

135 FERC ¶ 61,263
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.

Portland Natural Gas Transmission System

Docket No. RP11-1789-000

ORDER ON COMPLIANCE FILING

(Issued June 27, 2011)

1. In an October 21, 2010 order in Docket No. RP10-758-000 (October 2010 Order), the Commission reviewed non-conforming contracts submitted by Portland Natural Gas Transmission System (Portland Natural) and required Portland Natural to eliminate certain deviations or provide further explanations.¹ On February 18, 2011, in Docket No. RP11-1789-000, and supplemented March 24, 2011 in Docket No. RP10-758-000, Portland Natural submitted a revised tariff record and two amended agreements in compliance with the October 21 Order. We find the amended contracts to be in compliance with the October 21 Order. However, we reject Portland Natural's revised tariff record as not in compliance, as discussed below.

Background

2. On May 24, 2010, Portland Natural filed for review, pursuant to section 154.1(d) of the Commission's Regulations,² multiple non-conforming service agreements. On June 28, 2010, the Commission accepted Portland Natural's non-conforming agreements, effective on the dates requested, subject to further review.³ In the October 2010 Order,

¹ *Portland Natural Gas Transmission System*, 133 FERC ¶ 61,050 (2010) (October 21 Order).

² 18 C.F.R. §154.1(d) (2011).

³ *Portland Natural Gas Transmission System*, 131 FERC ¶ 61,276 (2010) (June 28 Order).

the Commission reviewed the non-conforming contracts and found that Portland Natural's agreements with EnergyNorth Natural Gas (EnergyNorth), Wausau Papers of New Hampshire, Inc. (Wausau Papers), and The Mead Corporation (Mead) contained impermissible deviations that required further action.

3. On February 18, 2011, and supplemented on March 24, 2011, Portland Natural submitted a revised tariff record and two amended agreements in compliance with the October 21 Order. Public notice of the filing was issued on February 23, 2011, allowing for protests to be filed by March 2, 2011, as provided in section 154.210 of the Commission's regulations. No protests or adverse comments were filed.

Discussion

4. In general, when reviewing any provision that differs from a *pro forma* service agreement, the Commission first determines whether it is a material deviation. The Commission has held that a material deviation is any provision which (1) goes beyond filling in the blank spaces in the form of service agreement with appropriate information allowed by the tariff, and (2) affects the substantive rights of the parties.⁴ The Commission prohibits negotiated terms and conditions of service that result in a customer receiving a different quality of service than that offered to other customers under the pipeline's generally applicable tariff,⁵ or that affect the quality of service received by others.⁶ Finally, the Commission need not accept non-conforming provisions for which the filer has failed to provide "a detailed narrative outlining the terms of its negotiated contract, the manner in which such terms differ from its form of service agreement, the effect of such terms on the rights of the parties, and why such deviation does not present a risk of undue discrimination."⁷

⁴ *Monroe Gas Storage Co., LLC*, 130 FERC ¶ 61,113, at P 28 (2010) (*Monroe*). See generally *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001) (*Columbia*).

⁵ *Texas Eastern Transmission, LP*, 123 FERC ¶ 61,095, at P 14 n.6 (2008).

⁶ See *Dominion Transmission, Inc.*, 93 FERC ¶ 61,177 (2000).

⁷ *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 33 (2003). See also *East Tennessee Natural Gas Co.*, 107 FERC ¶ 61,197, at P 10 (2004). Portland Natural, in its descriptions of some of its individual deviations, urges the Commission to approve them on the grounds that the deviation "reflects the mutual agreement reached between the parties" or "applies only to this shipper." These proffered grounds do not comply with the Commission's standards for reviewing material deviations.

EnergyNorth Agreement

5. The October 21 Order found that the FT agreement between Portland Natural and EnergyNorth contained one impermissible deviation. The agreement with EnergyNorth contained a provision that allowed EnergyNorth to reduce its maximum daily quantity by up to 400 Dth/day if Portland were to contract for firm transportation to the Berlin Station with another party, excluding Crown Vantage or its successors. We found that a “shipper’s right to reduce its contract demand before expiration of its agreement is a valuable right since it can enable the shipper to avoid significant liability for future reservation charges and must be granted in a not unduly discriminatory manner.”⁸ We accordingly directed Portland Natural to either remove the provision or offer it on a non-discriminatory basis to all shippers.

