

136 FERC ¶ 61,224
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

September 29, 2011

In Reply Refer To:
Central New York Oil and Gas
Company LLC
Docket Nos. RP11-2552-000
RP11-2570-000

Central New York Oil and Gas Company LLC
c/o Husch Blackwell LLP
750 17th St. NW, Suite 1000
Washington, DC 20006

Attention: William F. Demarest, Jr.
Counsel to CNYOG

Reference: Non-Conforming Agreements

Ladies and Gentlemen:

1. On September 1, 2011, Central New York Oil and Gas Company LLC, (CNYOG) filed revised tariff records,¹ in Docket No. RP11-2552-000 (Original Filing), in compliance with Ordering Paragraph (F) and Paragraph 34 of the Commission Order Issuing Certificate in Docket No. CP10-194-000,² which incorporate six negotiated rate Firm Wheeling Service Agreements (FWSA) that materially deviate from its Rate Schedule FW Form of Service Agreement. On September 20, 2011, CNYOG filed a revised tariff record,³ in an *errata* filing in Docket No. RP11-2570-000 (*Errata* Filing) to correct a typographical error inadvertently contained in Exhibit A of the FWSA submitted in Docket No. RP11-2552-000 between Anadarko Energy Services Company,

¹ See Appendix.

² *Central New York Oil and Gas Company LLC*, 134 FERC ¶ 61,035 (2011) (Certificate Order).

³ See Appendix.

LLC (AES) and CNYOG (AES-CYNOG FWSA). Upon reviewing the FWSAs, we require CNYOG to modify the most-favored-nation clause non-conforming provision, as discussed below. The Commission accepts CNYOG's revised tariff record sections, subject to conditions, to be effective October 1, 2011, as proposed, or the date on which the facilities authorized in Docket No. CP10-194-000 are placed into service. When CNYOG files in compliance with §157.20(c)(2) it should also make this informational filing with the Commission through the eTariff portal using a Type of Filing Code 620. In addition, CNYOG is advised to include as part of the eFiling description, a reference to Docket No. CP10-194-000 and the actual in-service date for this project.⁴

2. Ordering Paragraph (F) of the Certificate Order required CNYOG to file its “negotiated rate agreements . . . no less than thirty days and no more than sixty days prior to the commencement of interstate service on the proposed facilities.” Paragraph 34 of the Certificate Order provided that, if the negotiated rate agreements contain non-conforming provisions:

Central NY must clearly delineate differences between its negotiated contractual terms and that of its form of service agreement in redline and strikeout. In addition, Central NY must 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.⁵

3. Public notices of CNYOG's filings in Docket Nos. RP11-2552-000 and P11-2570-000 were issued on September 2, 2011 and September 21, 2011, respectively. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.⁶ Pursuant to Rule 214,⁷ all timely filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted. No party filed a protest or adverse comments.

⁴ *Electronic Tariff Filings*, 130 FERC ¶ 61,047, at P 17 (2010).

⁵ See *Natural Gas Pipelines Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 33 (2003).

⁶ 18 C.F.R. § 154.210 (2011).

⁷ 18 C.F.R. § 385.214 (2011).

4. CNYOG filed six FWSAs, all of which contain material deviations in common. Of the six FWSAs, four are identical in all respects except for volume: with (1) Cabot Oil & Gas Corporation (tariff record Section 8.1); (2) Central Hudson Gas and Electric Corp. (tariff record Section 8.2); (3) Chesapeake Energy Marketing, Inc. (tariff record Section 8.3); and (4) Southwestern Energy Services Company (tariff record Section 8.4). The remaining two FWSAs are identical (except for volume) to the other four FWSAs, except that these latter two FWSAs contain an additional material deviation in Article VII, Section 3, regarding liability limitation. These remaining two FWSAs are with (1) AES (tariff record Section 8.5); and, (2) MMGS Inc. (tariff record Section 8.6).⁸

5. There are three material deviations shared in common by all six filed FWSAs. First, Article III, Section 1, changes from years to months the dates used in the notification process for considerations unique to the start-up of new facilities. Second, Article III, Section 2, offers a one-time unilateral right to extend the term of the FWSA; no comparable provision exists in the form of FWSA. Third, Article IV, Section 3, offers most-favored nations treatment, as an inducement to prospective shippers to subscribe to capacity; no comparable provision exists in the form of FWSA.⁹ In addition, the FWSAs with AES and MMGS Inc. (tariff record Sections 8.5 and 8.6) contain another deviation in Article VII, Section 3. This deviation introduces a limitation on liability provision that is substantively identical to that in Section 13 of CYNOC's Rate Schedule FWS, but which is not ordinarily included in the form of FWSA.

6. 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.¹⁰ The Commission prohibits negotiated terms and conditions of service that result in a customer

⁸ Pursuant to AES' Precedent Agreement for 75,000 Dth of firm wheeling capacity, AES had the right to assign a portion of its firm wheeling service capacity to a joint venture participant with AES. MMGS Inc., is a joint venture participant with AES, to which AES has assigned a portion of its capacity. Accordingly, the AES and MMGS Inc., FWSAs are identical except as to volume, and both contain the additional material deviation language in Section 3 of Article VII.

⁹ Exhibit A, Article IV introduces a provision dealing with recovery of Fuel and Lost and Unaccounted for Gas over time, including a cost-based negotiated mechanism, for which no comparable provision exists in Exhibit A of the form of FWSA. Because CYNOC has negotiated rate authority, this provision is not a material deviation.

