

129 FERC ¶ 61,295
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

December 30, 2009

In Reply Refer To:
T.W. Phillips Pipeline Corp.
Docket No. RP10-192-000

T.W. Phillips Pipeline Corp.
502 Keystone Drive, Suite 400
Warrendale, PA 15086

Attention: Robert M. Hovanec
Executive Vice President and CFO

Reference: Tariff Sheet Listing Non-conforming Agreements

Dear Mr. Hovanec:

1. On November 30, 2009, T.W. Phillips Pipeline Corp. (T.W. Phillips) submitted for filing a negotiated rate agreement with non-conforming provisions and revised tariff sheets.¹ In lieu of providing specific details of the negotiated rate provisions on a numbered tariff sheet, T.W. Phillips filed the complete agreement as provided in section 15.2 of its General Terms and Conditions (GT&C) along with listing the non-conforming service agreement in its tariff. T.W. Phillips requests an effective date of January 1, 2010 for its tariff sheets to be placed into effect. The Commission accepts the tariff sheets and non-conforming service agreement to be effective January 1, 2010, as requested, subject to T.W. Phillips filing revised tariff sheets within 45 days of the issuance of this order.

2. T.W. Phillips is a new pipeline created for the sole purpose of constructing and operating the natural gas pipeline described herein (Bionol Project). On December 21, 2007, T.W. Phillips executed a contract with Bionol Clearfield, LLC (Bionol) whereby T.W. Phillips would construct, own and operate the Bionol Project (2007 Bionol Agreement). On October 6, 2008, T.W. Phillips filed an application with the

¹ First Revised Sheet No. 1, Substitute Original Sheet Nos. 7, 8, and 9, to FERC Gas Tariff, Original Volume No. 1.

Commission under section 7(c) of the Natural Gas Act (NGA) for authority to construct, own, operate, and maintain a new 8-mile, 6-inch diameter pipeline to provide service from a new interconnect with Columbia Gas Transmission Company (Columbia) to a new ethanol production plant to be constructed by Bionol. T.W. Phillips stated that Bionol would be the sole shipper on the proposed pipeline.

3. On February 19, 2009, the Commission issued its Certificate Order, among other things, granting the requested authorization.² The Certificate Order also required T.W. Phillips to file either its negotiated rate contracts or numbered tariff sheets for the Bionol Project in not less than 30 days and not more than 60 days prior to the commencement of service along with any service agreements that contain non-conforming provisions consistent with section 154.112(b) of the Commission's regulations.³

4. T.W. Phillips asserts that the information set forth in Exhibit A to the Service Agreement (Exhibit A) fully discloses all the essential considerations involved in the negotiated rate transaction. Specifically, T.W. Phillips states that the negotiated rate provisions in Exhibit A include: (1) a fixed monthly demand charge based upon the actual final construction cost of \$5,840,688 divided by 60 and Bionol's obligation to pay 100 percent of T.W. Phillips post-construction financing costs; (2) a monthly operating fee of \$75,000 per month indexed annually based on the annual average weekly earnings of "Oil and Gas Extraction" workers, as published by the United States Dept. of Labor, Bureau of Labor and Statistics; (3) the reimbursement of certain taxes; (4) a negotiated lost and unaccounted for provision; (5) re-opener rights related to the monthly operating fee; and (6) reimbursement for third party access to the Pipeline Facilities.

5. T.W. Phillips states Exhibit A to the service agreement also embodies the 2007 Bionol Agreement and includes transportation service-related obligations of the parties which may not conform to T.W. Phillips's *pro forma* FT service agreement. T.W. Phillips submits that many of these differences are not material. T.W. Phillips states that the non-conforming provisions in Exhibit A include: (1) a modified payment procedure which differs slightly from the form of service agreement; (2) an obligation that the shipper obtain an irrevocable standby letter of credit; (3) provisions to extend the term of the agreement; (4) throughput specifications which include maximum and minimum hourly delivery rates and a minimum daily rate; (5) *force majeure* clause; and (6) other provisions.

² *T.W. Phillips Pipeline Corp.*, 126 FERC ¶ 62,132 (2009).

³ 18 C.F.R. § 154.112(b) (2009).

