

157 FERC ¶ 61,164
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

November 30, 2016

In Reply Refer To:
Algonquin Gas
Transmission, LLC
Docket No. RP17-87-000

Algonquin Gas Transmission, LLC
P. O. Box 1642
Houston, TX 77251-1642

Attention: Janice K. Devers, General Manager,
Tariffs and Commercial Development

Dear Ms. Devers:

1. On October 27, 2016 Algonquin Gas Transmission LLC (Algonquin) filed a tariff record¹ pursuant to section 4 of the Natural Gas Act² (NGA) and the Commission's regulations,³ to reflect a negotiated rate between Algonquin and Footprint Power Salem Harbor Development LP (Footprint). For the reasons stated below, we accept the tariff record, effective November 1, 2016, as requested.
2. Algonquin states that the instant filing complies with a Commission order issued in Docket No. CP14-522-000,⁴ granting Algonquin certificate authorization to construct and operate a 1.2-mile lateral pipeline (Salem Lateral) to provide up to 115,000 dekatherms per day of firm natural gas service to Footprint under Rate Schedule

¹ Algonquin Gas Transmission, LLC, FERC NGA Gas Tariff, Algonquin Database 1, [22., Footprint Power Salem Harbor Devt - contract 510814, 0.0.0.](#)

² 15 U.S.C. § 717c (2012).

³ 18 C.F.R. §154.204 (2016).

⁴ *Algonquin Gas Transmission, LLC*, 151 FERC ¶ 61,118 (2015) (May 2015 Order).

AFT-CL.⁵ Algonquin further states that it has executed a firm service agreement and a negotiated rate agreement with Footprint, which will become effective on the service commencement date of the Salem Lateral pipeline. Algonquin states that the negotiated rate agreement includes a reservation charge derived using the estimated capital costs of the project, with the potential for that rate to be adjusted based on the final project costs.⁶ Algonquin states that the instant filing implements an adjusted reservation charge, based on updated capital costs for the Salem Lateral, in accordance with its agreement with Footprint.

3. Algonquin states that, as required by section 46 of the General Terms and Conditions of its FERC Gas Tariff, the proposed tariff record identifies and describes the applicable negotiated rate transaction with Footprint, including the exact legal name of the customer, the negotiated rates, the rate schedule, the contract term, and the contract quantities of the negotiated rate transaction. Algonquin adds that the instant negotiated rate transaction does not deviate in any material respect from the form of service agreement set forth in its tariff.

4. Public notice of the instant filing was issued on October 31, 2106. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.⁷ Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), all timely-filed motions to intervene and any unopposed motions to intervene out-of-time before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. On November 8, 2016, Footprint filed a comment.

5. In its comment, Footprint seeks additional and more detailed data regarding the costs that form the basis for its negotiated rate with Algonquin. Footprint states that although it received general costs updates during construction, it lacks data sufficient to determine whether the reservation charge that Footprint is obligated to pay reflects the actual capital costs Algonquin has incurred to construct the Salem Lateral. Specifically, Footprint questions the expenditure of approximately 12 percent of the total project costs in the last four to six weeks of the project.

6. Footprint acknowledges that under its negotiated rate agreement with Algonquin, it is obligated to pay a reservation charge that may reflect up to a 15 percent increase over the reservation charge that was computed based on an estimated capital cost of \$62.66

⁵ Rate Schedule AFT-CL is a firm transportation service for "closed laterals." Shippers under this rate schedule have no rights to receive service on any other portion of Algonquin's system and other shippers have no rights to receive service on the lateral.

⁶ Algonquin Transmittal letter at 2, n.4.

⁷ 18 C.F.R. § 154.210 (2016).

million originally set forth in that agreement. Footprint also concedes that the reservation charge that Algonquin has set forth in the negotiated rate agreement filed in the instant proceeding falls below this 15 percent cap set forth in the agreement, and it states that it intends to honor its commitment and pay such a rate. However, Footprint continues to assert that Algonquin has not provided sufficient information for it to determine whether the reservation charge that it is obligated to pay reflects the actual capital costs Algonquin incurred to construct the lateral facilities.

7. Moreover, Footprint also states that it recognizes its obligation, pursuant to a precedent agreement with Algonquin, not to interfere with or obstruct Algonquin's receipt of the regulatory authorizations required under the precedent agreement to develop the lateral pipeline. Footprint states that it does not take issue with the contractual obligations to which it agreed, and that it does not intend that its comments be viewed or construed as such interference or as a violation of the precedent agreement provisions or Algonquin's receipt of a NGA section 7 certificate for the subject facilities.

8. To support its claim, Footprint states Algonquin has been providing high level cost information throughout construction, and that Algonquin's expenses continued to track below its projections. Footprint states that before Algonquin filed the instant negotiated rate agreement, Algonquin informed Footprint that it would be filing for rates that would reflect the full \$67.0 million of its actual construction costs despite the fact that, a month before the facilities were declared in service, 12.2 percent of these costs had not been spent. Footprint states that Algonquin claimed that those costs would be incurred in just the last month of construction increasing its actual costs incurred from \$58.8 million as of September 30, 2016, to approximately \$67 million by the estimated in-service date of November 1, 2016. Footprint asserts that it requested that Algonquin provide additional information detailing the basis for the substantial increase in estimated cost accruals in the last days of construction of the Salem Lateral but that Algonquin did not provide the requested information.

