

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 No. RP06-194-003

ORDER DENYING REHEARING

(Issued May 4, 2007)

1. Columbia Gas Transmission Corporation (Columbia) requests rehearing of the Commission's letter order of November 22, 2006¹ which conditionally accepted proposed changes to tariff sheets respecting certain waivers of provisions within section 3 (Injections into Storage) and section 4 (Withdrawals from Storage) of Rate Schedule FSS (Firm Storage Service).

2. As discussed below, the Commission denies Columbia's request for rehearing.

I. Background

3. On January 30, 2006, Columbia made a tariff filing proposing to authorize waiver of certain specific criteria and limitations associated with injections and withdrawals of gas from storage by FSS customers based on the Storage Contract Quantity (SCQ). In its transmittal letter, Columbia stated that its proposal would allow waiver of these limitations "where granting such waiver is appropriate to address current operational issues."² Specifically, Columbia proposed to implement new sections 3(f) and 4(g) to provide that, "Transporter may waive any of the limitations set forth in this section, provided that such waiver is granted in a non-discriminatory manner." Columbia also

¹ *Columbia Gas Transmission Corp.*, 117 FERC ¶ 61,222 (2006) (November 22, 2006 Order).

² January 30, 2006 transmittal letter at 1.

stated that it expected to exercise this proposed waiver authority to waive the upcoming requirement that by February 1, 2006, each FSS customer reduce its storage inventory to a level not exceeding 65 percent of its SCQ. Columbia explained that some of its FSS customers would not be able to meet this requirement, since they had maintained higher than normal storage inventories because of concerns about supply shortages due to Hurricanes Katrina and Rita and because of higher than normal temperatures.

4. The Commission issued a letter order on March 1, 2006³ accepting Columbia's January 30, 2006 filing, on condition that Columbia modify these provisions "to allow waivers of past defaults, and also advance waivers, for specific, temporary, operational problems on a case-by-case and non-discriminatory basis."⁴

5. On March 16, 2006, Columbia filed a compliance filing proposing the following language to revise sections 3 and 4 of Rate Schedule FSS to comply with the Commission's directive:

Transporter may waive any of the limitations set forth in this section, and may waive a Shipper's default in advance or a default that already has occurred, for specific temporary operational problems, provided that such waiver is granted in a non-discriminatory manner on a case-by-case basis.

6. In its November 22, 2006 Order, the Commission accepted, subject to condition, Columbia's March 16, 2006 compliance filing. The November 22, 2006 Order held that Columbia's March 16, 2006 filing did not fully comply with the March 1, 2006 Order because the language is subject to misinterpretation. The Commission found that the required limitations can be read as not applying to waivers granted pursuant to the initial clause of the proposed tariff provision ("Transporter may waive any of the limitations set forth in this section.').⁵ Additionally, the Commission found that the limitations, which are located in a separate clause, can be interpreted as setting forth an additional type of permitted waiver since the clause begins, "and may waive a Shipper's default . . ."⁶ Columbia's construction of the sentence, especially the use of the conjunction "and" essentially creates two types of waivers: one in which the transporter may waive any of

³ *Columbia Gas Transmission Corp.*, 114 FERC ¶ 61,225 (2006) (March 1, 2006 Order).

⁴ *Id.* at P 11.

⁵ *Id.*

⁶ *Id.*

the limitations set forth in sections 3(f) and 4(g) and one in which the transporter “may waive a Shipper’s default in advance or a default that already has occurred, for specific temporary operational problems.”⁷ Therefore, the Commission directed Columbia to further modify the proposed revisions to sections 3(f) and 4(g) of the FSS Rate Schedule to read as follows:

Transporter may waive a Shipper’s default of any of the limitations set forth in this section that has already occurred. In addition, Transporter may waive a Shipper’s default of such limitations in advance, provided that such a waiver is to address a specific, temporary, operational problem. Any waiver granted pursuant to this section must be granted in a non-discriminatory manner on a case-by-case basis.

7. On December 4, 2006, in compliance with the Commission’s directive and subject to the outcome of its request for rehearing of the November 22, 2006 Order, Columbia filed the revised waiver language. On March 9, 2007, the Commission accepted Columbia’s December 4, 2006 compliance filing.

II. Columbia’s Request for Rehearing

8. Columbia requests rehearing of the Commission’s November 22, 2006 Order to allow the deletion of the phrase “provided that such a waiver is to address a specific, temporary, operational problem” from the waiver provisions in sections 3(f) and 4(g) of Rate Schedule FSS. Columbia claims the deletion of the phrase will permit Columbia to provide FSS customers with additional storage injection and withdrawal flexibility during periods when Columbia has the operational capabilities to permit such flexibility. Columbia argues that unless the language is modified, Columbia’s FSS customers will be deprived of this beneficial flexibility.

