

134 FERC ¶ 61,172
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.

Tuscarora Gas Transmission Company

Docket No. RP10-559-001

ORDER ON REHEARING

(Issued March 4, 2011)

1. On May 28, 2010, Tuscarora Gas Transmission Company (Tuscarora) filed a request for rehearing of the Commission's April 30, 2010 order in the captioned docket.¹ The April 30 Order found that a Tuscarora service agreement with Barrick Goldstrike Mines, Inc. (Barrick) contained an impermissible material deviation from Tuscarora's *pro forma* service agreement. For the reasons discussed below, the Commission denies Tuscarora's request for rehearing.

Background

2. On March 31, 2010, Tuscarora submitted two potentially non-conforming transportation service agreements² along with a tariff sheet upon which the agreements were listed as non-conforming. In the April 30 Order, the Commission accepted both agreements and the related tariff sheet, on the condition that Tuscarora either revise the Barrick Agreement to conform to the existing *pro forma* service agreement or revise its General Terms and Conditions (GT&C) and *pro forma* service agreement to provide the right to reduce quantities to all firm shippers in the same manner as the Barrick Agreement.³

3. Specifically, the Commission found that a provision in the Barrick Agreement provided for a reduction of the shipper's maximum transmission

¹ *Tuscarora Gas Transmission Co.*, 131 FERC ¶ 61,091 (2010) (April 30 Order).

² Barrick Goldstrike Mines, Inc. FT No. F074 (Barrick Agreement) and California Dept. of Corrections FT No. F021.

³ April 30 Order P 9.

quantity (MTQ) (step-down provision) after the first ten years of the agreement and that this did not conform to Tuscarora's form of service agreement.⁴ The Commission found that this MTQ step-down provision was an impermissible material deviation because it appeared to offer the shipper the option to choose a different MTQ for specific time periods, an option that Tuscarora's form of service agreement did not provide to all shippers. In short, the form of service agreement did not make it clear to all shippers that any shipper could negotiate for the type of step down provision that was provided to the shipper by Tuscarora in the Barrick Agreement.

Request for Rehearing

4. Tuscarora states that the Commission erred in finding that the MTQ provision of the Barrick Agreement afforded substantive rights to one shipper that were not available to other shippers, and that it also erred in subsequently finding that the MTQ provision was an impermissible material deviation from the form of service agreement.

5. Tuscarora states that the April 30 Order appears to reflect a misapprehension that the MTQ provision was "fixed and negotiated at the outset of the agreement."⁵ Tuscarora explains that this misapprehension may be due to its characterization of the MTQ provision as a "step down" provision in the March 31, 2010 Filing. Tuscarora states that the MTQ provision only reflects an extension of the agreement, and is not a "step down" provision as described in the March 31, 2010 Filing.

6. Tuscarora contends that the Barrick Agreement is the result of negotiations between the parties for the transportation of fixed quantities of capacity for set time periods. Tuscarora also explains that these negotiations took place in the context of extending the term of existing service. Tuscarora states that, as a result of the negotiations, the period of time during which the lesser MTQ is to be effective constitutes an extension of service negotiated in advance, which is permissible under Commission policy and its tariff.

⁴ The agreement states that the shipper's MTQ for the first ten years for the contract is 20,000 Dth/d of capacity and that the shipper's MTQ for the following five years is 10,000 Dth/d.

⁵ Rehearing Request at 4.

7. Specifically, Tuscarora explains that the Barrick Agreement was entered into as a result of a permanent release by Morgan Stanley Capital Group Inc. (Morgan Stanley). Tuscarora states that in February 2002, Morgan Stanley entered into a service agreement with Tuscarora for 20,000 Dth/day for a ten-year term.⁶ In February 2005, Morgan Stanley permanently released that capacity pursuant to a Capacity Relinquishment and Termination Agreement, effective June 25, 2005.⁷ Tuscarora states that it entered into the Barrick Agreement in July 2004 for the 20,000 Dth/day of capacity and agreed to an extension of the original Morgan Stanley agreement, which would have otherwise expired November 30, 2012. Tuscarora states that the parties negotiated an extension for 20,000/Dth/day through June 24, 2015, as well as an additional extension for a five-year term from June 25, 2015 through June 24, 2020, at an MTQ of 10,000 Dth/day.

8. Tuscarora contends that the right to negotiate contract extensions is in fact available to all shippers under the Tuscarora tariff and that this right to negotiate is not prohibited by Commission policy. Specifically, Tuscarora refers to section 27.5(b) of its General Terms & Conditions (GT&C), which provides:

Shipper and Transporter [may] mutually agree to amend the terms of the existing Service Agreement which shall include an extension of the term beyond the termination date of the existing Service Agreement. Tuscarora will mutually agree to a contract extension term under this subsection on a not unduly discriminatory basis.

