

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 3, 2007

In Reply Refer To:
Mississippi Canyon Gas Pipeline, LLC
Docket Nos. RP06-312-001 and
RP06-312-000

Mississippi Canyon Gas Pipeline, LLC
1100 Louisiana Street, Suite 3300
Houston, TX 77002

Attention: Cynthia A. Corcoran
FERC Compliance Officer & Senior Counsel

Reference: Revised Tariff Sheets Reflecting Non-Conforming Transportation
Agreements

Ladies and Gentlemen:

1. On April 19, 2006, Mississippi Canyon Gas Pipeline, LLC (Mississippi Canyon) filed revised tariff sheets listing numerous currently effective, non-conforming discount agreements.¹ Mississippi Canyon also included the referenced non-conforming discount agreements with the filing. On May 19, 2006, the Commission issued an order accepting the proposed tariff sheets and non-conforming agreements subject to further review.² On July 18, 2006, Mississippi Canyon filed a supplement to the original filing to clarify six service agreements in Docket No. RP06-312-001. The Commission's review of the subject contracts is now complete and we will permit the subject tariff sheets to become effective May 19, 2006, as discussed below.

¹ Sixth Revised Sheet No. 2, Fifth Revised Sheet No. 55, First Revised Sheet No. 155, and Original Sheet No. 156 to its FERC Gas Tariff, First Revised Volume No. 1.

² *Mississippi Canyon Gas Pipeline, LLC*, 115 FERC ¶ 61,208 (2006). The service agreements had been in effect for a significant period of time and therefore the Commission accepted the proposed tariff sheets and accompanying service agreements, effective May 19, 2006, subject to further review of the Commission.

2. Mississippi Canyon provides firm and interruptible transportation service on the Outer Continental Shelf (OCS) in the Gulf of Mexico. It offers firm service under two rate schedules, Rate Schedule FT-1 which includes a two-part rate with a reservation charge, and Rate Schedule FT-2 which includes a one-part volumetric rate. Firm shippers must commit reserves to the transportation service contract to qualify for service under Rate Schedule FT-2.

3. In its April 19, 2006 filing, Mississippi Canyon stated that it was acquired by Enbridge, Inc. on December 31, 2004, and that Enbridge, Inc. and Enbridge Energy Partners, L.P. (collectively, Enbridge) are continuing efforts to standardize and clarify Mississippi Canyon's tariff provisions and procedures for implementing discounted rate transactions. Mississippi Canyon stated that it filed the instant discounted rate agreements because they contain non-conforming contract provisions that have material deviations from the *pro forma* service agreements contained in its tariff. Mississippi Canyon submitted for the Commission's review, 16 non-conforming contracts for firm service under Rate Schedule FT-2 or interruptible service under Rate Schedule IT, containing various material deviations.

4. Mississippi Canyon stated that the non-conforming contracts fall into two categories of discount agreements: (1) those with anchor shippers who contracted for capacity and agreed to commit reserves in an original open season (or the successors of such shippers); and, (2) those executed after the initial construction of Mississippi Canyon with non-anchor firm shippers who also agreed to commit reserves. The deviations include, among other things, provisions that: (1) the discounted rate is contingent upon the commitment of reserves; (2) extend the discounted rates to future increases in volumes; (3) permit prior period adjustments for 15 months after the date of invoice rather than only six months; and, (4) waive the shipper's right to seek changes in Mississippi Canyon's maximum recourse rates under NGA section 5. As mentioned above, the Commission accepted the tariff sheets with the accompanying agreements, subject to further review.

