to its tariff"²⁶ and "the Commission must accept a just and reasonable tariff proposal by a pipeline, regardless of whether other tariff provisions would also be just and reasonable."²⁷

3. Distributor Coalition's Answer

20. Distributor Coalition argues that instead of controverting the allegations of protestors, Gulf South's answer "proves" them. Distributor Coalition argues that the proposed competition clause "is intended to be nothing less than a self-proving statement in support of the pipeline's burden to justify discount-type adjustments." Distributor Coalition further states that it is inappropriate to include language which "may be true in certain situations not in others."

²³ *Id.* at 8 (citing Selective Discounting NOI, 109 FERC ¶ 61,202 at PP 3, 20-42).

²⁴ *Id.* at 11.

²⁵ *Id.* at 12.

²⁶ Gulf South Answer at 6 (citing 15 U.S.C. § 717c).

²⁷ Gulf South Answer at 6 (citing *Equitrans, L.P.*, 148 FERC ¶ 61,250, at P 32 (2014) (*Equitrans*) and *Consol. Edison Co. v. FERC*, 165 F.3d 992, 998, 1002-1004 (D.C. Cir. 1999)).

4. Commission Determination

21. The Commission rejects Gulf South's proposed competition clause. While it is true that "the Commission must accept a just and reasonable tariff proposal by a pipeline, regardless of whether other tariff provisions would also be just and reasonable,"²⁸ the pipeline still must, at minimum, provide a defensible argument in favor of its proposal. Gulf South has not shown that its proposed competition clause is a reasonable provision to be included in a *pro forma* service agreement.

22. Section 154.110 of the Commission's regulations²⁹ requires pipelines to include in their tariffs an unexecuted *pro forma* copy of each form of service agreement. That section requires that the *pro forma* service agreement "provide spaces for insertion of the name of the customer, effective date, expiration data and term. Spaces may be provided for the insertion of receipt and delivery points, contract quantity, and other specifics of each transaction as appropriate." Gulf South's proposed competition clause goes beyond setting forth the specific terms of the service to be provided by Gulf South to the shipper, and would instead require the shipper to agree as to the parties' motivations for executing the subject discounted or negotiated rate agreement. The Commission finds that such information is inappropriate for inclusion in a *pro forma* service agreement.

23. As noted above, Gulf South states that it generally will not enter into either a discounted or negotiated rate agreement that is not necessary to meet competition. It is not necessary for Gulf South to include this type of statement in its tariff to express its intent, as the Commission presumes that pipelines enter into discounted or negotiated rate agreements due to competition.³⁰ Further, as Gulf South acknowledges, there are times when the competition clause is not appropriate or does not reflect the intention of the shipper.

²⁸ *E.g.*, *Equitrans*, 148 FERC ¶ 61,250 at P 32.

²⁹ 18 C.F.R. § 154.110 (2015).

³⁰ *See, e.g. Rate Design Policy Statement*, 47 FERC ¶ 61,295, at 62,056-57 (1989) ("The Commission presumes that pipelines enter into discounted or negotiated rate agreements due to competition as a pipeline's economic interest requires it to always seek the highest rate possible from non-affiliated shippers.") *See also Southern Natural Gas Co.*, 65 FERC ¶ 61,347, at 62,829-30 (1993); *Iroquois*, 84 FERC ¶ 61,086, at 61,476 (2000); *Policy for Selective Discounting by Natural Gas Pipelines*, 113 FERC ¶ 61,173, at PP 100, 107 (2005).

