

133 FERC ¶ 61,180
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Questar Southern Trails Pipeline Company Docket No. RP10-388-001

ORDER ON REHEARING

(Issued November 29, 2010)

1. On April 23, 2010, Questar Southern Trails Pipeline Company (Southern Trails) filed a request for rehearing or, in the alternative, a motion to vacate order and to grant leave to withdraw filing, and request for stay. Southern Trails' rehearing request concerns the Commission's March 24, 2010 order¹ which found that a Southern Trails service agreement, Transportation Service Agreement No. 4027² (Sempra Agreement or Sempra Contract), contained an impermissible material deviation from Southern Trails' form of service agreement. As discussed below, the Commission grants Southern Trails' request for rehearing in part to accept the Sempra Contract, subject to certain revisions to Southern Trails' tariff and *pro forma* service agreement.

Request for Rehearing

2. In its rehearing request, Southern Trails contends that the Commission erred in finding that the Sempra Agreement contained an impermissible material deviation from the FT *pro forma* service agreement. Southern Trails contends that it filed the agreement erroneously, as it is Southern Trails' position that the Sempra Agreement does in fact conform to its FT *pro forma* service agreement.

¹ *Questar Southern Trails Pipeline Company*, 130 FERC ¶ 61,234 (March 24 Order).

² TSA No. 4027 is with Sempra Energy Trading, LLC. The agreement is for 40,000 Dth/day of firm transportation with a primary term from July 1, 2008 to October 31, 2012.

3. Southern Trails states that the Sempra Agreement was initially identified as a non-conforming service agreement because it appeared atypical in that it provided the shipper with a provision granting it a unilateral evergreen right.³ In its rehearing request, Southern Trails contends that the Sempra Agreement conforms to its FT *pro forma* service agreement because section 8.1 of the General Terms and Conditions (GT&C) of its FERC Gas Tariff expressly permits it to waive its right to terminate the agreement if the contract term, rate, and volumes meet certain criteria, thereby leaving the shipper with a unilateral termination right. Section 8.1 of Southern Trails' GT&C states:

Either Southern Trails or Shipper may terminate a firm transportation service agreement at the end of its existing term by providing written notice the earlier of (i) the date of the notice period provided for in Shipper's contract; or (ii) 90 days prior to the expiration of the term of the contract. At the time of entering into a transportation service agreement, Southern Trails may waive its termination rights if Shipper's contract (1) has a volume of 40,000 Dth or greater at the maximum tariff rate or a negotiated rate equal to or greater than the maximum tariff rate and (2) has an initial term of four years or greater.⁴

Southern Trails argues that the FT *pro forma* service agreement includes a blank space for "Additional Terms," which enabled the Sempra Agreement to conform to the FT *pro forma* service agreement, since the unilateral termination right granted to Sempra was such an "additional term" agreed to by Southern Trails pursuant to section 8.1.

4. Southern Trails maintains that because Sempra's unilateral termination right results from the exercise of Southern Trail's discretion to waive its own right to terminate, as permitted by tariff section 8.1, the agreement with Sempra permissibly noted this as an "additional term," and therefore it conforms to the FT *pro forma* service agreement. Thus, Southern Trails posits on rehearing that the

³ The provision states that "[t]his agreement will continue from year-to-year unless Shipper gives written notice to terminate the agreement 90 days prior to the termination or renewal date."

⁴ General Terms and Conditions, FERC Gas Tariff, First Revised Vol. No. 1, section 8.1.

valuable unilateral shipper right of termination in the Sempra contract is both permissible under Southern Trails' tariff and in conformance with its FT *pro forma* service agreement.

Commission Discussion

5. The March 24 Order addressed the issue of whether a contractual evergreen right that only the shipper could terminate was a valuable option that was not reflected in the FT *pro forma* service agreement. To remedy this, Southern Trails was directed either to revise its FT *pro forma* service agreement to include this option for all similarly situated shippers, or revise its contract with Sempra to exclude the non-conforming provision. In its request for rehearing, Southern Trails has explained that this provision, making the contract solely terminable by the shipper, arises from section 8.1 of its GT&C, which sets criteria under which Southern Trails *may* award such a unilateral termination right to any shipper meeting the criteria, as it did to Sempra. This explanation does not, however, completely assuage the underlying concern of the Commission – that to the extent such a unilateral termination right is available, it must be made known to and afforded to all similarly situated shippers without undue discrimination or preference.