5. In its July 18, 2006, supplemental filing, Mississippi Canyon clarifies six provisions in service agreements with Shell Offshore Incorporated (SOI Agreements) that it submitted in its initial filing. Mississippi Canyon states that it originally described its SOI Agreements as agreements under which the shipper could elect to change its maximum daily quantities (MDQ) on a quarterly basis. Specifically, Mississippi Canyon clarifies that each of the SOI Service Agreements is an "Annual Election" service agreement, as defined under its Rate Schedule FT-2, and not a quarterly election service. Mississippi Canyon states that in two of these contracts,³ MDQ changes were established monthly because of shipper assignments elected during the annual period which resulted

³ Contract Nos. 100558/614020 and 100969/614040.

in changes to the MDQs for the delivery period for the term of the assignment. Mississippi Canyon states that these material deviations do not present a substantial risk of undue discrimination because all Rate Schedule FT-2 shippers have the same assignment rights.

6. Public notice of the July 18, 2006, instant filing was issued with interventions, comments, and protests due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2006)). No interventions, comments, or protests were filed.

7. The Commission's review of Mississippi Canyon's non-conforming discount agreements is complete. We find the subject service contracts contain a variety of material deviations from its form of service agreement. The Commission previously held that material deviations fall into two general categories of material deviations: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without undue risk of discrimination. The Commission finds that the material deviations at issue here do not present a substantial risk of undue discrimination, as more fully discussed below.⁴

8. Three of the non-conforming discount agreements⁵ filed by Mississippi Canyon contain provisions under which the shipper waives its rights under NGA section 5 to request changes in any of Mississippi Canyon's rates, terms, or conditions of service.⁶

⁴ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 at p. 62,004 (2001) (stating that not all material deviations are impermissible and that if the Commission finds that such a deviation does not constitute a substantial risk of undue discrimination the Commission may find that the deviation is permissible).

⁵Referenced in Appendix B, "Discount Letter Agreements" in Mississippi Canyon's filing, under item number twelve. Two of the contracts were executed with BP America Production Company, effective May 16, 1998, and February 1, 2000, and one contract with ConocoPhillips Company, effective February 1, 2000; each includes the subject section 5 waiver provision.

⁶ The NGA section 5 waiver provisions in the subject discount contracts state that the shipper:

shall not request, or support any request by any other person for, future review of [transporter's] rates or terms and conditions of service or that [transporter] be required to file a future rate case under sections 4 or 5 of the Natural Gas Act

(continued...)

The Commission has held that the parties to negotiated rate and discounted rate agreements may include a provision under which the shipper waives its section 5 rights as to the rate for the particular transaction in question, without risk of undue discrimination. However, the Commission has generally held that broader waivers of the type at issue here, under which the shipper waives its section 5 rights as to all the pipeline's maximum recourse rates, do present a risk of undue discrimination.

9. In *Columbia*,⁷ the Commission explained that it:

...has been reluctant to sanction a section 5 waiver in a service agreement for a particular transaction, where the customer waives its 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.⁸

The Commission further explained that a broad section 5 waiver provision could increase the risk of undue discrimination among customer classes, unless the terms of the agreement are offered to all similarly situated customers. For example, the pipeline might offer favorable rates only to its larger customers in return for an agreement not to challenge the pipeline's recourse rates. The larger customers might be willing to accept such an offer, because they obtain the benefit of reduced rates for services of interest to them. However, smaller customers with fewer resources to litigate the pipeline's rates might not receive the benefit of the deal offered to the larger customers.⁹

or under the Outer Continental Shelf Lands Act, provided that [shipper] shall have the right to participate in any such future proceedings to protect its commercial interests and to protect the rights set forth herein.

⁷ *Columbia Gulf Transmission Corp.*, 109 FERC ¶ 61,152 (2004), *order on reh'g*, 111 FERC ¶ 61,338 (2005)(*Columbia*), *aff'd*, *Columbia Gas Transmission Corp. v. FERC*, 2007 U.S. App. LEXIS 3265 (D.C. Cir. 2007).

⁸ *Id* at P 12-14.

⁹ *Id* at P 15.

