

111 FERC ¶ 61,003
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Algonquin Gas Transmission, LLC

Docket Nos. RP00-70-007
RP00-70-008
RP00-70-009

ORDER REJECTING AND ACCEPTING TARIFF SHEETS SUBJECT TO
CONDITIONS

(Issued April 1, 2005)

1. In three separate, but related, filings on March 2, 2005, March 11, 2005, and March 15, 2005, Algonquin Gas Transmission, LLC (Algonquin) filed tariff sheets to implement a number of negotiated rate agreements with customers representing approximately 90 percent of Algonquin's contract demand.¹ Algonquin requests waiver of the Commission's notice requirements to permit the tariff sheets to become effective April 1, 2005. The Commission will reject certain tariff sheets as moot and will grant the requested waiver and accept the other tariff sheets to become effective April 1, 2005, subject to conditions.

Summary of Algonquin's Filings

2. On March 2, 2005, Algonquin filed tariff sheets to implement negotiated rate agreements reached as a result of negotiations with certain of Algonquin's customers.² According to Algonquin, the negotiated rate agreements provide each of these customers with a reduction in their existing rates without the expense associated with litigation of

¹ See Appendix.

² Algonquin's March 2, 2005 filing reflects the terms of the negotiated rate agreements with (1) Connecticut Natural Gas Corporation, (2) the Southern Connecticut Gas Company; (3) Northern Utilities, Inc.; (4) Bay State Gas Company; (5) Yankee Gas Services Company; (6) NSTAR Gas Company; (7) New England Gas Company – North Attleboro; (8) New England Gas Company – Fall River; and (9) New England Gas Company – Rhode Island.

numerous controversial issues. Algonquin states that, to provide rate certainty during the negotiated rate term (April 1, 2005 through December 31, 2008), the customers may not initiate or support a request for a rate review proceeding under section 5 of the Natural Gas Act (NGA) with respect to Algonquin's rates, including its recourse rates and fuel retention methodology.³ The negotiated rate shippers may, however, elect to terminate their respective contracts if a section 5 proceeding is initiated by other shippers on Algonquin's system. Also, during the negotiated rate term, Algonquin will not file a new section 4 rate case seeking to change its recourse rates. Algonquin states that it will make similar negotiated rate agreements available to shippers that are similarly situated.

3. Algonquin's proposed tariff sheets also include language that provides that the customers who are subject to these negotiated rates will only receive the negotiated rate

³ For example, Algonquin's Original Sheet No. 60A-60B, Fifth Revised Volume No. 1, Note 7 (Bay State Gas Company Negotiated Rate Agreement) states:

In the event that a Section 5 rate review proceeding is initiated on Algonquin with respect to rates or with respect to the [Fuel Reimbursement Quantity] FRQ methodology, Algonquin will be free to defend and to take any positions necessary to defend any such rate review, including the filing of a new Section 4 rate case by Algonquin. These negotiated rates shall continue to apply during the Negotiated Rate Term in the event that a proceeding is initiated under Section 5 of the Natural Gas Act on Algonquin with respect to rates or with respect to the FRQ methodology, or Algonquin initiates a proceeding under Section 4 of the Natural Gas Act in response to any such Section 5 filing, except that Algonquin and Customer each shall have the right to issue a notice of termination for these negotiated rates at any time prior to the date of a final order in such Section 5 or such Section 4 proceeding. Upon giving notice of termination, (1) Algonquin and Customer shall be free to take any position with respect to the issues in such proceeding, and (2) termination of these negotiated rates shall be effective as of the earlier of the effective date or any change in rates pursuant to such Section 5 proceedings or the date of the final Commission order in such Section 4 proceeding. During the Negotiated Rate Term, Customer shall not initiate a request for a rate review proceeding under Section 5 on Algonquin with respect to rates or FRQ methodology. During the Negotiated Rate Term, except as provided in this footnote 7, Customer shall not support a request for a rate review proceeding under Section 5 on Algonquin with respect to rates or FRQ methodology. During the Negotiated Rate Term, except as otherwise provided in this footnote 7, Algonquin shall not file a Section 4 rate case seeking to change its recourse rates.

at the receipt and delivery points specified in the contracts. If the shipper uses a different point, it must pay the applicable recourse rate.