6. T.W. Phillips states that the differences do not present a risk of undue discrimination and reflect the natural consequence of a pipeline that would not have been built but for the need to serve a single customer. T.W. Phillips further states that the Commission has ruled that material deviations from *pro forma* service agreements are permissible if they are not unduly discriminatory and has found non-discriminatory provisions acceptable that “reflect the unique circumstances involved with construction of new infrastructure and to provide the needed financial security to ensure the viability of the project.”⁴ Finally, T.W. Phillips states the Commission recently emphasized this point in approving the non-conforming negotiated agreement containing material deviations, with regard to a foundation shipper.⁵

7. Public notice of T.W. Phillips’ filing was issued on December 1, 2009, allowing for protests to be made on or before December 14, 2009. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2009)), all timely motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceedings or place additional burdens on existing parties. No protests or adverse comments were filed.

8. Section 154.1(d) of the Commission’s regulations requires the pipeline to file a contract which materially deviates from the pipeline’s form of service agreement.⁶ In *Columbia Gas Transmission Corp.*,⁷ the Commission clarified that a material deviation is any provision in a service agreement that: (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties.⁸ Therefore, if a negotiated rate agreement contains any of the above deviations, the pipeline must file it for Commission review. One category of material deviation that is generally not permissible is negotiated terms and conditions of service not authorized by the tariff. However, not all material deviations are impermissible. If the Commission finds that such a deviation does not constitute a substantial risk of undue discrimination, the Commission may permit the deviation.⁹ Therefore, there are two

⁴ See *Midcontinent Express Pipeline*, 124 FERC ¶ 61,089 (2008) (*Midcontinent*).

⁵ *Dominion Cove Point LNG, L.P.*, 129 FERC ¶ 62,073, at P 11 (2009) (*Dominion Cove Point*).

⁶ 18 CFR §154.1(d) (2009).

⁷ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001) (*Columbia Gas*).

⁸ See *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 27 (2003) (*Policy Statement*).

⁹ *Columbia Gas*, 97 FERC at 62,004.

general categories of material deviations: (a) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers, and (b) provisions the Commission can permit without a substantial risk of undue discrimination.

9. Our review of the material deviations at issue in this case is hampered by the fact that the instant service agreement has been drafted using the *pro forma* service agreement, which T.W. Phillips has proposed in Docket No. RP10-141-000 and which the Commission is finding in a contemporaneous order is not consistent with Commission policy.¹⁰ Exhibit A to the proposed *pro forma* service agreement includes a blank for filling in “Other Conditions,” without any limitation as to what conditions may be included in that blank. In the contemporaneous order, the Commission finds that such a blank is too broad and vague, and could lead to the inclusion of impermissible terms and conditions of service.¹¹ The Commission is therefore requiring T.W. Phillips: (1) to revise Exhibit A to its *pro forma* service agreement to clearly indicate that the only provisions which may be included in the blank for “Other Conditions” are provisions which the pipeline’s tariff permits it to negotiate with shippers; and (2) to include a provision in its GT&C listing the specific tariff provisions authorizing it to negotiate those provisions.¹²

10. The service agreement between T.W. Phillips and Bionol illustrates why an undefined blank for “other conditions” is unacceptable. The parties have used that blank to include fifteen conditions. Those conditions cover a range of subjects, including gas quality, *force majeure*, maximum and minimum delivery pressure, assignment rights, contract extension rights, credit requirements, the pipeline’s obligation to carry certain types of insurance, and the method and timing of shipper payments to the pipeline. Some of these provisions, such as the *force majeure* and gas quality provisions,¹³ are worded

¹⁰ See *T.W. Phillips Pipeline Corp.*, Commission Letter Order, 129 FERC ¶ 61,272 (2009) (issued in Docket No. RP10-141-000).

¹¹ See *Northern Natural Gas Co.*, 102 FERC ¶ 61,171, at P 19 (2003) (*Northern Natural*).

¹² *Id.*

¹³ The gas quality provision in Bionol’s service agreement requires that all gas it tenders to T.W. Phillips meet “the quality, heat content and other requirements and specifications set forth in Columbia’s” tariff. Section 2 of T.W. Phillips’ GT&C sets forth specific gas quality specifications which are identical in most, but not all, respects to those in Columbia’s tariff. See also, *Saltville Gas Storage Co., LLC*, 110 FERC ¶ 61,324, at P 11 (2005) (finding that a special gas quality provision in a shipper’s service agreement would constitute an impermissible material deviation).

differently from similar provisions in T.W. Phillips' GT&C, but it is not immediately apparent whether the parties intended the provisions to be substantively different. Other provisions are terms and conditions of service which the Commission generally does not allow to be negotiated, unless such provisions are offered, subject to reasonable conditions, as part of the pipeline's generally applicable tariff.¹⁴ Examples of such provisions include the contract extension rights,¹⁵ and maximum and minimum hourly flow rights.¹⁶ Some other conditions involve administrative matters that do not affect quality of service, such as the provisions concerning payment procedures, the procedures for amending the agreement, and the courts in which any disputes will be resolved. These types of provisions are ordinarily set forth in standardized provisions in the *pro forma* service agreement,¹⁷ and it is not apparent why that approach could not be followed in this case or whether T.W. Phillips actually intends all such provisions to vary from shipper to shipper.¹⁸