6. Portland Natural states that it proposes to offer this provision to all similarly situated shippers, which it considers to be long term shippers with a primary delivery point of Berlin, NH, on a non-discriminatory basis. Portland Natural proposes the following new tariff section:

5.1.3.7- For any Rate Schedule FT Shipper whose gas transportation contract has both an initial term of twenty (20) years or longer and a primary delivery point of Berlin, NH; in the event Transporter enters into a new gas transportation contract for firm transportation service with any other shipper, excluding Crown Vantage (or any successor operating Crown Vantage's facilities), that calls for delivery at Berlin Station, Shipper shall have the right to the extent of the Maximum Daily Quantity under that other contract up to 400 Dth per day, to reduce its Maximum Daily Quantity under their FT Agreement.⁹

7. We find that this proposed tariff section does not comply with the October 21 Order. Portland Natural has failed to show that its proposal to limit contract demand reduction rights solely to 20-year firm shippers whose primary delivery point is at Berlin, New Hampshire is not unduly discriminatory. The Commission does not require pipelines to permit shippers to terminate or reduce their contractual obligations before the

⁸ *Id.* P 17.

⁹ Part 5.1.3.7 Rate Sch FT, Primary Deliveries at Berlin, NH Delivery Point, 0.0.0 to PNGTS Tariffs, FERC NGA Gas Tariff.

end of their contract terms.¹⁰ However, if a pipeline voluntarily offers contract demand reduction rights, it must do so on a not unduly discriminatory basis. As we stated in *ANR*:

The Commission is not requiring pipelines to offer identical contract demand adjustment provisions to all customers, without regard to their varying circumstances. Pipelines may propose tariff provisions under which they would retain the ability to offer contract demand adjustment provisions tailored to the individual circumstances of different classes of customer, *so long as similarly situated customers are treated similarly*. For example, it may be reasonable for a pipeline to offer contract demand adjustment provisions tied to certain events, such as the closure of the plant being served by a particular contract.¹¹

8. Consistent with *ANR*, the Commission has approved tariff provisions offering the contract demand reduction rights only to particular customer classes which could be found to have a greater need for such rights than other customer classes. For example, the Commission has approved offering contract demand rights only to local distribution companies affected by retail unbundling¹² or offering such rights only to shippers who have dedicated declining gas reserves to be transported on the pipeline.¹³ Portland Natural has not explained why firm shippers with a primary delivery point at Berlin, New Hampshire have a greater need for contract demand reduction rights than firm shippers with primary delivery points at other locations. Nor has Portland Natural provided any other reason why firm shippers at other points are not similarly situated to firm shippers at Berlin for purposes of contract demand reduction rights. Moreover, Portland Natural has not explained why the Commission should accept a provision that discriminates by name against Crown Vantage.

¹⁰ *ANR Pipeline Co.*, 98 FERC ¶ 61,181, at 61,669 (2002) (*ANR*). *ANR Pipeline Co.*, 99 FERC ¶ 61,310, at 62,321, *reh'g*, 101 FERC ¶ 61,246 (2002). *Florida Gas Transmission Co.*, 101 FERC ¶ 61,401, at P 10 (2002). *Columbia Gulf Transmission Co.*, 105 FERC ¶ 61,351, at P 11 (2003).

¹¹ *ANR*, 98 FERC at 61,669 (emphasis supplied).

¹² *CenterPoint Energy Gas Transmission Co.*, 109 FERC ¶ 61,387 (2004).

¹³ *Columbia Gulf Transmission Co.*, 107 FERC ¶ 61,075, at P 12 (2004).

9. Portland Natural appears to have submitted tariff language so narrowly tailored that EnergyNorth would be the only shipper which could qualify for these contract demand reduction rights, thus attempting to thwart the Commission's directive to offer such rights pursuant to generally applicable, not unduly discriminatory conditions. Accordingly, we reject Portland Natural's proposed tariff language and direct Portland Natural to submit a further compliance filing in this docket, within 30 days of this order, to comply with the directive of the October 21 Order and our guidance in this order.

Wausau Papers Agreement

10. The October 21 Order found that Portland Natural's Firm Transportation (FT) agreement with Wausau Papers contained two impermissible deviations. First, the service agreement did not include a provision in the applicable *pro forma* service agreement which permits firm shippers to reduce their firm contract demand if Portland executes an agreement with a new or replacement shipper and Portland's revenues over the next twelve months are projected to exceed its cost of service. The Commission found the right to reduce contract demand to be "a valuable right [that] must be granted in a not unduly discriminatory manner," and directed Portland to restore the deleted provision or provide explanation as to why it was deleted.¹⁴ Portland Natural states that Wausau Papers has agreed to restore the deleted provision to the agreement.