10. However, in *Algonquin Gas Transmission, LLC*,¹⁰ the Commission did approve broad section 5 waivers included in individual negotiated rate agreements. In that case, the Commission found that its usual concerns about broad section 5 waiver provisions were mitigated by several features of the agreements, and were further resolved by additional conditions we placed on our acceptance of the agreements. The Commission's concerns about undue rate discrimination among customer classes were mitigated by the fact that Algonquin offered identical rates to all the firm shippers under each of the pipeline's firm rate schedules. Moreover, each agreement was for the same term (April 1, 2005, through December 31, 2008).¹¹ To further ensure that the agreements were not unduly discriminatory, the Commission conditioned its approval of the agreements on Algonquin offering "each negotiated rate in the subject filings to all similarly situated existing and new customers, under the same rate schedule."¹² As the Commission stated in *Columbia*, with this condition the agreements in *Algonquin* accomplished much the same purpose as a generally applicable settlement of a general section 4 rate case.

11. Mississippi Canyon asserts that the NGA section 5 waiver provisions in its contracts are permissible under the unique circumstances presented in this instance. Mississippi Canyon claims that the Commission's concerns about undue discrimination among customer classes are not present in the instant proceeding because it only provides services in a localized area so it has no other services over which it might exert market power. Mississippi Canyon also claims that all of its Rate Schedule FT-2 shippers receive the same discounted rate, so there is no rate discrimination. Mississippi Canyon claims that under these specific circumstances, the NGA section 5 waiver presented in the subject contracts is permissible.

12. In the instant case, three of Mississippi Canyon's contracts contain a provision that would require a shipper to waive its NGA section 5 rights against any of the pipeline's maximum rates. However, the Commission finds that the instant situation is analogous to that faced by the Commission in *Algonquin*. Here, all of Mississippi Canyon's Rate Schedule FT-2 shippers pay the same discounted rate and the terms of all their contracts

¹⁰ 111 FERC ¶ 61,003 (2005); See Also, Director Letter Order issued on April 21, 2005, in Docket Nos. RP00-70-010 and RP00-70-011 (Unpublished), Director Letter Order issued on April 29, 2005, in Docket No. RP00-70-012 (Unpublished), *order on compliance*, Director Letter Order issued on June 27, 2005, in Docket Nos. RP00-70-013 and RP00-70-014 (Unpublished)(approving negotiated rates for remaining customers).

¹¹ The pipeline also waived its section 4 rights during the same term.

¹² 111 FERC at 61,007.

are for the economic life of the reserves committed by the shippers. Therefore, all shippers have received essentially the same contract terms from the pipeline.¹³ Moreover, the fact that the pipeline has not waived its NGA section 4 rights as part of the consideration for the waiver of the shipper's NGA section 5 rights, a consideration that the Commission took into account in *Algonquin*, is not as relevant in the instant case. This is because all shippers have received the same discounted rates for the economic life of their committed reserves and the discounted rate would not change if the pipeline, at some point in the future filed under NGA section 4 to increase its rates. Therefore, the Commission does not find that the instant waiver provision constitutes an undue risk of discrimination. However, as in *Algonquin*, to further ensure that the agreements are not unduly discriminatory, the Commission will condition its approval of the instant agreements on Mississippi Canyon offering each rate in the subject filings to all similarly situated existing and new customers, under the same rate schedule.

13. The Commission finds that the other material deviations in the subject contracts are also permissible, since they generally only affect the rates the shippers will pay for the particular service in question and do not result in the shippers receiving a different quality of service from that provided other customers in the tariff.¹⁴ For example, the Commission previously held that pipelines may make discounts contingent upon a commitment of reserves, and pipelines may agree to the rates that will be charged in future circumstances such as an increase in volumes. Accordingly, the Commission finds that the proposed tariff sheets and the accompanying non-conforming discount agreements may take effect on May 19, 2006, subject to Mississippi Canyon filing revised discount letter agreements, as discussed above, within 30 days of the date this order issues.

By direction of the Commission.

Philis J. Posey,
Acting Secretary.

¹³ Mississippi Canyon has no customers under its Rate Schedule FT-1.

¹⁴ *ANR Pipeline Co.*, 97 FERC ¶ 61,252 at 62,115-6 (2001).