9. First, Columbia argues that the Commission’s decision is arbitrary and capricious and not the product of reasoned decisionmaking.⁸ It asserts that the waiver language mandated by the Commission is too restrictive and the explanation provided to support

⁷ *Id.*

⁸ *Columbia cites Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006).

the revision cannot be reconciled with the facts presented in this case or the prevailing authority.

10. Columbia also argues that the Commission has failed to articulate “a rational connection between the facts found and the choice made.”⁹ The November 22, 2006 Order holds that Columbia did not fully comply with the March 1, 2006 Order because the Commission “intended the revision . . . to limit the scope and duration of any waivers Columbia could grant pursuant to its waiver proposal.”¹⁰ Columbia asserts that, according to the Commission’s reasoning, “the limitations, which are located in a separate clause, can be interpreted as setting forth an additional type of permitted waiver since the clause begins, ‘and may waive a Shipper’s default . . .’”¹¹

11. Finally, Columbia contends that the source of the Commission’s concern with the creation of some “additional type” of waiver authority and the “scope and duration” of waivers, is not the proposed tariff waiver language itself, but rather its mistaken application of the *Discovery*¹² policy to that language. Columbia argues that, in contrast to the facts at issue in *Discovery*, the language at issue here would provide Columbia with authority to grant waiver of certain specific storage injection and withdrawal “limitations” under Rate Schedule FSS that take effect on certain specific dates during a calendar year. The waiver authority proposed by Columbia applies to a single rate schedule, and not the entire tariff. In addition, the waiver provisions apply only to the limitations under sections 3 and 4 of the FSS Rate Schedule. Moreover, the fact that the waiver would be a one-time temporary waiver is implicit in the type of storage injection and withdrawal limitations at issue.

III. Discussion

12. The Commission denies rehearing of the November 22, 2006 Order and rejects Columbia’s request to delete the phrase “provided that such waiver is to address a specific, temporary, operational problem” from sections 3(f) and 4(g) of the FSS Rate Schedule. Columbia’s request for rehearing goes beyond the issue raised by the March 16, 2006 compliance filing and is essentially an untimely request for rehearing of the March 1, 2006 Order.

⁹ *Citing Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1016 (D.C. Cir. 1987).

¹⁰ 117 FERC ¶ 61,222 at P 6.

¹¹ *Id.*

¹² *Discovery Gas Transmission LLC*, 111 FERC ¶ 61,377 (2005) (*Discovery*).

13. At the outset, the only issue before the Commission in reviewing Columbia's March 16, 2006 compliance filing was whether it had complied with the Commission's March 1, 2006 Order. Having found that Columbia did not fully comply, the only issue that can be raised now is whether the Commission erred in finding that the March 16, 2006 filing did not fully comply. Columbia does not contest the Commission's ruling regarding compliance and, instead, through a misinterpretation of the November 22, 2006 Order, now wishes to raise an objection to the original ruling in the March 1, 2006 Order directing Columbia to limit the waiver authority to certain specified circumstances, *i.e.*, past occurrences or advance waivers to address specific short-term operational problems for a temporary, prospective period, where such waivers are granted on a case-by-case, non-discriminatory basis. Columbia did not seek rehearing of that order and filed to comply with it.

14. By raising objections now to the requirement, imposed by the March 1, 2006 Order, limiting advance waivers to address specific, temporary operational problems, Columbia is effectively seeking an untimely rehearing of that order.¹³ Columbia seeks to avoid this procedural problem by responding to the Commission's November 22, 2006 Order as if it were a *de novo* review of its original January 30, 2006 filing. We deny rehearing because the Commission did not err in finding that Columbia did not fully comply with the March 1, 2006 Order and in ordering Columbia to file tariff language fully complying with the directive of that order.

15. Columbia mistakenly asserts that the Commission's concern with Columbia's compliance proposal to create an additional type of waiver was that the proposal was "inconsistent with the narrowly tailored waiver authority *proposed by Columbia* in this case." (emphasis added) Columbia then goes on to claim that the Commission's concern is not with the proposed tariff waiver language itself, but rather its mistaken application of the *Discovery* policy to that language. Both claims misstate the Commission's ruling. The Commission found that the compliance proposal did not fully comply with the changes that the *Commission directed* Columbia to make in its original proposal.¹⁴ Thus, the Commission did, in fact, have a concern with the proposed compliance tariff language.

¹³ Under section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a) (2000), requests for rehearing must be filed no later than 30 days after issuance of the Commission's decision.

¹⁴ 117 FERC ¶ 61,222 at P 6.

