127 FERC ¶ 61,073
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Columbia Gulf Transmission Company — Docket No. RP09-33-001

ORDER ON REHEARING

(Issued April 22, 2009)

1. Indicated Shippers requested rehearing of an unpublished November 12, 2008 Director's Letter Order (November 12, 2008 Letter Order) that accepted tariff sheets filed on October 27, 2008 by Columbia Gulf Transmission Company (Columbia Gulf). In the October 27, 2008 filing Columbia Gulf proposed to add a new section 4.1(d) to the General Terms & Conditions (GT&C) of its tariff to permit Columbia Gulf and its shippers to agree to terminate a long-term service agreement prior to its expiration date.[1] Although the filing was protested, the November 12, 2008 Letter Order accepted the tariff sheet without condition. For the reasons discussed below, the Commission grants, in part, and denies, in part, Indicated Shippers' request for rehearing.

Background

2. Columbia Gulf proposed to add a new section 4.1(d)(2) to the GT&C of its tariff in order to provide for the early termination of long-term service agreements. Columbia Gulf stated that the proposed section 4.1(d)(2) would allow Columbia Gulf and its customers to agree to terminate an entire long-term service agreement prior to its expiration date in a not unduly discriminatory manner. Columbia Gulf also included a list of the circumstances under which this discretion may be exercised. Specifically, Columbia Gulf proposed that the parties may agree to terminate a long-term service agreement where a shipper: (i) responds to a solicitation for capacity release offers in a reverse open season for capacity requiring construction of new facilities and the conditions set forth in the solicitation have been satisfied; or (ii) agrees to pay an exit fee

[1] *See* Third Revised Sheet No. 0 and Fifth Revised Sheet No. 145A to FERC Gas Tariff, Second Revised Volume No. 1.

that is sufficient to make the termination or reduction financially beneficial to Columbia Gulf. The tariff also provides for a waiver of the exit fee where a shipper's service agreement provides for a discounted rate and Columbia Gulf concludes that the capacity subscribed thereunder would be sold at a higher rate for the remaining term. According to Columbia Gulf, the Commission has approved similar such provisions for a number of pipelines in the past.[2]

3. Public notice of the filing was issued on October 28, 2008. Interventions and protests were due on or before November 10, 2008. Indicated Shippers filed comments on November 10, 2008 and Columbia Gulf filed an answer on November 12, 2008.[3] However, the November 12, 2008 Letter Order stated that no protests or adverse comments were filed. Consequently, the November 12, 2008 Letter Order accepted the tariff sheets without addressing the comments and without condition. As a result, Indicated Shippers seek rehearing of the November 12, 2008 Letter Order, raising the same issues as it raised in its comments on Columbia Gulf's proposal. Indicated Shippers do not oppose Columbia Gulf's proposal to amend its tariff to provide for early termination of a shipper's contract based on a mutual agreement between Columbia Gulf and its shipper. However, Indicated Shippers have some concerns about the proposal. For the reasons discussed below, the Commission grants, in part, Indicated Shippers' request for rehearing.

Discussion

4. On rehearing, Indicated Shippers contend that Columbia Gulf's proposal lacks adequate protections against undue discrimination and preference by Columbia Gulf in its negotiation of early termination agreements and should therefore be revised. Indicated Shippers' specific concerns and Columbia Gulf's responses are discussed below.

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[2] *See National Fuel Gas Supply Corp.* 115 FERC ¶ 61,127, *order on compliance*, 116 FERC ¶ 61,307 (2006); *Northern Natural Gas Co.*, 118 FERC ¶ 61,124 (2007); and *Tennessee Gas Pipeline Co.*, 97 FERC ¶61,255 (2001). In addition, Columbia Gulf updated the cover sheet to its FERC Gas Tariff to reflect the current contact person for communications concerning the proposed tariff.

[3] The Commission's Rules of Practice and Procedure generally do not permit answers. *See* 18 C.F.R. § 385.213(a)(2) (2008). However, the Commission finds good cause to accept Columbia Gulf's answer because it will assist us in resolving the issues raised on rehearing in this proceeding. Therefore, Columbia Gulf's answer is accepted.

Placement of the Proposed Provision

5. Indicated Shippers complain that the placement of the early termination provision in a section of Columbia Gulf's GT&C that deals generally with the shipper's right of first refusal (ROFR) is inappropriate because early termination is a different topic than the right to continue to receive service following expiration of the primary term. In addition, the Indicated Shippers state that Columbia Gulf does not propose to amend its pro forma service agreement to include a "blank space" providing for early termination. The Indicated Shippers state that in *Northern Natural Gas Co.*,[4] the pipeline submitted far more comprehensive tariff revisions to implement a comparable early termination proposal. The tariff provisions in *Northern Natural* included changes to: (1) the Rate Schedule; (2) GT&C; and (3) the pro forma service agreement, by including a blank space in the service agreement. The Indicated Shippers argue that Columbia Gulf's proposal to provide for early termination through a revision to its GT&C without any revisions to the relevant rate schedules and pro forma agreements falls well short of the Commission's standards of clarity and transparency, as exemplified by the *Northern Natural* order. Therefore, the Indicated Shippers request that the Commission require Columbia Gulf to provide sufficient notice to its shippers of their ability to request early termination, through amendments to its rate schedules and pro forma agreements.

