

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Columbia Gas Transmission Corporation

Docket Nos. RP06-311-001
and 002

ORDER ON REHEARING AND COMPLIANCE

(Issued October 17, 2006)

1. On June 15, 2006, Columbia Gas Transmission Corporation (Columbia) filed a request for rehearing of an order issued in this proceeding on May 16, 2006.¹ The May 16, 2006 Order accepted tariff sheets revising Columbia's *pro forma* PAL Service Agreement subject to the condition that Columbia file revised tariff sheets to delete language regarding eligibility for discount rates in Appendix A of the *pro forma* agreement that the Commission found to effectively constitute an unjust and unreasonable penalty.² The May 16, 2006 Order also stated that Columbia may file to propose a less onerous penalty. On May 26, 2006, Columbia filed revised tariff sheets in Docket No. RP06-311-001 to comply with the May 16, 2006 Order and to propose alternative language in the *pro forma* agreement. For reasons discussed below, the Commission will accept the compliance filing and deny rehearing.

¹ *Columbia Gas Transmission Corporation*, 115 FERC ¶ 61,181 (2006) (May 16, 2006 Order).

² The tariff sheets were conditionally accepted, effective May 19, 2006, as proposed by Columbia in their filing.

Background

2. On April 19, 2006, Columbia filed to revise its *pro forma* PAL Service Agreement by consolidating certain terms in a new Appendix A. The PAL Rate Schedule provides for interruptible park or loan service at a volumetric rate charged on a daily basis. For discount rate PAL service agreements, Appendix A included the following language that the Commission found to be unjust and unreasonable in the May 16, 2006 Order:

Any service(s) outside the defined Schedule for Service terms will result in Shipper being charged the maximum applicable tariff rate on all Account Balances from the Term Commencement Date through the Term Ending Date, unless otherwise mutually agreed upon by Transporter and Shipper and set forth in a revised Appendix A.³

3. Citing similar action recently taken in *Stingray Pipeline Company, L.L.C.*,⁴ the Commission determined that the proposed language constitutes an unjust and unreasonable penalty because, depending on the length of the term, a PAL shipper could be required to pay the difference between the discount rate and the maximum rate for several years of service during which no violation occurred. However, the Commission stated that, when it makes its compliance filing, Columbia may propose a less onerous penalty that is related to the specific transaction, level of service and period of time during which the violation occurred.

Request for Rehearing

4. On rehearing, Columbia argues that the Commission acted in an arbitrary and capricious manner and contrary to Commission precedent when it rejected the proposed penalty language in Appendix A. Columbia states that Commission policy has permitted parties to agree to conditions for qualifying for a discounted rate, provided that the maximum rate would apply if the conditions were not met.⁵ Columbia further states that the proposed language is not a penalty provision, drawing an analogy to the

³ Sheet No. 539 as conditionally accepted in Columbia's April 19, 2006 filing in Docket No. RP06-311-000.

⁴ 115 FERC ¶ 61,161 (2006), *clarification granted* 117 FERC ¶ 61,028 (2006). *Stingray* concerned provisions that would eliminate discounts for violation of gas dedication provisions of *Stingray's* transportation contracts.

⁵ Request for Rehearing at 4 (citing *Gulf South Pipeline Co., LP*, 105 FERC ¶ 61,117 at P 9 (2003) (October 23, 2003 *Gulf South* Letter Order).

Commission's recognition that requiring a shipper that engages in unauthorized overruns to pay the maximum interruptible transportation rate is not a penalty.⁶ Columbia states that it is well-settled that pipelines do not have to provide shippers with discounts in lieu of charging the maximum applicable tariff rate. Given this, it asserts, it is hard to understand how application of the maximum just and reasonable tariff rate to PAL service when the shipper acts in contravention of its bargained-for PAL rights is a penalty. Columbia asserts that it is merely seeking to impose the maximum tariff rate for service that is rendered in a manner that is not compliant with the agreed-upon contract terms, where such non-compliance is caused by the Rate Schedule PAL shipper's failure to adhere to its contractual bargain.⁷

5. In its request for rehearing, Columbia reiterates a hypothetical example from its original pleadings in the case to explain its position. It states, assume a PAL service agreement provides for a shipper to receive PAL service at a 5 cent discounted rate by scheduling a minimum/maximum of 10,000 Dth/D for delivery to Columbia (parking) during the period of June 1-3, and for unparking those volumes by scheduling the same minimum/maximum volumes for the period December 1-3. Columbia states that if the shipper nominated and scheduled the agreed-upon volumes at the agreed-upon times, it would receive the discount. If, however, the shipper failed to park the volumes during the June 1-3 parking period, and later parked the volumes sometime during the June-December period, Columbia states that the shipper would not receive the discount and instead would pay the maximum rate. Columbia asserts that this type of discount is customary in the natural gas industry and that the Commission has recognized this.