16. Thus, Columbia is mistaken in essentially claiming that the Commission's November 22, 2006 Order was based on reviewing Columbia's proposal on a *de novo* basis by applying the policy articulated in the *Discovery* order. The citation to the *Discovery* order in the November 22, 2006 Order is in the background section of the order and was in reference to the summary of the Commission's ruling in the March 1, 2006 Order. As explained above, the November 22, 2006 Order does not rely on *Discovery* to reach its conclusion. Instead, the Commission only reviewed the filing for compliance with its earlier order, the March 1, 2006 Order, and found that "Columbia has not fully complied with the March 1, 2006 Order."¹⁵

17. Accordingly, the Commission's decision is neither arbitrary and capricious nor the product of unreasoned decisionmaking, contrary to Columbia's claims.¹⁶ As the Supreme Court stated in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), it would uphold an agency's decision "of less than ideal clarity if the agency's path may reasonably be discerned."¹⁷ The Commission's discussion of the faulty March 16, 2006 compliance filing in the November 22, 2006 Order, clearly demonstrates the lack of clarity evident in the proposed tariff language as drafted by Columbia. One can reasonably discern from the November 22, 2006 Order that the Commission required a second compliance filing because the March 16, 2006 compliance filing did not accurately carry out "the Commission's required change to Columbia's tariff proposal."¹⁸ The Commission explained that the required change, "was not meant to be a grant of an additional type of waiver to Columbia, but to qualify the type of waiver described by Columbia in its initial filing."¹⁹ Columbia avoids addressing the actual rationale for the November 22, 2006 Order in its rehearing request, focusing instead on the rationale from the March 1, 2006 Order.

18. Moreover, Columbia simply reiterates similar arguments rejected by the Commission in its March 1, 2006 Order. Columbia argues on rehearing that the Commission misapplied the *Discovery* policy because *Discovery* only prohibits generic waiver provisions that apply to all rate schedules and general terms and conditions of the

¹⁵ 117 FERC ¶ 61,222 at P 6.

¹⁶ Columbia Rehearing Request at 4.

¹⁷ 463 U.S. at 458 (citations omitted).

¹⁸ 117 FERC ¶ 61,222 at P 6.

¹⁹ *Id.*

pipeline's tariff as opposed to Columbia's proposal, which only applies to two specific provisions of its tariff. Although the Commission stated that "the Commission agrees with Columbia that its waiver proposal is substantially different from the generic waiver proposals rejected by the Commission,"²⁰ the Commission noted there that *Discovery*, "also recognized the need for advance waivers to address specific, short-term operational problems for a temporary, prospective period."²¹ That is precisely the type of limited waiver the March 1, 2006 Order directed Columbia to revise its proposed tariff language to authorize.

19. Columbia fails to support its assertion that the waiver language mandated by the Commission is too restrictive and would have a negative impact on FSS customers and that it should be permitted to grant waivers in any case where it has the operational capability to provide FSS customers with additional flexibility. Under the currently-authorized tariff, Columbia would be allowed to waive a shipper's default of limitations in advance to address a specific, temporary, operational problem, which is the very circumstance described by Columbia both in its original filing and in its rehearing request (a one-time advance waiver of an FSS tariff SCQ Requirement which customers could not meet because of maintenance of high storage inventory levels due to concerns about the possibility of supply shortages resulting from Hurricanes Katrina and Rita). The only limitation would be that the waiver would have to be for a temporary, and not permanent, period.

20. Columbia also claims that "the fact that the waiver would be a one-time temporary waiver is implicit in the type of storage injection and withdrawal limitations at issue." We fail to see how adding language to the tariff in the manner outlined in the November 22, 2006 Order would negatively impact FSS customers, given that it serves only to make explicit what Columbia now claims is implicit in its tariff.

21. In its rehearing request, Columbia also suggests that it should have the ability to waive its tariff not only in situations where waiver is necessary to address an operational problem, but also in situations "where it possesses the *operational capability* to provide FSS customers with additional flexibility."²² However, the focus of Columbia's instant filing was on obtaining waiver authority to address temporary operational problems such as those arising from Hurricanes Katrina and Rita. If Columbia believes that it has the

²⁰ 114 FERC ¶ 61,225 at P 11.

²¹ *Id.*

²² Columbia Rehearing Request at 6 (emphasis in original).

operational ability to provide storage customers a more flexible service than currently reflected in the terms and conditions of Rate Schedule FSS, then it should file to propose specific changes in those terms and conditions which would offer such flexibility to all FSS customers on a not unduly discriminatory basis.

22. The Commission concludes that it provided “a rational connection between the facts found and the choice made,”²³ in this case, a rational connection between the “facts found,” *i.e.*, the Commission’s finding that Columbia’s March 16, 2006 compliance filing did not fully comply with the requirements of the March 1, 2006 Order, and the “choice made,” *i.e.*, the Commission’s ruling that Columbia submit a corrected second compliance filing. Therefore, we will deny Columbia’s request for rehearing.

The Commission orders:

Columbia’s request for rehearing is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²³ *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1016 (D.C. Cir. 1987).