4. On March 11, 2005, Algonquin filed additional tariff sheets to implement negotiated rate agreements it reached with an additional seven customers.⁴ Subsequently, on March 15, 2005, Algonquin filed tariff sheets to implement negotiated rate agreements with two additional customers.⁵ According to Algonquin, with these additional customers, approximately 90 percent of its eligible contracts with customers are subject to negotiated rate agreements with terms comparable to those first reflected in its March 2, 2005 filing.⁶ The March 11, 2005 and March 15, 2005 filings reflect the same provisions concerning the waiver of NGA section 4 and section 5 rights as the March 2, 2005 filing.

Public Notice, Interventions and Protests

5. Notice of Algonquin's March 2, 2005, March 11, 2005, and March 15, 2005 filings was issued with interventions and protests due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 385.210 (2004). Pursuant to Rule 214, 18 C.F.R. § 385.214, all timely-filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late

⁴ In the March 11, 2005 filing, Algonquin added the following customers: (1) United States Gypsum Company; (2) Middleborough, MA, Gas and Electric Department; (3) the City of Norwich, CT, Department of Public Utilities; (4) Central Hudson Gas & Electric Corporation; (5) Amerada Hess Corporation; (6) Lake Road Generating Company, L.P.; and (7) Sprague Energy Corporation.

⁵ The March 15, 2005 filing includes Boston Gas Company D/B/A KeySpan Energy Delivery New England and Colonial Gas Company D/B/A KeySpan Energy Delivery New England.

⁶ On March 24, 2005, Algonquin filed tariff sheets in Docket No. RP00-70-010 to implement negotiated rate agreements with Milford Power Limited Partnership and PPL EnergyPlus, LLC. In its transmittal letter to that filing, Algonquin states that, with the filing of these of these negotiated rate agreements, approximately 95 percent of the eligible contrasts with its customers are now subject to negotiated rate agreements on terms comparable to those first reflected in the March 2, 2005 filing. On March 28, 2005, Algonquin filed tariff sheets in Docket No. RP00-70-011 to implement a negotiated rate agreement with Northeast Energy Associates. Both filings are pending Commission action.

intervention at this stage will not disrupt this proceeding or place additional burdens on existing parties. New England Local Distribution Companies (New England LDCs) and Keyspan Delivery Companies (Keyspan) filed comments in support of the instant filings.⁷ Nominally, New England LDCs' comments in support were filed only in response to Algonquin's March 2, 2005 filing in Docket No. RP00-70-007. Keyspan filed its comments in Docket No. RP00-70-007, but directed its comments in support specifically towards Algonquin's March 15, 2005 filing in Docket No. RP00-70-009. The Commission will consider these pleadings in the context of all three filings.

Discussion

6. Algonquin has filed tariff sheets to implement non-conforming agreements with the Commission. In particular, Algonquin's agreements contain provisions that limit the rights of the customers to initiate or support an NGA section 5 investigation of Algonquin's recourse rates during the term of the agreement. Moreover, Algonquin agrees not to initiate a rate proceeding pursuant to section 4 of the NGA during the term of the agreement.

7. Such terms represent material deviations from Algonquin's form of service agreements and therefore must be examined by the Commission. The Commission has held that material deviations fall into two general categories: (1) material deviations that must be prohibited because they present a significant potential for undue discrimination among shippers,⁸ and (2) material deviations that can be permitted without undue risk of discrimination. One type of material deviation that is not generally permitted is negotiated terms and conditions of service different from those provided other customers. The Commission generally finds that such provisions would be permissible only if the pipeline modifies its tariff to make the provision available to its other customers.⁹ Other

⁷ On March 14, 2005, Northeast Energy Associates (Northeast) filed a protest in Docket No. RP00-70-007. On March 23, 2005, Northeast also file a protest in Docket No. RP00-70-008. Northeast withdrew both of these protests on March 25, 2005.

