130 FERC ¶ 61,067
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

January 27, 2010

In Reply Refer To:
Discovery Gas Transmission LLC
Docket No. RP10-270-000

Discovery Gas Transmission LLC
2800 Post Oak Blvd
Houston, TX 77056

Attention: Larry Jensen, Regulatory Affairs Manager

Reference: Reserve Dedication Agreements

Dear Mr. Jensen:

1. On December 29, 2009, Discovery Gas Transmission LLC (Discovery) filed three potentially non-conforming Reserve Dedication Agreements with three producers for Commission review. Discovery also filed a Fourth Revised Sheet No. 23 to its FERC Gas Tariff Original Volume No.1, to reflect the Reserve Dedication on its list of non-conforming agreements. Discovery states that it has been operating under the three potentially non-conforming contracts since May 1, 2009, and requests the necessary waivers to place the tariff sheet into effect as of that date. The requested waiver is granted and the subject Reserve Dedication Agreements are accepted effective May 1, 2009, as requested, subject to conditions, as discussed below.

2. The present filing concerns three potentially non-conforming contracts under Discovery's Rate Schedule FT-2, which is for shippers willing to commit production reserves to transportation on the Discovery pipeline system for the life of the reserve lease. Discovery states that the Reserve Dedication Agreements used to commit to FT-2 service "are not among the suite of *pro forma* transportation service agreements in Discovery's FERC Gas Tariff."

3. In addition, Discovery states that the filed agreements contain a provision that specifies that Discovery agrees not to reduce a producer's maximum daily volume quantity (MDVQ), pursuant to its discretionary right under the FT-2 Rate Schedule. Discovery's tariff provides, at section 2.f of Rate Schedule FT-2, that if any shipper fails

to ship at least half of its MDVQ for either Mainline or Expansion service over any given 12-month period, then Discovery "shall have the right to reduce Shipper's MDVQ … for the following contract year." The filed agreements, however, state that Discovery "agrees that during the term hereof it will not reduce, pursuant to its discretionary right under the FT-2 Rate Schedule of DGT's FERC Gas Tariff, Producer's MDVQ-Expansion capacity rights … due to Producer's use or lack of use of transportation service…."

4. Discovery argues that the filed agreements do not constitute material deviations because Discovery has interpreted the MDVQ reduction clause as discretionary. Discovery argues that the Commission usually deems deviations immaterial when parties exercise discretion of an option contemplated by the tariff.[1]

5. Public notice of Discovery's filing issued on January 4, 2010. Interventions and protests were due January 11, 2010, as provided in section 154.210 of the Commission's regulations.[2] Pursuant to Rule 214,[3] 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 intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

6. Section 154.1(d) of the Commission's regulations requires a pipeline to file a contract which materially deviates for the pipeline's form of service agreement.[4] In *Columbia Gas Transmission Corporation* (*Columbia*), issued on November 21, 2001,[5] 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.[6] However, not all

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[1] Discovery transmittal at 4 (citing *Texas Eastern Transmission, LP*, 119 FERC ¶ 61,337 at P 20 (2007) (*Texas Eastern*)).

[2] 18 C.F.R. § 154.210 (2009).

[3] 18 C.F.R. § 385.214 (2009).

[4] 18 CFR §154.1(d) (2006).

[5] *Columbia Gas Transmission Corp*., 97 FERC ¶ 61,221 (2001) (*Columbia*).

[6] In *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 at P 27 (2003), the Commission stated "[s]ince there would appear to be no reason for the parties to use language different from that in the form of service agreement other than to affect the substantive right of the parties, this effectively means that all

(continued…)

material deviations are impermissible. If the Commission finds that such deviation does not constitute a substantial risk of undue discrimination the Commission may permit the deviation.[7] Therefore, there are 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 a substantial risk of undue discrimination. The Commission finds that the service agreements contain material deviations that present a substantial risk of undue discrimination, as more fully discussed below.[8]

7. We find that the filed agreements are materially non-conforming agreements that Discovery should have filed for Commission review at the time of their execution. Under section 4(c) of the Natural Gas Act (NGA), jurisdictional pipelines must file "all contracts which in any manner affect or relate to" the pipeline's rates and services. Section 154.1(b) of the Commission's regulations implements this provision and provides that pipelines must file all contracts related to their rates and services.[9] The subject agreements clearly affect or relate to Discovery's rates and services. Further, section 154.1(d) of the Commission's regulations provides that any contract that conforms to the form of service agreement set forth in the pipeline's tariff need not be filed, but that any contract that deviates in any material aspect from the form of service agreement set forth in the pipeline's tariff must be filed.[10] Here, we find that the subject provision guaranteeing that Discovery will not invoke its right under section 2.f of Rate Schedule FT-2 to reduce the shipper's MDVQ is a material deviation from its *pro forma* Rate Schedule FT service agreement insofar as the *pro forma* agreement incorporates by reference all provisions of that rate schedule.

8. As the Commission explained in *Columbia Gas Transmission Corp.*,[11] the exemption from the requirement that each customer service agreement must be filed with

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language that is different from the form of service agreement should be filed with the Commission." *Id*. P 32.

[7] *Columbia* at p. 62,004.

[8] *See ANR Pipeline Co*., 97 FERC ¶ 61,252 at 62,115-16 (2001).

[9] 18 C.F.R. § 154.1(b) (2009); *El Paso Natural Gas Co.*, 115 FERC ¶ 61, 391 (2006).

[10] 18 C.F.R. § 154.1(d) (2009).

[11] 97 FERC ¶ 61,221 at 62,002 (2001).

the Commission is based on a finding that the section 4 filing requirement has already been satisfied by the pipeline's previous filing of the *pro forma* service agreement. Because Discovery has no *pro forma* Reserve Dedication Agreement, it should be filing its individual Reserve Dedication Agreements.

9. Further, we find the subject MDVQ reduction clause presents significant potential for undue discrimination among shippers. Daily throughput quantities are a significant factor for shippers in determining the value of a transportation contract. A contract that provides a secure MDVQ, therefore, is providing a more valuable service than an otherwise identical contract that does not provide the shipper with a stable MDVQ. Discovery's reliance on *Texas Eastern* is inapposite. In that case, under the *pro forma* service agreement, "the parties were given an option by the tariff."[12] In the *Texas Eastern* context, then, all shippers were aware of and in a position to negotiate service reductions under an option expressly set forth in the tariff. In the present case, Discovery's tariff only provides one party, Discovery itself, with the option to reduce service. Indeed, until this filing, no other shippers would have even been aware that Discovery would be willing to negotiate away its right to reduce service.

10. Accordingly, as a condition of acceptance, within 30 days of this order, Discovery must either delete this provision from the three filed agreements, or else file to amend section 2.f of Rate Schedule FT-2 of its tariff to either delete the subject provision giving Discovery the right to reduce the Shipper's MDVQ or to provide that Discovery's right to reduce the MDVQ under this provision is subject to negotiation.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[12] *Texas Eastern*, 119 FERC ¶ 61,337 at P 20.