Discussion of the Request for Rehearing

6. The Commission denies rehearing. As proposed in its April 19, 2006 filing, the language in Appendix A of the proposed *pro forma* PAL service agreement is overly broad and effectively constitutes an unjust and unreasonable penalty. It would require a PAL shipper that violated its service agreement at any point during the term of the agreement to retroactively pay the difference between the discounted rate and the

⁶ Request for Rehearing at 6, citing *Gulf South Pipeline Co., LP*, 98 FERC ¶ 61,278 at 62,177-178 (2002) (“Shippers have no specific right to overrun their contractual entitlements. Gulf South’s proposal is simply to charge its maximum IT rate for such occurrences. We do not believe such a charge should be viewed as a penalty; it is a maximum rate charged for service rendered without a contract.”)(March 14, 2002 *Gulf South Order*).

⁷ Request for Rehearing at 6.

maximum tariff rate from the beginning of term when the shipper was otherwise in compliance with the agreement. The result of this language is to ensure that the shipper acts within the terms of its agreement by imposing what is effectively a penalty for non-compliance that applies during non-critical periods. The Commission generally views tariff language imposing monetary or other consequences, such as confiscation of gas, in order to ensure compliant shipper behavior to be penalties. The March 14, 2002 *Gulf South* Order does not support Columbia's claim that its proposal does not effectively result in a penalty being assessed.⁸ In that proceeding, the company proposed to eliminate its unauthorized overrun penalty during normal operating conditions and proposed to charge its maximum IT rate as an unauthorized overrun penalty.⁹ The Commission responded to protests seeking a requirement that Gulf South credit the proceeds as penalty revenues by stating that the unauthorized overrun charge was not a penalty but rather a charge for using transportation services without a contract, consistent with the Commission's policy on authorized overrun services. Accordingly, since the IT rate was a rate for an unauthorized service separate and apart from the firm service for which the shipper had contracted, the revenues did not have to be credited to its customers. In contrast, here, Columbia continues to treat the service as being provided under the same contract, but at a different rate when conditions warranting the discount rate are not met. Accordingly, the Commission's ruling in that case is not relevant to the central issue here, which is whether the otherwise applicable maximum rate may be required to be paid on a retroactive basis for a discount rate service even during past periods when the shipper was in compliance with its agreement. What constitutes an unjust and unreasonable penalty as opposed to a proper application of the foregoing Commission policies for failure to meet conditions for discounts is clarified further in the discussion that follows regarding Columbia's hypothetical.

7. Columbia's hypothetical reflects a misunderstanding of what the Commission found onerous about Columbia's proposed language. In Columbia's hypothetical, the shipper failed to park its gas during the June 1-3 window established for that purpose. When it later parked the gas, say in July, it had not complied with the requirements of the discount from that point forward. Contrary to what Columbia apparently believes, it is reasonable and consistent with the ruling of the May 16, 2006 Order to begin billing at the full maximum rate for the remainder of the period the gas remains parked. The discount would not apply to any gas parked during any period other than the agreed-upon parking period. That would not constitute a penalty. Assume, however, that the shipper appropriately parked the agreed-upon volumes of gas during the June 1-3 parking period,

⁸ *Gulf South Pipeline Co., LP*, 98 FERC ¶ 61,278 (2002).

⁹ *Id.* at 62,177.

left the gas parked for the contract period through the end of November, but then failed to withdraw the gas during the December 1-3 unparking period. In that instance, Columbia's proposal would unreasonably and retroactively charge the shipper for the difference between the maximum rate and the agreed-to discount rate for the entire prior period of the contract back to the June 1-3 parking period despite the fact that the shipper was fully compliant with the contract during that period.¹⁰ That would be the type of unreasonable retroactive elimination of a discount that the Commission rejected in the May 16, 2006 Order.¹¹ As discussed below, we will accept Columbia's alternative proposal that reasonably cures the penalty aspect of its original proposal by removing the discount only during such periods that the conditions for obtaining the discount are not met.