¹⁴ The Commission has found that "as a general matter, that rate differentials between foundation shippers that sign up for service early and shippers that sign up for service later are not unduly discriminatory, since the later shippers are not similarly situated to the foundation shippers." *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, 71 FR 36276 at P 98 (June 26, 2006); FERC Stats. & Regs. ¶ 32,606 (2006). However, that statement only applied to rates, and did not authorize different terms and conditions of service for foundation shippers. *East Tennessee Natural Gas, LLC*, 117 FERC ¶ 61,016, at P 11 (2006). *See also, Dominion Cove Point*, 129 FERC ¶ 62,073 at P 11.

¹⁵ *See Northern Natural Gas Co.*, 113 FERC ¶ 61,032, at P 11 (2005). (The Commission has only permitted a pipeline to negotiate provisions giving shippers the right to extend their contracts if its tariff contains a provision offering to negotiate such provisions on a not unduly discriminatory basis.).

¹⁶ *See Columbia Gas*, 97 FERC at 62,003.

¹⁷ *See Natural Gas Pipeline Co. of America*, 111 FERC ¶ 61,376, at P 11 (2005).

¹⁸ In addition, the parties have included in the blank for "negotiated rate" in Exhibit A certain provisions which appear to go beyond setting forth the negotiated rate. These include the provisions concerning Re-Opener Rights; Certain Cost and Expense Reimbursement; and Third-Party Access to the Pipeline Facilities. The "blank" should only include provisions necessary to calculating the negotiated rate to be charged to Bionol. *See Columbia Gas*, 97 FERC at 62,003. Any other matter included in that blank constitutes a material deviation. If such provisions are included in the revised service agreement required by this order, T.W. Phillips will have to provide a justification for them consistent with the discussion below.

11. T.W. Phillips has failed to provide a detailed narrative explaining each of these provisions, whether and how each provision differs from the tariff or *pro forma* service agreement provisions that will govern service to other shippers, the effect of such terms on the rights of the parties, and why any material deviation does not present a risk of undue discrimination, as required by Commission policy.¹⁹

12. In light of these facts and our order in Docket No. RP10-141-000 requiring T.W. Phillips to revise its *pro forma* service agreement, the Commission directs that T. W. Phillips revise its service agreement with Bionol, consistent with the following guidelines. As required by Commission policy, the parties must use the *pro forma* service agreement as revised to comply with the contemporaneous order in Docket No. RP10-141-000 as the starting point in drafting Bionol's revised service agreement.²⁰ To the extent that the parties intend that service to Bionol is to be governed by the same tariff and *pro forma* service agreement provisions as will govern service to other shippers on the pipeline, Bionol's service agreement should not include any language with respect to those provisions that is different from the *pro forma* service agreement. To the extent that T.W. Phillips' tariff as revised in Docket No. RP10-141-000 permits it to negotiate a particular provision with its shippers on a not unduly discriminatory basis, the parties may include any such a provision they negotiate in the "Other Conditions" section of the revised *pro forma* service agreement and such provision will not constitute a material deviation. To the extent that Bionol's revised service agreement continues to include material deviations, T.W. Phillips must provide redlined agreements showing any non-conforming provisions and a detailed narrative containing all the information described in the preceding paragraph of this order in order to show that the material deviation is permitted.²¹

13. Therefore, based on our review of the filed service agreement, the Commission requires that, within 45 days of the date of this order, T.W. Phillips file a revised service agreement, together with redlined agreements showing any non-conforming provisions

¹⁹ *Policy Statement*, 104 FERC ¶ 61,487 at P 33. *East Tennessee Natural Gas Co.*, 105 FERC ¶ 61,162, at P 16 (2003).

²⁰ *Id.*

²¹ The Commission permits pipelines to negotiate credit requirements different from those in the tariff for shippers who execute precedent agreements before a pipeline is constructed. *See Midcontinent*, 124 FERC ¶ 61,089. Therefore, the Commission approves the Letter of Credit provisions in Bionol's service agreement. The Commission makes no other determinations in this order concerning the permissibility of any other material deviation that may be included in Bionol's revised service agreement.

and supporting information for any material deviations contained in the revised agreement, consistent with the discussion above.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.