⁸ *CenterPoint Energy Gas Transmission* 104 FERC ¶ 61,281 at PP 17-18 (2003), citing *Tennessee Gas Pipeline Co.*, 97 FERC ¶ 61,225 at 62,029 (2001); *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 at 62,001-02, and 62,004 (2001); *ANR Pipeline Company*, 97 FERC ¶ 61,222 at 62,012-13 (2001).

⁹ For example, the Commission required that all agreements having an early termination provision be placed in the pipeline's general terms and conditions authorizing such a clause because of the danger of discrimination. See *ANR Pipeline Co.*, 97 FERC ¶ 61,222 at 62,012-13 (2001) and *ANR Pipeline Co.*, 97 FERC ¶ 61,223 at 62,017 (2001).

clauses are deemed to present such a danger of discrimination or are so contrary to Commission policy that they are rejected with finality.¹⁰

8. Algonquin's filing raises the issue of the extent to which a pipeline may negotiate with its customers to limit their statutory rights under NGA section 5 to challenge the justness and reasonableness of the pipeline's recourse rates. Despite the authority cited by Algonquin, in fact, the Commission has not permitted a pipeline to include in a negotiated rate agreement a provision limiting the right of its customers to initiate or support an NGA investigation into the pipeline's generally applicable recourse rates under NGA section 5, the type of clause Algonquin seeks to include in the instant filing. However, as shown by the cases cited by Algonquin, the Commission has permitted the pipeline to reach an agreement with its customer that includes a provision that the customer will not challenge the rate obtained by virtue of the negotiated rate agreement pursuant to its section 5 rights.

9. The Commission's reasoning for refusing to permit pipelines to forestall investigation of all of its recourse rates by virtue of a negotiated rate agreement is grounded in the origins of its negotiated rate policies. Given the market power of the pipelines, the Commission has been reluctant to allow pipelines to limit an individual shipper's statutory rights under NGA section 5 to challenge the justness and reasonableness of the pipeline's rates, or condition benefits of lower rates on a shipper giving up rights under NGA section 5. Moreover, the Commission has been particularly reluctant to sanction a NGA section 5 waiver provision in a particular transaction, where the customer waives its NGA section 5 rights not only as to the rate for its particular transaction at issue, but as to the pipeline's rates for all services.¹¹

10. The Commission has been concerned that while shippers may have some leverage in negotiating specific rates and services in some markets, this leverage does not necessarily extend to the broader range of services contained in the pipeline's recourse tariffs. As a general matter, the Commission does not believe that the pipeline should be permitted to condition offering a negotiated for one service for which a shipper may have alternatives on the shipper's limiting its section 5 rights to challenge the pipeline's rates for other services over which the pipeline does have market power. Secondly, the

¹⁰ *CenterPoint Energy Gas Transmission Co.*, 104 FERC ¶ 61,281 at PP 22, 31, 42-52; *see CenterPoint Energy Gas Transmission Company*, 102 FERC 61,059 (2003), *order on reh'g*, 103 FERC ¶ 61,228 (2003) (rejecting a provision for sharing capacity release or marketing revenues).

¹¹ For example, in *Gulf South Pipeline Co.*, 98 FERC ¶ 61,318 (2002), the section 5 waiver provision only applied to the rates "established in this agreement."

Commission has been troubled that a pipeline may offer favorable rates solely to its larger customers with greater resources to litigate the justness and reasonableness of the pipeline's recourse rates, in return for their agreement not to challenge the pipeline's recourse rates and rate structure. However, the smaller customers with less resources and/or alternatives would not receive the benefit of the deal offered to the large customers. In short, the Commission has been concerned that such waiver provisions increase the risk of undue discrimination among customer classes.