11. Second, the Commission found that the Wausau Papers agreement's *Memphis* clause¹⁵ contained impermissible non-conforming language. The Commission found that the non-conforming clause went beyond merely exempting certain non-conforming provisions from Portland's right to file unilateral changes, and also committed Portland not to file unilaterally to modify various provisions of its tariff that govern service to all its shippers. The Commission stated that "it may be reasonable for a pipeline to agree not to file unilaterally to change a non-conforming provision in a particular shipper's service agreement which the Commission has approved."¹⁶ The Commission found that commitments from the pipeline not to change generally applicable terms and conditions of service, however, were potentially discriminatory. Therefore, we required Portland Natural to remove the relevant non-conforming language in the *Memphis* clause of its

¹⁴ October 21 Order, 133 FERC ¶ 61,050 at P 6.

¹⁵ See *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 79 S. Ct. 194, 3 L. Ed. 2d 153 (1958). A *Memphis* clause permits a pipeline to reserve the right to make Natural Gas Act (NGA) section 4 filings to unilaterally propose changes in the rates and terms and conditions of service in settlements and in contracts, which the Commission evaluates under the just and reasonable standard of review.

¹⁶ October 21 Order, 133 FERC ¶ 61,050 at P 16.

agreement, without prejudice to Portland Natural and the shipper renegotiating the clause consistent with the October 21 Order. Portland Natural states that it has renegotiated the agreement with Wausau Papers to remove the impermissible language and to replace it with language consistent with the October 21 Order.

12. We find that the amended agreement between Portland Natural and Wausau Papers complies with the directives of the October 21 Order.

Mead Agreement

13. The October 21 Order found that the FT agreement between Portland Natural and Mead contained four impermissible deviations. Portland Natural states that Mead has released its capacity to NewPage Corp. (NewPage) through the end of Mead's contracted term. Portland Natural states that because NewPage is the replacement shipper on its system, it would renegotiate the agreement with NewPage and once the renegotiated agreement was finalized the agreement would be reviewed and signed by Mead. Portland Natural states at the time it submitted its compliance filing on February 18, 2011, the agreement with Mead had yet to be executed. On March 24, 2011, Portland Natural submitted a supplemental filing with the executed amended agreement with Mead.

14. First, the Commission found a provision of the Mead agreement, which provided Mead with the option of using arbitration to establish a cost-of-service rate should Portland Natural cease to have FERC approved cost based rates, to be impermissible.¹⁷ Portland Natural states that this provision has been removed from the amended agreement.

15. Second, the agreement with Mead did not include a provision, which was contained in the *pro forma* FT service agreement, which obligates shippers to deliver supporting documentation to Portland Natural's lenders in order to assist it in the process of obtaining a possible future refinancing of its system. The Commission found this to be an impermissible deviation as it removed a condition for one shipper which all of its other shippers must comply with in order to obtain FT service. We directed Portland Natural to either provide an explanation for removing the provision or else to restore the deleted provision.¹⁸ Portland Natural states that the amended agreement with Mead restores the provision, consistent with its then applicable *pro forma* FT service agreement.

¹⁷ *Id.* P 7.

¹⁸ *Id.* P 14.

16. Third, a provision in the Mead agreement granted Mead the option to purchase an additional 18,000 MMBtu/day of capacity. The Commission required additional explanation on the circumstances under which the option was offered to Mead before it could determine whether the provision is a permissible material deviation.¹⁹ Portland Natural states that the amended agreement removes this provision, as the process for building additional capacity is described in Portland Natural's tariff.

17. Fourth, the Commission made the same findings with respect to the Mead agreement's *Memphis* clause as it did with respect to the Wausau Papers agreement's *Memphis* clause discussed above.²⁰ Portland states that the amended agreement with Mead has been renegotiated to remove the impermissible language and replace it with language consistent with the October 21 Order.

18. We find that the amended agreement between Portland Natural and Mead complies with the directives of the October 21 Order.

PL Agreements

19. The October 21 Order found that twenty Park and Loan (PL) agreements in which Portland Natural had replaced the term "bid" with "nominate" were permissible deviations that appeared to correct an error that remained in Portland Natural's *pro forma* PL agreement. The October 21 Order accepted the deviation on the condition that Portland Natural file to amend its *pro forma* PL agreement so as to use the correct nomination nomenclature.²¹ Portland Natural states that it made the required correction as part of a filing made on June 24, 2010, in Docket No. RP10-885-000. The Commission accepted the tariff sheets submitted in Docket No. RP10-885-000 on July 28, 2010 via an unpublished letter order. Therefore, we find that Portland Natural had complied with directives of the October 21 Order regarding PL agreements.

The Commission orders:

(A) Portland Natural's amended agreements with Wausau Papers and Mead, and its PL agreements, are in compliance with the directives of the October 21 Order.

(B) Portland Natural's proposed tariff record is rejected.

¹⁹ *Id.* P 10.

²⁰ *Id.* P 15-16.

²¹ *Id.* P 24.

(C) Portland Natural's agreement with EnergyNorth is accepted subject to further review and to Portland Natural submitting a compliance filing within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.