9. Footprint states that it recognizes that Algonquin intends to file a cost report with the Commission approximately six months after the in-service date of the project where Algonquin will specify actual costs incurred for the Project. Footprint states that it is filing these comments in order to preserve its right to raise the issue concerning Algonquin's capital cost estimates. Footprint requests that in order to avoid unnecessary proceedings at a future point, Algonquin be required to provide additional information concerning its actual costs incurred in the instant proceeding. To that end, Footprint requests that the Commission direct Algonquin to provide additional data and information on how its capital costs were incurred. Footprint states that it would like to work with Algonquin to obtain information on the capital costs and therefore, in the alternative, Footprint states that it is willing to discuss its concerns with Algonquin in alternative dispute resolution discussions facilitated by the Commission or through other

avenues that the Commission determines would be helpful or to which Algonquin may otherwise be amenable.

10. On November 14, 2016, Algonquin filed an answer to these comments. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,⁸ answers to protests are prohibited unless otherwise ordered by the decisional authority. We will accept this answer because it provides information that will assist us in our decision-making process.

11. Algonquin states that it has fully complied with the terms of its agreement with Footprint. Algonquin points out that, as Footprint acknowledges, the parties agreed to base the negotiated transportation rate on the estimated cost of the project, subject to an adjustment to reflect the actual cost of the project up to a 15 percent cap.⁹ Algonquin states that the Footprint agreement specifies the updated cost information that Algonquin must use to calculate the adjusted reservation charge and authorizes Algonquin to update the charge prior to filing. Specifically, Algonquin states that the agreement provides that Algonquin calculate the adjusted reservation charge based upon "an updated cost report for the Project, substantially in the form of an amended Exhibit K."¹⁰ The original \$62.66 million capital cost estimate was set forth in Exhibit K to Algonquin's certificate application for the Salem Lateral, as required by the Commission's regulations.¹¹ Algonquin states that it provided an updated cost report to Footprint in the form of an amended Exhibit K as required by the agreement and used the updated capital costs from the cost report to calculate the adjustment.

12. Algonquin also notes that Footprint's filing runs afoul of its contractual obligation not to interfere with Algonquin's attainment of the necessary regulatory approvals for the project. Algonquin states that the subject agreement does not provide any right for Footprint to request additional cost information or to challenge the updated cost report in the form of an amended Exhibit K. Therefore, Algonquin states, by claiming that additional information is necessary, Footprint is attempting to unilaterally amend the agreement to insert new conditions and obligations, in violation of Footprint's obligation

⁸ 18 C.F.R. § 385.213(a)(2) (2016).

⁹ Algonquin Answer at 2 (citing May 2015 Order at P 24; Footprint Comment at 3, 4).

¹⁰ Algonquin Answer at 3. Algonquin submitted the original Exhibit K as part of its certificate application.

¹¹ 18 C.F.R. § 157.14 (a)(14) (2016).

under the Precedent Agreement to not interfere with authorizations necessary for Algonquin to perform its obligations under the Precedent Agreement.

13. Algonquin further claims that Footprint's challenge is inconsistent with the Commission's Negotiated Rate Policy Statement.¹² According to Algonquin, that policy only requires that the negotiated rate be filed, and the Commission does not evaluate the agreed upon rate because customers are protected by the availability of the recourse rate.¹³ Algonquin thus argues that Footprint does not have any rights to claim the agreed upon negotiated rate is not just and reasonable.

14. Algonquin states that although it has exceeded the requirements of the Footprint agreement, in the interest of customer relations it is willing to continue its dialogue with Footprint regarding the Salem Lateral project costs. Algonquin maintains, however, that the cost information requested by Footprint is not relevant to the Commission's consideration of the negotiated rate in the instant filing and it asserts that the Commission's action should not be delayed for such extraneous information. Moreover, Algonquin asserts that Footprint's alternative request for dispute resolution is not appropriate because, as discussed above, Footprint has failed to identify a dispute with respect to the terms of the Footprint agreement or Commission policy.

15. The Commission accepts the proposed contract and tariff record to be effective November 1, 2016, as proposed. As argued by Algonquin, in accepting a negotiated rate arrangement the Commission will not look behind the calculation of a negotiated rate because the parties agree to it through arm's length negotiation and the shipper is

¹² Algonquin Answer at 4, (citing Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services, Statements of Policy and Comments, 74 FERC ¶ 61,076, at 61,240 (1996), *order on clarification*, 74 FERC ¶ 61,194 (1996), *order on reh'g*, 75 FERC ¶ 61,024 (1996)).

¹³ Algonquin Answer at 5, (citing, *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 2 (2003)); *see also Wyoming Interstate Co., Ltd.*, 117 FERC ¶ 61,150, at P 9 (2006) (citing *Negotiated Rate Policy Statement*, 74 FERC ¶ 61,076, at 61,238-42 (1996) (“The Commission relies on the availability of the recourse rates to prevent pipelines from exercising market power by assuring that the customer can fall back to the just and reasonable tariff rate if the pipeline unilaterally demands excessive prices or withholds service”).

additionally protected by the availability of a recourse rate.¹⁴ In the instant case, the Commission is accepting a contract statement of terms and conditions pursuant to section 4 of the NGA. The Commission has previously found if a negotiated rate shipper has an issue with the costs included in its negotiated rate, the appropriate remedy is not a review of those costs in the NGA section 4 proceeding in which the pipeline files the negotiated rate, but rather a breach of contract action or a section 5 complaint with the corresponding burden of proof.¹⁵

By direction of the Commission.

Kimberly D. Bose,
Secretary.

¹⁴ As the Court found in *Iberdrola Renewables v. FERC*, 597 F.3d 1299, at 1304-05 (D.C. Cir. 2010):

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

¹⁵ *Alliance Pipeline LP*, 145 FERC ¶ 61,149, at P 11 (2013). The Commission notes, as acknowledged by Footprint, that Algonquin will file its actual project cost data within six months of the in-service date of the facilities. See Footprint comments at 7.