9. Tuscarora states that the MTQ provision does not change the conditions under which service is provided to Barrick nor does it pose a risk of undue discrimination. Tuscarora contends that because the MTQ provision in the Barrick Agreement neither affects the substantive rights of the parties nor provides an opportunity for undue discrimination, it should be accepted as consistent with Commission policy. In sum, Tuscarora contends that the Barrick Agreement is the result of a five-year term extension of a contract beyond its original ten-year term and that such an extension is permitted by its tariff.

⁶ *Id.* at Exhibit B.

⁷ *Id.*, Appendix C.

Commission Determination

10. In the April 30 Order, the Commission considered Tuscarora's filing and determined that the contract at issue must either be revised to conform to the existing Form of Service Agreement, or Tuscarora must provide the right to decrease capacity to all firm shippers.

11. The Commission has found that a shipper's right to reduce its contract demand before the expiration of its agreement is a valuable right since it can enable the shipper to avoid significant liability for future reservation charges. The Commission has held that such a valuable right must be granted in a not unduly discriminatory manner.⁸ For example, as the Commission discussed in the April 30 Order, the Commission addressed a situation in *Questar Pipeline Co.* where the company had a non-conforming agreement with Anadarko that included a provision that decreased the contract quantity every year of the contract. The Commission found that this was impermissible since substantive rights were afforded to Anadarko that are not afforded to other similarly situated firm shippers. Therefore, the Commission determined that contract must either be revised to conform to the existing Form of Service Agreement, or Questar must provide this substantive right to all firm shippers.⁹ The same was required of Tuscarora.

12. On rehearing, Tuscarora argues that the maximum transportation quantities listed in the Barrick Agreement were not fixed and negotiated at the outset of the agreement, but were an extension of an ongoing contract and therefore, permitted by section 27.5(b) of its tariff. The Commission does not dispute the fact that section 27.5(b) of Tuscarora's tariff allows it to negotiate extensions of agreements. However, it is not clear that an extension similar to the one offered in the Barrick Agreement is permitted by section 27.5(b).

13. The MTQ provision in the Barrick Agreement is more than a mere extension of a contract. In addition to extending the length of the contract, it also reduces the shipper's MTQ. This additional flexibility to reduce capacity in

⁸ *Questar Pipeline Co.*, 132 FERC ¶ 61,152, at P 2 (2010); *see also TransColorado Gas Transmission Co.*, 121 FERC ¶ 61,217, at P 10 (2007) (citing *Colorado Interstate Gas Co.*, 105 FERC ¶ 61,124, at P 26 (2003)).

⁹ *Questar Pipeline Co.*, 131 FERC ¶ 61,011, at P 5 (2010).

multiple time periods covered by the contract as provided to the shipper under the Barrick Agreement is not expressly noticed in section 27.5(b) nor can it be deduced from the *pro forma* service agreement. Therefore, other shippers may not be aware that multiple extensions of their contracts may be negotiated with corresponding changes in the terms of the newly extended contracts.

14. Furthermore, even if section 27.5(b) provides the pipeline with the authority to extend the term and quantity, as argued by Tuscarora on rehearing, the agreement still fails to conform to the *pro forma* service agreement.

15. Tuscarora's *pro forma* service agreement does not accommodate more than a single quantity and term. In section 1.1, Tuscarora's *pro forma* service agreement only accommodates a single quantity for a single term, as there is only one blank for quantity and term. As such, even though extensions are permitted by Tuscarora's tariff, the additional quantity and term deviates from the *pro forma* service agreement.

16. Therefore, the Barrick Agreement still deviates from the *pro forma* service agreement even if the section 27.5(b) applies to the provision at issue. For example, Tuscarora asserts that it negotiated an extension for 20,000/Dth/day through June 24, 2015, as well as an additional extension for a five-year term from June 25, 2015 through June 24, 2020, at an MTQ of 10,000 Dth/day. As set forth, the *pro forma* service agreement in Tuscarora's tariff could not accommodate such a contract provision with but one blank for quantity and one blank for term.

17. In *Equitrans, L.P.*,¹⁰ the Commission held that a pipeline's *pro forma* service agreement for each rate schedule should have blank spaces or optional provisions to accommodate all the types of contractual provisions that the pipeline typically offers to customers under that rate schedule in the normal course of business. Accordingly, Tuscarora's *pro forma* service agreement should have blanks which would put shippers on notice that provisions, such as extensions pursuant to section 27.5(b) of Tuscarora's tariff, are available. Such a revision minimizes the risk of undue discrimination among customers by ensuring that all customers have notice of all the types of contractual provisions that may be negotiated. It also reduces the burden on Tuscarora, the Commission, and others from the filing and processing of non-conforming agreements, by minimizing the number of agreements that must be filed. For these reasons, Tuscarora's request for rehearing is denied.

¹⁰ *Equitrans, L.P.*, 131 FERC ¶ 61,090, at P 11 (2010).

18. As directed by the April 30 Order Tuscarora must either amend the Barrick Agreement to conform to its *pro forma* service agreement or amend its *pro forma* service agreement as described above.

The Commission orders:

Tuscarora's request for rehearing is denied, as discussed in the body of the order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.