6. While section 8.1 of its GT&C establishes some objective criteria for the award of such valuable right – a four year term and a minimum volume of 40,000 Dth at the maximum tariff rate – it appears up to Southern Trails to subjectively decide for which shipper Southern Trails *may* waive its own termination right, thereby providing a shipper the unilateral and sole right of termination. Southern Trails asserts that the section 8.1 grant of the unilateral termination right could be considered as an annotation in the blank space for “Additional Terms” in the FT *pro forma* service agreement thereby providing a sufficient basis for deciding that the Sempra contract “conforms” to the FT *pro forma* service agreement. Carried to its extreme, this type of analysis could make any contract conform to a *pro forma* agreement that contained a blank space for “Additional Terms.” Even assuming that based on this interpretation of the “Additional Terms” feature of the FT *pro forma* service agreement, the Sempra contract conformed to Southern Trails' FT *pro forma* service agreement, this does not fulfill the Commission's intended policy goal of similar treatment for similarly situated shippers. This

blank space for “Additional Terms” is contrary to the Commission’s precedent governing forms of service agreements and must be revised.⁵

7. In *Northern Natural*, the Commission required the pipeline to change the term “Other” in the *pro forma* service agreement to the more specific “Other Provisions Permitted by Tariff Under the Applicable Rate Schedule,” and also required Northern Natural to delineate the tariff-permitted special provisions. To be consistent with the requirements enunciated in *Northern Natural*, the Commission directs Southern Trails to similarly expand the title “Additional Terms” to “Additional Terms Permitted by Tariff Under the Applicable Rate Schedule” and to list the specific tariff provisions permitting such additional terms, including the one at issue here (GT&C § 8.1). With these changes, the Sempra contract would be conforming and would not need to be renegotiated.

8. However, after considering the explanation provided by Southern Trails, the Commission finds that GT&C section 8.1 must also be revised to ensure that it is applied in a not unduly discriminatory manner.

9. Even though the Sempra contract would conform to a properly constructed FT *pro forma* service agreement after the compliance revision directed above, GT&C section 8.1 affords Southern Trails discretion to choose which shippers that meet the section 8.1 objective criteria receive a unilateral termination right. In other words, shippers that meet the volumetric, rate, and term criteria only receive this unilateral termination right when Southern Trails waives its own termination right, which Southern Trails “may” waive. The Commission is concerned upon consideration of Southern Trails’ rehearing argument, that section 8.1 of its GT&C must be applied in a not unduly discriminatory manner. Therefore, the Commission directs Southern Trails to revise this provision to expressly state that waiver of its termination rights under section 8.1 shall not be granted or withheld on an unduly discriminatory basis.⁶ This type of language is consistent with what

⁵ See, e.g., *Northern Natural Gas Company*, 102 FERC ¶ 61,171, at P 14-19 (2003) (*Northern Natural*) (Commission rejects a blank labeled “Other” in a *pro forma* service agreement).

⁶ For example, a sentence could be added at the end of the language from section 8.1, quoted *supra*, as follows: “Southern Trails’ waiver of its termination rights shall not be granted or withheld in an unduly discriminatory manner.”

we have required with contractual rights of first refusal (ROFR),⁷ and we also find it appropriate here.

10. Accordingly, the Commission grants rehearing in part of the March 24 Order to accept the Sempra contract, subject to Southern Trails' compliance filing. As the Commission is addressing Southern Trails' primary request which seeks rehearing of the March 24 Order, Southern Trails' alternative motions are moot.

The Commission orders:

(A) Questar's request for rehearing is granted in part to accept the Sempra Agreement as conforming. Subject to Southern Trails' making the changes in its tariff and *pro forma* FT service agreement as directed by this order.

(B) Within 30 days of the date of this order, Southern Trails shall revise the FT *pro forma* service agreement and section 8.1 of its GT&C as discussed in this order.

By the Commission.

(S E A L)

Kimberly D. Bose
Secretary

⁷See, e.g., *Texas Eastern Transmission, LP*, 109 FERC ¶ 61,145 at P 6 (2004).