6. The Indicated Shippers also argue that Columbia Gulf's proposal does not clearly provide for public disclosure of early termination agreements as Columbia Gulf does not propose to amend its pro forma agreements to include a "blank space" providing for early termination. The Indicated Shippers further state that it appears that Columbia Gulf envisions early termination agreements as separate written contracts which would not be filed with the Commission in violation of NGA section 4(c).[5] Indicated Shippers further state that an agreement to terminate a service prior to the expiration of its primary term is a contract that affects or relates to a service.

7. In its answer, Columbia Gulf stated that it believes the Indicated Shippers misunderstand the intent and application of its proposed tariff change. Columbia Gulf stated that the placement of the early termination option in section 4.1(d)(2) in its GT&C is appropriate and sufficient. Columbia Gulf explained that all shippers will know of the ability to request an early termination of their service agreements because this option will

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[4] 118 FERC ¶ 61,124 (2007) (*Northern Natural).*

[5] Indicated Shippers state that 15 U.S.C. §717c(c) provides in pertinent part that (emphasis added) " every natural-gas company shall file with the Commission … <u>*all*</u> contracts which in any manner affect or relate to … services."

be defined in the GT&C of Columbia Gulf's tariff. Columbia Gulf stated that this provision grants Columbia Gulf and any of its shippers the right to negotiate and agree to the early termination of a service agreement at some point during the term of the agreement. Columbia Gulf explained that the right to request early termination is not a right that Columbia Gulf will negotiate in advance when it enters into a new service agreement. Columbia Gulf stated that it expects that all service agreements will continue for their agreed upon term and therefore, it is illogical and inappropriate to revise the pro forma service agreements to provide for the possibility of early termination.

8. Columbia Gulf also stated that section 4.1(d)(2) is similar to section 4.1(b)(2) of its GT&C which permits shippers and Columbia Gulf to extend the customer's service on a not unduly discriminatory basis.[6] Section 4.1(b)(2) permits Columbia Gulf and its shippers to mutually agree to extend the customer's service on Columbia Gulf's system through the re-negotiation of the customer's existing service agreement prior to the expiration of the agreement. Columbia Gulf argued that in that case no modifications to the rate schedules or pro forma service agreements were required.

9. Finally, Columbia Gulf argued that section 4.1(d)(2) is not hidden within the ROFR section of its tariff. Columbia Gulf stated that ROFR rights are addressed in section 4.1(c) of the GT&C. In addition, Columbia Gulf stated that section 4.1(d) is titled "Termination of Other Long-Term Service Agreements" and subpart (d)(2) is titled "Early Termination of Service Agreements." Columbia Gulf stated that there is no language anywhere in that subsection to suggest that the ability to request an early termination of a service agreement is tied to a ROFR.

10. The Commission agrees with Columbia Gulf that the placement of the tariff provision for early termination of contracts in section 4.1(d)(2) of its GT&C is appropriate and sufficient to notify its customers that all long-term contracts may be renegotiated and terminated prior to their expiration date in a not unduly discriminatory manner. Shippers will know of the ability to request early termination of their service agreements because this ability will be defined in the GT&C of Columbia Gulf's tariff. Consistent with our decision in *Columbia Gas Transmission, LLC (Columbia Gas),*[7] addressing a virtually identical proposal by an affiliate of Columbia Gulf, we will not require Columbia Gulf to amend its pro forma service agreement by including a blank space for an early termination agreement, as the pipeline proposed to do in *Northern Natural*. As Columbia Gulf explained, it did not propose to negotiate, at the time it

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[6] Section 4.1(b)(2) was approved in Docket No. RP07-655-000 by Commission Letter Order issued on September 28, 2007 (*Columbia Gas Transmission Corp.*, 120 FERC ¶ 61,289 (2007)).

[7] *Columbia Gas Transmission, LLC*, 126 FERC ¶ 61,256 (2009).

enters into a long-term firm service agreement, a right for the shipper to terminate the agreement at some later date before the agreement would otherwise expire. Columbia Gulf has only proposed to revise its GT&C to authorize it to mutually agree with the shipper to terminate an agreement after it has gone into effect. Since Columbia Gulf's proposal does not contemplate an agreement, when a long-term firm service agreement is executed, upon the terms under which the shipper would have a right to early termination of the service agreement, there is no need for any blank space in the pro forma agreement for inserting such an early termination right.