11. In the particular circumstances of this case, however, the Commission will accept Algonquin's proposed negotiated rate agreements, including the section 5 waiver conditions, subject to the conditions set forth below. The instant negotiated rate agreements benefit the subject shippers by reducing the rates they are currently required to pay pursuant to their existing contracts without the time and expense of litigation. In addition, the Commission's usual concerns about waiver of section 5 rights are mitigated by several features of these agreements, and are further resolved by the additional conditions we place on our acceptance of the agreements. First, in regard to the Commission's concerns regarding undue rate discrimination among customer classes, Algonquin has offered its reduced rates on similar terms to customers comprising approximately 90 percent of its contract demand and states that it is cognizant that there may be other shippers on its system that are similarly situated and that it intends to offer such shippers negotiated rate agreements with the same terms as those reflected in the subject agreements.¹² Specifically, Algonquin provides transportation service under rate schedules AFT-1, AFT-E, AFT-1S and AFT-ES. The negotiated rate in the negotiated rate agreements under each rate schedule is identical for each negotiated rate shipper. Second, while the negotiated rate agreements limit the customer's NGA section 5 rights with respect to all services, Algonquin, in reciprocal fashion, has also proposed to give up its right to request rate modifications pursuant to section 4 of the NGA. Third, negotiated rate shippers may elect to terminate their respective contracts if a section 5 proceeding is initiated by other shippers on the system and participate fully in that section 5 proceeding. Fourth, Algonquin's proposal does not affect the quality of service that it will provide.

12. However, to further assure that these agreements are not unduly discriminatory, the Commission will require Algonquin to offer the same identical negotiated rates it has given to the negotiated rate shippers under each of the rate schedules to all similarly situated shippers. This will fully mitigate the potential for undue discrimination.

¹² The Commission notes that the March 11, 2005 and March 15, 2005 filings did not include this assurance.

13. Lastly, while Algonquin's statement that its proposed negotiated rate is limited to the receipt and delivery points designated in its proposed tariff sheets would usually be acceptable, as relating to a single customer or transaction, in the instant case it constitutes a nearly system-wide elimination of the shipper's rights to flexible receipt and delivery points as well as segmented points. This occurs because any shipper that desires to exercise its right to flexible receipt and delivery points or segmented points not currently contemplated by the tariff as a point to which the negotiated rate is offered, will be required to pay the higher recourse rate for access to such points. Therefore, Algonquin's restriction of its negotiated rate to designated points has the effect of locking in shippers to certain designated points and inhibiting their exercise of flexible receipt and delivery points as well as segmented rights.

14. In Order No. 636, the Commission held that flexible receipt and delivery points and segmented capacity was necessary to improve the efficiency of the market and provide captive customers with the opportunity to reduce their cost of holding long-term pipeline capacity while continuing to protect against the exercise of market power.¹³ Therefore, the system-wide restrictions undermine and negate the fundamental regulatory framework constructed under Order Nos. 636 and 637. Accordingly, in order to encourage and protect the continued use of flexible receipt and delivery points and segmented capacity, the Commission will require that Algonquin revise the underlying service agreements and the filed tariff sheets to permit each customer subject to a negotiated rate to retain that rate while utilizing any receipt and delivery point available for use under that same rate schedule.

15. Under section 154.110 of the Commission's regulations, pipelines must file a form of service agreement in their tariffs.¹⁴ Sections 154.1(d) and 154.112(b) require service agreements which deviate in any material aspect from the form of service agreement to be filed with the Commission, and to be referenced in FERC Volume No. 1.¹⁵ Despite

¹³ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations*, Order No. 636, 57 Fed. Reg. 13,267 (Apr. 16, 1992), FERC Stats. & Regs., Regulations Preambles [Jan. 1991 – June 1996] 30,939, at 30,428, 30,420-21 (Apr. 8, 1992), Order No. 636-A, 57 Fed. Reg. 36,128 (Aug. 12, 1992), FERC Stats. & Regs., Regulations Preambles [Jan. 1991 – June 1996] 30,950 at 30,559 n. 151 (Aug. 3, 1992), Order No. 636-B, 61 FERC 61,272, at 61,997 (1992).

¹⁴ 18 C.F.R. § 154.110 (2004).