¹⁰ *Monroe Gas Storage Company, LLC*, 130 FERC ¶ 61,113, at P 28 (2010). See generally *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001).

receiving a different quality of service than that offered to other customers under the pipeline's generally applicable tariff,¹¹ or that affect the quality of service received by others.¹²

7. The Commission finds that the year/month deviation in Article III, Section 1 and the limitation on liability deviation in Article VII, Section 3 do not affect the substantive rights of the parties. The term-extension deviation in Article III, Section 2 was offered on equal terms to all shippers participating in the open season, and is in keeping with the sort of deviations that the Commission has generally permitted pipelines to offer foundation shippers signing up for newly-constructed capacity. Accordingly, CNYOG's filing in Docket No. RP11-2552-000 complies with the requirements of Ordering Paragraph (F) and Paragraph 34 of the Certificate Order, except as detailed below.

8. Section 3 of article IV of the filed contracts contains the following most-favored-nation clause, in its entirety (emphasis added):

In consideration of Customer's reservation of capacity supporting the Firm Wheeling Facilities, Seller agrees that if, prior to and up to five (5) years after the In-Service Date of the Firm Wheeling Facilities, Seller enters into an FWS Agreement (excluding interim FWS service authorized under Seller's Tariff) with any other FWS customer –

(a) for an MDFWQ of Firm Wheeling Service equal to or less than the MDFWQ of this FWS Agreement, or

(b) for a term equal to or less than the term of this FWS Agreement,

at a Reservation rate less than Customer's Reservation rate, **or with terms and conditions materially more favorable to such other FWS customer than those otherwise set forth in this FWS Agreement**, Seller shall notify Customer in writing within five (5) Business Days. Unless Customer notifies Seller in writing within five (5) Business Days that Customer does not want to revise its rates or terms and conditions of service, then Seller will revise this FWS Agreement to reduce Customer's Reservation rate to equal such lower Reservation rate, if any, **and/or to provide the**

¹¹ *Texas Eastern Transmission, LP*, 123 FERC ¶ 61,095, at P 14 n.6 (2008).

¹² *See Dominion Transmission, Inc.*, 93 FERC ¶ 61,177 (2000).

more favorable terms and conditions of service, if any, effective as of the date of such FWS Agreement with such other FWS customer.

9. CNYOG states that no comparable provision exists in its form of service agreement. CNYOG argues that the provision should be accepted, however, because CNYOG is authorized to negotiate rates, and the most-favored-nation clause is a form of negotiated price. CNYOG states that the clause was offered to all prospective shippers in the open season, and argues that it poses no risk of undue discrimination.

10. The Commission has permitted most-favored-nation clauses that are limited to guaranteeing a shipper the best possible price. However, even in the context of a newly-constructed pipeline, the Commission has found that permitting the pipeline “the ability to pick and choose which shippers to grant the most favorable terms and conditions raises the risk of undue discrimination.”¹³ Accordingly, “in order to be permissible such clauses must relate only to rates and not result in the [most-favored-nation] customer receiving a different quality of service from other shippers or adversely affect other shippers.”¹⁴ We accept CNYOG’s most-favored-nation clause on the condition that CNYOG strike the text on terms and conditions emphasized in the above quotation from each of its contracts.

11. The AES-CYNOG FWSA inadvertently contained a typographical error in Exhibit A. Specifically, explanatory references in Exhibit A, Sections II(f) and III(e) of the AES-CYNOG FWSA submitted in Docket No. RP11-2552-000 indicates that AES has up to 75,000 Dth of Primary Receipt Point and Primary Delivery Point Capacity at each point. The corrected AES-CYNOG FWSA contains the correct explanatory references in Exhibit A, Sections II(f) and III(e), which reflect 50,625 Dth, rather than 75,000 Dth. CNYOG states the correction of the volumetric references in Appendix A, Sections II(f) and III(e), do not affect any of the non-conforming provisions of the FWSAs submitted in Docket No. RP11-2552-000. We accept the revised tariff record submitted in CNYOG’s *Errata* Filing in Docket No. RP11-2570-000.

¹³ *Gulfstream Natural Gas System, L.L.C.*, 100 FERC ¶ 61,036, *order on reh’g*, 101 FERC ¶ 61,368, at P 22 (2002).

¹⁴ *Northern Natural Gas Co.*, 110 FERC ¶ 61,321, *order on reh’g*, 111 FERC ¶ 61,379, at P 46 (2005).

12. The Commission accepts CYNOC's revised tariff record sections and six non-conforming FWSAs, subject to CNYOG filing revised tariff records consistent with this order, within 30 days of the date that this order issues.

By direction of the Commission.

Kimberly D. Bose,
Secretary

APPENDIX

Central New York Oil and Gas Company, LLC
Central New York Oil And Gas FERC Gas Tariff
FERC NGA Gas Tariff

Docket No. RP11-2552-000

*Tariff Records Accepted Effective the Latter of October 1, 2011,
or the date on which the facilities are placed into service*

Section 1.0, Table of Contents, 5.0.0
Section 1.0, Table of Contents, 4.0.0
Section 4.0, Currently Effective Rates, 4.0.0
Section 8.0, Nonconforming Service Agreements, 1.0.0
Section 8.1, Cabot Oil & Gas Corporation FWSA, 1.0.0
Section 8.2, Central Hudson Gas and Electric Corp. FWSA, 1.0.0
Section 8.3, Chesapeake Energy Marketing, Inc. FWSA, 1.0.0
Section 8.4, Southwestern Energy Services Company FWSA, 1.0.0
Section 8.6, MMGS, Inc. FWSA, 1.0.0

Tariff Record Rejected as Moot

Section 8.5, Anadarko Energy Services Company FWSA, 1.0.0

Docket No. RP11-2570-000

*Tariff Record Accepted Effective the Latter of October 1, 2011,
or the date on which the facilities are placed into service*

Section 8.5, Anadarko Energy Services Company FWSA, 2.0.0