

136 FERC ¶ 61,228
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

September 30, 2011

In Reply Refer To:
National Fuel Gas Supply Corporation
Docket No. RP11-2529-000

National Fuel Gas Supply Corporation
6363 Main Street
Williamsville, NY 14221-5887

Attention: Antoinetta D. Mucilli
Senior Attorney

Reference: Non-conforming Agreement

Dear Ms. Mucilli:

1. On August 31, 2011, National Fuel Gas Supply Corporation (National Fuel) filed Amendment No. 2 to a consent agreement between itself, Beacon Landfill Gas Holdings LLC (Beacon), and The Bank of New York Mellon (BNY), as successor to JP Morgan Chase Bank, N.A., as Trustee,¹ (Consent Agreement) and a revised tariff record adding Amendment No. 2 to the list of non-conforming agreements in its tariff.² National Fuel requests that the Commission accept Amendment No. 2 for filing as a non-conforming agreement, and grant waiver of the Commission's filing requirements to permit the associated revised tariff record to become effective September 22, 2011.³ No protests or adverse comments have been filed. For reasons discussed below, the Commission grants waiver, accepts Amendment No. 2, and accepts the revised tariff record⁴ to be effective September 22, 2011, subject to conditions.

¹ "Amendment No. 2 to Consent to Assignment and Agreement" dated November 22, 2010. (Amendment No. 2)

² 34 – Non-Conforming Agmts, 34 – Non-Conforming Service Agreements, 1.0.0 to National Fuel Tariff, FERC NGA Gas Tariff.

³ 18 C.F.R § 154.207 (2011) requires, in part, that changes in tariffs be filed not less than 30 days prior to the proposed effective date thereof.

⁴ National Fuel is directed to indicate the rate schedule applicable to the service agreement required to be filed by this order on its revised tariff record.

2. According to National Fuel, it entered into a precedent agreement (Precedent Agreement) with Beacon, under which National Fuel would transport 10,000 Dth/day on a firm basis for Beacon from Imperial, Pennsylvania to an interconnection with Texas Eastern Transmission, LP at Holbrook, Pennsylvania, on facilities National Fuel would construct.⁵ In addition, National Fuel, Beacon, and BNY executed Amendment No. 2 providing that the Precedent Agreement and any resulting service agreement would be subject to a Consent Agreement executed by the same parties in 2006 whereby Beacon assigned its interest in four earlier service agreements with National Fuel to BNY as Trustee for Beacon's note holders. Under the assignment, the Trustee would possess the ability to step into Beacon's shoes in order to cure defaults under service agreements subject to the Consent Agreement, and to otherwise preserve the service agreements and therefore the value of the collateral supporting issuance of the notes. On January 26, 2011, National Fuel and Beacon entered into a firm service agreement (Service Agreement No. F11547) in accordance with the terms set forth in the Precedent Agreement.

3. National Fuel states that it filed Amendment No. 2 because it will effectively amend and supplement Service Agreement No. F11547. However, according to National Fuel, Service Agreement No. F11547 does not otherwise deviate from the *pro forma* FT service agreement in its tariff. National Fuel points out that, in June 2006, in Docket No. RP06-393-000, the Commission accepted the Consent Agreement and the four earlier service agreements as non-conforming agreements.⁶

4. Public notice of National Fuel's Filing was issued on September 1, 2011. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2011)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2011)), all timely filed motions to intervene and any unopposed motion 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.

5. Section 154.1(d) of the Commission's regulations requires pipelines to file with the Commission contracts that materially deviate from the pipeline's form of service agreements.⁷ In *Columbia Gas*, the Commission explained 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

⁵ The certificate for this project was issued in *National Fuel Gas Supply Corp.*, 133 FERC ¶ 61,235 (2010).

⁶ *National Fuel Gas Supply Corp.*, 115 FERC ¶ 61,381 (2006) (*National Fuel*).