8. Accordingly, Columbia reads too much into the October 23, 2003 *Gulf South* Letter Order.¹² In that order, the Commission did not deal with the instant issue here of whether to permit the retroactive removal of a discount applicable to periods when the shipper was compliant with the conditions of obtaining the discount rate. There, in the October 23, 2003 *Gulf South* Letter Order, the Commission addressed the issue of

¹⁰ Its existing tariff already governs prospective treatment of the violation of the contract conditions for the period starting December 4. Section 5(b) of the PAL Rate Schedule provides that, unless the parties mutually agree to an extended time frame and/or to modify the terms of the agreement, in the event parked quantities remain in Columbia's system at the expiration of the contract term, Columbia can require their removal and, if not so removed, may confiscate the gas. Further, section 5(b) provides that loaned volumes not returned within the specified time frame shall be sold to the shipper at 150 percent of the spot market price as defined in that section. See Third Revised Sheet No. 229 to Columbia's FERC Gas Tariff, Second Revised Volume No. 1.

¹¹ There are other permutations that would have to be dealt with on a case-by-case basis but applying the same principle that the discount rate should apply during periods that the conditions of the discount are met. For example, if the shipper withdrew (unparked) a portion of the gas prematurely before the December 1-3 period, it would lose the discount for the remaining parking service being provided relative to the remaining parked volumes. But if the shipper restored the volumes to the full agreed-to 30,000 Dth level later during the contract period, for example in November, the discount rate should resume on a prospective basis. Alternatively, Columbia may propose language permitting it to terminate the PAL service agreement such as in circumstances where the shipper is repeatedly violating the park and loan service agreement conditions.

¹² 105 FERC ¶ 61,117 (2003).

whether conditions Gulf South proposed could allow negotiation of service conditions. The Commission simply observed that Commission policy requires the conditions for the grant of a PAL discount for specific injection and withdrawal periods must be transparent and set forth in the tariff and that such conditions are permissible only if they affect the rate and not the service itself.¹³ The May 16, 2006 Order found the proposed language objectionable because it could be imposed when the shipper was in compliance with the terms of its agreement for obtaining the discount.

9. Therefore, for the foregoing reasons, we deny rehearing.

Compliance Filing

Summary of the Filing

10. On May 26, 2006, Columbia filed revised tariff sheets¹⁴ in Docket No. RP06-311-001 to comply with the May 16, 2006 Order along with proposed alternative language consistent with the Commission's discussion of the foregoing issue, to be effective May 19, 2006. The May 16, 2006 Order required Columbia to delete language from Sheet No. 539 that constituted an unreasonable penalty provision, but also stated that Columbia may propose a less onerous penalty that is related to the specific transaction, level of service and period of time during which the violation occurred.

11. In its compliance filing, Columbia deleted the objectionable language and proposes the following alternative language on Sheet No. 539:

If quantities exceed the maximum daily quantities or do not meet the minimum daily quantities agreed to on the above Schedule for Service for any day, the maximum Account Balance Charge set forth in the Tariff from time to time shall apply to the account balance on that day. In no event is Transporter obligated to provide service under this Service Agreement for time periods outside the above term commencement and ending dates.

Sheet No. 540 adds language reciting the date Appendix A would be executed and provides signature fields.

¹³ *Id.* at P 9.

¹⁴ Third Revised Sheet No. 539 and First Revised Sheet No. 540 to FERC Gas Tariff, Second Revised Volume No. 1.

12. In its compliance filing, Columbia states that it believes it has complied with the Commission's May 16, 2006 Order and that it is completely reasonable to require a PAL Shipper that acts in contravention of the agreed-upon Schedule for Service on a particular day to lose its discount for that day.¹⁵

Notice

13. Notice of Columbia's compliance filing was issued on June 1, 2006, with comments and protests due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2006). No protests or comments were filed.

Discussion

14. The Commission finds that Columbia has complied with the requirement to remove language rejected by the May 16, 2006 Order. Further, although the Commission left open an option for Columbia to propose a less onerous "penalty," the Commission finds reasonable the proposed revisions specifying that the PAL maximum rate will only be charged on the actual day and for each day that the PAL shipper violates the conditions of its discount. It is not a penalty as it constitutes an appropriate condition of eligibility for a discount rate. Therefore, Columbia is not obligated to credit the increased revenues that may result from the operation of that provision. Accordingly, for good cause shown, the Commission waives the 30-day notice requirements of the Natural Gas Act to permit the revised tariff sheets to be accepted effective May 19, 2006, as proposed.

The Commission orders:

(A) Rehearing of the Commission's May 16, 2006 Order is denied.

(B) The tariff sheets identified in footnote no. 14 are accepted, to be effective May 19, 2006.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁵ Compliance Filing at 2 (*citing Stingray Pipeline Co., L.L.C.*, 115 FERC ¶ 61,161 (2006)).