11. Further, as we stated in *Columbia Gas,* the pro forma service agreement at issue in *Northern Natural* involved a different type of service than the long-term services at issue here. In *Northern Natural*, the pipeline proposed to permit the early termination of individual short-term transactions performed pursuant to an overall service agreement for a limited firm storage service, and the pro forma service agreement included blank spaces for various terms of each individual transaction, including amendments to those terms. There, the pipeline reasonably proposed to include a blank space to set forth the terms of any agreement to terminate an individual transaction under the overall service agreement. In this case, by placing the early termination provision in the GT&C of its tariff, Columbia Gulf provides notice to all shippers in every rate schedule that long-term contracts are eligible for early termination.

Posting of Special Details

12. Indicated Shippers next state that the Commission's regulations require Columbia to post on its website information regarding early terminations as "special details" of a service agreement.[8] Indicated Shippers assert that Columbia Gulf does not indicate that it intends to post early termination information as "special details." Indicated Shippers argue that, without access to information regarding the early termination agreements, including exit fees and information on how to evaluate exit fees as it relates to the remaining contract obligations that would be terminated, parties can not evaluate whether Columbia Gulf has agreed to or refused to agree to early termination on an unduly discriminatory or preferential basis. In addition to requiring Columbia Gulf to post early termination agreement information on its website, the Indicated Shippers request the Commission to direct Columbia Gulf to provide a written explanation of how interested parties may locate that information as it is unclear how Columbia Gulf provides "special details" information on its web currently.

13. Columbia Gulf disagreed with the Indicated Shippers' position that the terms of an early termination agreement should be posted. Columbia Gulf stated that the language in section 4.1(d)(2) clearly explains the circumstances under which Columbia Gulf may

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[8] *See* 18 C.F.R. § 284.13(b)(1)(viii) (2008).

agree to the early termination of an existing service agreement. Columbia Gulf stated that it is obligated to and intends to assess these requests in a not unduly discriminatory fashion. Columbia Gulf also stated that, if a shipper believes it is facing discrimination, the shipper always has the option of seeking relief from the Commission.

14. Columbia Gulf argued that the posting of the terms of an early termination also has the potential to harm the terminating shipper. Columbia Gulf believes the specific details of an exit fee may be a commercially sensitive item for the shipper and its disclosure could affect the shipper's competitive position by disclosing proprietary cost information in a public forum. Finally, Columbia Gulf argued that the exit fee is not a term and condition affecting service since once negotiated, the service provided by Columbia Gulf will cease.

15. The Commission shares the Indicated Shippers' concern regarding the posting of the terms of any early termination agreement. As Indicated Shippers accurately point out, section 284.13(b)(1)(viii) requires the posting of such information for the very purpose of allowing the Commission and other shippers to monitor the pipeline's actions for undue discrimination. Consistent with our decisions in *Northern Natural* and *Columbia Gas*, we find that Columbia Gulf is required by section 284.13(b)(1)(viii) of the Commission's regulations to post such information on its website as a special detail pertaining to a transportation contract. This requirement should alleviate the concerns raised by Indicated Shippers. Further, since the regulations already require Columbia Gulf to post the terms of any early termination agreement, including the amount of any fees to be paid by the shipper, on its web site, we will not require Columbia Gas to further modify its tariff.

Making Unsubscribed Capacity Available

16. Indicated Shippers next argue that Columbia Gulf's proposal does not address how it will ensure that unsubscribed capacity due to early termination will be available to shippers on a not unduly discriminatory basis. Indicated Shippers are concerned that early termination capacity should not be a vehicle for Columbia Gulf to allocate unsubscribed capacity outside of an open season process that awards the capacity to the shipper that places the highest value on that capacity. Therefore, Indicated Shippers request that the Commission direct Columbia Gulf to clarify that it will make all early termination capacity available to shippers on a not unduly discriminatory or preferential basis.

17. In response, Columbia Gulf asserted that the Indicated Shippers' concern that Columbia Gulf will not post the availability of all capacity that becomes available following an early termination is unfounded. Columbia Gulf stated that it has never been its intent or practice to withhold capacity and that there is no need for the Commission to require clarification on this point.

18. As Columbia Gulf explained in its answer, the purpose behind the early termination proposal is to provide flexibility in order to accommodate changes in a shipper's business circumstances. The Commission agrees that there is no need for Columbia Gulf to make any additional change to its tariff to provide for posting capacity that becomes available after an early termination. Section 4.2 of Columbia Gulf's GT&C provides that "[a]s capacity becomes available… such capacity shall be made available for bidding provided that it is not previously committed and capacity remains available." Columbia Gulf maintained in its answer that just as capacity becomes available whenever a service agreement expires on its own terms, the capacity previously held under a service agreement that is terminated early will become available and will be made available for bidding. If a party believes that Columbia Gulf is not following its tariff provisions, they can ultimately file a complaint with the Commission.

The Commission orders:

(A) Indicated Shippers' request for rehearing is granted, in part, and denied, in part, as discussed in the body of this order.

(B) Columbia Gulf must post the terms of any early termination agreement as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.