24. Gulf South states that the competition clause does not change the burden of proof if it seeks a discount adjustment to its rate design volumes in a future NGA general section 4 rate case. Rather, Gulf South is concerned that its evidentiary trail may “go stale” prior to filing a rate case and that the proposed competition clause may help it to meet its evidentiary burden. This argument is not persuasive as Gulf South controls (subject to any settlement moratorium or “come back” provisions) when it files a rate case and the type of information that it includes in that rate case to support a discount or discount-type adjustment. Furthermore, Gulf South may, consistent with Commission policy, require shippers to provide documentation supporting any request for a discount, for example by requiring the shipper to fill out a questionnaire explaining why they require a discounted or negotiated rate,³¹ and Gulf South can record any other relevant facts under which it entered into a discounted or negotiated rate agreement. There is nothing preventing Gulf South from developing a better records retention policy so that all this information is available when it files its next rate case.

25. Gulf South states that it has the right to propose changes to its tariff and the Commission must accept just and reasonable tariff provisions. There is no dispute that Gulf South exercised its right to file a proposed change to its tariff in this docket. However, as explained above, Gulf South’s proposed competition clause is inconsistent with section 154.110 of the Commission’s regulations. Furthermore, in determining whether such proposed changes are in fact just and reasonable, it is within the Commission’s administrative discretion to ensure that jurisdictional tariffs are not cluttered with unnecessary provisions.³² While Gulf South assures in its answer that its proposal would not contravene the Commission’s well-established policy on the burdens of proof for obtaining discount or discount-type adjustments, these assurances were only necessary because its proposal creates unnecessary confusion on a well-settled policy.

26. For the reasons discussed above, the Commission finds that the competition clause has not been shown to be just and reasonable. Accordingly, the Commission directs Gulf South to make a compliance filing to delete the competition clause within 15 days of the date of this order.

³¹ *Trunkline Gas Co*, 90 FERC ¶ 61,017, at 61,087 (2000) (Opinion No. 441).

³² *See SFPP, L.P.*, 71 FERC ¶ 61,425, at 62,655 (1995). *See also Williston Basin Interstate Pipeline Co.*, 85 FERC ¶ 61,247, 62,029-30 (1998).

B. Multiple Rate Agreement Provision

27. Distributor Coalition notes that the proposed tariff language allowing Gulf South to enter into separate negotiated rate agreements under a single firm service agreement is not limited to fuel costs, as suggested by the transmittal letter, but encompasses a much broader category of costs. Because the proposed tariff language inappropriately seeks to allocate costs to individual customers outside of an NGA general section 4 rate case, Distributor Coalition requests that the proposed tariff language be rejected. However, if the Commission does not reject this aspect of Gulf South's filing, Distributor Coalition requests that the Commission clarify that Gulf South's multiple rate agreements do not necessarily reflect appropriate cost allocation.³³

28. UMDG states that it does not object to the inclusion of the phrase "including but not limited to surcharges" to the *pro forma* letter agreements for prospective application in new agreements. UMDG argues that the proposed language does not have any bearing on the language or the interpretation of any pre-existing agreement between Gulf South and other parties.³⁴

29. In response to Distributor Coalition's concern, Gulf South states that its proposal to enter into multiple discounted and negotiated rate letter agreements associated with a single service agreement will only apply to fuel costs. To clarify its intent, Gulf South proposes tariff language stating:

Negotiated fuel rates must be contracted under a separate Negotiated Rate Letter Agreement. If the negotiated rate under this letter agreement is limited to the fuel component, insert here: "Fuel Negotiated Rate Letter Agreement."

30. Gulf South's proposed revisions to its *pro forma* letter agreements relating to multiple rate agreements in a single service agreement and "including but not limited to surcharges" are accepted, subject to Gulf South refile the tariff records, within 15 days from the date of this order, to reflect the clarification provided in its June 7, 2016 answer. The Commission finds that this clarification, which limits the proposal to fuel surcharges, addresses the parties' concerns and accordingly accepts the proposal as just and reasonable.

³³ Distributor Coalition Protest at 10-11.

³⁴ UMDG Protest at 6-7.

The Commission orders:

- (A) Gulf South's tariff records are accepted for filing, effective August 1, 2016, subject to conditions, as more fully described above.
- (B) Gulf South is required to refile, within 15 days from the date of this order, the tariff records consistent with the discussion above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.