⁷ 18 C.F.R. § 154.1(d) (2011).

the parties.⁸ The Commission prohibits negotiated terms and conditions of service that result in a shipper receiving a different quality of service than that offered other shippers under the pipeline's generally applicable tariff or that affect the quality of service received by others.⁹ However, not all material deviations are impermissible. As the Commission explained in *Columbia Gas*, provisions that materially deviate from the corresponding *pro forma* service agreement fall into two general categories: (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.¹⁰

6. Amendment No. 2 makes the Precedent Agreement and “any and all Transportation Service Agreements . . . pursuant to or in connection with the Precedent Agreement” subject to the Consent Agreement that the Commission accepted, along with four other service agreements between National Fuel and Beacon, as permissible non-conforming agreements in *National Fuel*. Amendment No. 2 simply adds Service Agreement No. F11547 to the group of service agreements already subject to the Consent Agreement. Therefore, we accept Amendment No. 2 because it addresses unique circumstances allowing BNY to step into Beacon's shoes, which will not unduly discriminate against other shippers on National Fuel's system. Further, we require that Service Agreement No. F11547 be filed as a non-conforming agreement because Amendment No. 2 makes that service agreement subject to the non-conforming provisions of the Consent Agreement. While National Fuel states that Service Agreement No. F11547 itself does not contain any material deviations, Amendment No. 2 makes the service agreement a part of the non-conforming Consent Agreement, and sections 154.1(d) and 154.112 (b)¹¹ of our regulations require that the entire agreement be filed if it contains any non-conforming provision. Our acceptances herein, including acceptance of the tariff record identified in footnote no. 2, are subject to National Fuel's compliance with all filing directives in this order within 15 days of the issuance date of this order.

7. In Order No. 714, the Commission adopted regulations that established electronic filing requirements for filings affecting tariffs, rate schedules, service agreements, and jurisdictional contracts in order to establish an electronic database of these jurisdictional

⁸ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001). (*Columbia Gas*). See also *ANR Pipeline Co.*, 97 FERC ¶ 61,224, at 62,022 (2001) (*ANR*).

⁹ *Monroe Gas Storage Co., LLC*, 130 FERC ¶ 61,113, at P 28 (2010).

¹⁰ *Columbia Gas*, 97 FERC at 62,003; *ANR*, 97 FERC at 62,024.

¹¹ 18 C.F.R. § 154.112(b) (2011).

agreements accessible to the Commission and the public.¹² The purpose of Order No. 714 was to ensure that all such jurisdictional agreements would appear in the pipeline's electronic tariff so that they would be transparent to the public and could be easily searched.¹³ The Commission stated that the database would consist of all "tariffs, rate schedules, jurisdictional contracts, and other jurisdictional agreements that are required to be on file with the Commission."¹⁴ The Commission required that these filings be made according to its prescribed electronic formatting requirements.¹⁵ Under these electronic filing rules, all tariffs, rate schedules, and jurisdictional contracts, including service agreements, are required to be filed as "tariff records" so they will be included as part of the electronic database for the company.¹⁶

8. Although National Fuel included Amendment No. 2 in the instant filing, it must also file Amendment No. 2 electronically as a tariff record pursuant to Order No. 714. This directive also applies to Service Agreement No. F11547. Order No. 714 requires that agreements predating the implementation of the e-tariff filing requirements must be filed electronically if they are revised after such implementation.¹⁷ Therefore, National Fuel must file as tariff records both the Consent Agreement and its subsequent revisions, Amendment Nos. 1 and 2.¹⁸ Additionally, National Fuel's tariff record listing all these non-conforming agreements must be further revised to reflect the filing directives in this order.

¹² *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 9-12 (2008) (Order No. 714).

¹³ The same "tariff record" filing requirement applies to any filed jurisdictional agreement, such as negotiated rate agreements, that the pipeline chooses to file.

¹⁴ Order No. 714, at P 13 and n.11 (2008).

¹⁵ 18 C.F.R. § 154.4(a) and (c) (2011) (requiring the electronic filing of "tariffs, rate schedules, service agreements, and contracts, or parts thereof.... The requirements and formats for electronic filing are listed in instructions for electronic filing and for each form").

¹⁶ The Implementation Guide states that a tariff record is "the actual 'text' or 'content' of the tariff, rate schedule, or service agreement along with its associated metadata." Office of the Secretary of the Commission, *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings*, at 14, 20, available at <http://www.ferc.gov/docs-filing/etariff/implementation-guide.pdf>.

¹⁷ Order No. 714, FERC Stats. & Regs. ¶ 31,276 at P 13.

¹⁸ The parties to the Consent Agreement executed Amendment No. 1 as a result of a condition imposed by the Commission in *National Fuel*. Amendment No. 1 was accepted for filing effective June 26, 2006, in an unreported Director's Letter Order dated July 19, 2006.

9. Finally, National Fuel requests waiver of the thirty-day filing requirement in section 154.207 of the Commission's regulations so that the tariff record identified in footnote no. 2 can be accepted effective on September 22, 2011, its anticipated date for commencement of transportation under Service Agreement No. F11547. For good cause, we will grant waiver.

By direction of the Commission.

Kimberly D. Bose,
Secretary.