¹⁵ 18 C.F.R. §§ 154.1(d), 154.112(b) (2004).

material deviations from its form of service agreement, Algonquin failed to file the non-conforming subject negotiated rate agreements with the Commission. Algonquin has also failed to file a tariff sheet referencing the subject agreements as non-conforming or as deviating in a material aspect from the form of service agreement. In accordance with sections 154.1(d) and 154.112(b), the Commission directs Algonquin to file its non-conforming negotiated rate agreements, as revised within the body of this order, with the Commission. The Commission further orders Algonquin to file a tariff sheet listing these agreements as non-conforming, in accordance with section 154.112(b).

16. Algonquin requests a waiver of the Commission's 30-day prior notice requirement to allow an April 1, 2005 effective date for its proposed tariff sheets.¹⁶ No party opposes this request. For good cause shown, the Commission will grant Algonquin's request for waiver of the effective date.

The Commission orders:

(A) Certain of Algonquin's tariff sheets are rejected as moot and certain of its tariff sheets are accepted, subject to conditions as discussed in the body of this order, as listed in the Appendix, to become effective on April 1, 2005.

(B) Algonquin's requests for waiver of the Commission's 30-day notice requirement as set forth in 18 C.F.R. § 154.207 (2004) are hereby granted, as discussed within the body of this order.

(C) Algonquin must file each non-conforming negotiated rate agreement described in its March 2, 2005, March 11, 2005, and March 15, 2005 filings, modified as discussed within the body of this order, within 30 days of the date of this order.

(D) Algonquin must file a tariff sheet listing these agreements as non-conforming within 30 days of the issue date of this order.

¹⁶ 18 C.F.R. § 154.207 (2004).

Docket No. RP00-70-007, *et al.*

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(E) Algonquin must offer each negotiated rate in the subject filings to all similarly situated existing and new customers, at all points available to such customers, under the same rate schedule, and report back the status of these offers to its existing customers to the Commission within 90 days of the date of this order.

By the Commission. Commissioner Kelly concurring with a separate statement to be issued later.

(S E A L)

Linda Mitry,
Deputy Secretary.

APPENDIX**Algonquin Gas Transmission, LLC
FERC Gas Tariff, Fifth Revised Volume No. 1****Accepted Effective April 1, 2005****Docket No. RP00-70-007**

Original Sheet No. 60
 Original Sheet No. 60A
 Original Sheet No. 60B
 Original Sheet No. 61
 Original Sheet No. 61A
 Original Sheet No. 61B
 Original Sheet No. 62
 Original Sheet No. 62A
 Original Sheet No. 62B
 Original Sheet No. 64
 Original Sheet No. 65
 Original Sheet No. 65A
 Original Sheet No. 65B
 Original Sheet No. 66
 Original Sheet No. 66A
 Original Sheet No. 66B
 Original Sheet No. 67
 Original Sheet No. 67A
 Original Sheet No. 67B
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 Original Sheet No. 68A
 Original Sheet No. 68B
 Original Sheet No. 68C

Docket No. RP00-70-008

Substitute Original Sheet No. 63
 Substitute Original Sheet No. 63A
 Substitute Original Sheet No. 63B
 Substitute Original Sheet No. 64A
 Substitute Original Sheet No. 64B
 Original Sheet No. 69
 Original Sheet No. 69A
 Original Sheet No. 70
 Original Sheet No. 70A
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Original Sheet No. 71A
 Original Sheet No. 71B
 Original Sheet No. 72
 Original Sheet No. 72A
 Original Sheet No. 72B
 Original Sheet No. 73
 Original Sheet No. 73A
 Original Sheet No. 73B
 Original Sheet No. 74
 Original Sheet No. 74A
 Original Sheet No. 75
 Original Sheet No. 75A

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Original Sheet No. 76
 Original Sheet No. 76A
 Original Sheet No. 76B
 Original Sheet No. 77
 Original Sheet No. 77A
 Original Sheet No. 77B
 Sheet Nos. 78-89

Rejected as Moot:**Docket No. RP00-70-007**

Original Sheet No. 63
 Original Sheet No. 63A
 Original Sheet No. 63B
 Original Sheet No. 64A
 Original Sheet No. 64B
 Sheet Nos. 69-89

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Sheet Nos. 76-89

