

142 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Paiute Pipeline Company

Docket Nos. RP12-130-001
RP12-130-002

ORDER ON REHEARING AND COMPLIANCE

(Issued January 8, 2013)

1. On May 2, 2012, the Commission issued an order addressing *pro forma* tariff records filed by Paiute in response to the technical conference in the above-captioned proceeding, and requiring Paiute to make a compliance filing.¹ On June 1, 2012, Paiute filed a request for clarification, or in the alternative, rehearing of the May 2 Order, as well as a compliance filing.² In this order, the Commission grants Paiute's request for rehearing or clarification of the May 2 Order concerning the duration of evergreen provisions. The Commission also accepts the tariff records contained in Paiute's compliance filing, subject to Paiute removing disputed portions of proposed section 3.2(d) regarding indemnification of liability for failure to odorize gas, as referenced below. Paiute is directed to file these revised tariff records within 30 days of the date this order issues, consistent with the discussion below.

I. Background

2. In its initial filing, Paiute submitted tariff records proposing numerous revisions throughout its entire tariff. The Commission accepted and suspended Paiute's tariff records for five months, which would have allowed them to become effective May 3, 2012, and ordered staff to convene a technical conference.³ On January 24, 2012, staff convened a technical conference to address all issues raised by Paiute's tariff revisions. Based on discussions at the technical conference and subsequent meetings among the

¹ *Paiute Pipeline Co.*, 139 FERC ¶ 61,089 (2012) (May 2 Order).

² See Compliance Filing Tariff Sheets of Paiute Pipeline Company FERC Gas Tariff, Fourth Revised Volume No. 1-A (Compliance Filing).

³ *Paiute Pipeline Co.*, 137 FERC ¶ 61,164 (2011) (November 30 Order).

parties, on February 23, 2012, Paiute filed revised *pro forma* tariff records replacing those it filed originally and added language resolving some of the issues previously in dispute.⁴ Southwest Gas Corporation (Southwest), Sierra Pacific Power Company D/B/A/NV Energy (Sierra), and Northern Nevada Industrial Gas Users (NNIGU), and Paiute submitted comments and reply comments following the technical conference on February 27, 2012, and March 6, 2012, respectively.

3. In the May 2 Order, the Commission addressed the outstanding disputed issues, which included the following: capacity release reservation charge crediting, reservation charge crediting during restricted periods, reservation charge crediting and conditions on upstream pipelines, reservation charge crediting and segmentation, odorization liability, creditworthiness, hourly limitations, imbalance and netting provisions, and ROFR and evergreen rights.

II. Discussion

4. On June 1, 2012, Paiute filed a request for clarification, or in the alternative, rehearing of the May 2 Order, as well as a compliance filing. The request for clarification/rehearing addresses only one portion of the May 2 Order—the Commission’s discussion of Paiute’s proposed ROFR and evergreen provisions. While the tariff records in Paiute’s compliance filing address a number of issues, the only contested portions of the compliance filing relate to Paiute’s proposed ROFR and evergreen provisions and its proposed odorization liability provisions.⁵

5. Public notice of Paiute’s compliance filing was issued on June 4, 2012. Protests were due on or before June 13, 2012, as provided in section 154.210 of the Commission’s regulations, 18 C.F.R. § 154.210 (2012). On June 13, 2012, NNIGU filed a limited protest of Paiute’s compliance filing as well as an answer to Paiute’s request for clarification. Also on that day, Sierra filed a protest of Paiute’s compliance filing. On June 23, 2012, Paiute filed an answer to the protests, in which it asked to withdraw certain disputed language concerning indemnification of liability, which it stated had the support of all active parties.

⁴ See *Pro Forma* Tariff Sheets of Paiute Pipeline Company FERC Gas Tariff, Fourth Revised Volume No. 1-A (February 23 Filing).

⁵ Paiute also proposes two minor housekeeping changes to revise its table of contents to reflect pagination changes, and to correct a reference in its Statement of Rates at Sheet No. 10 to an outdated version of its tariff.

A. ROFR and Evergreen Rights

6. In its February 23 Filing, Paiute proposed modifying section 16.2 of its General Terms and Conditions (GT&C) in a number of ways—many of which were not opposed. Two provisions, however, were opposed by parties to this proceeding: (1) a provision in section 16.2 stating that if either Paiute or a shipper elects termination under an evergreen provision, Paiute will not be obligated to continue a shipper's evergreen rights on a contract extended through the ROFR process (Evergreen Continuation Provision); and (2) new section 16.2(c), which would tie expansion project open-seasons into the ROFR process (Capacity Rationalization Provision).

1. May 2 Order

7. The May 2 Order rejected Paiute's proposed revisions to section 16.2.⁶ Specifically, the Commission stated:

Paiute proposes modifying section 16.2 to provide that when there is a fully subscribed expansion open season process and either Paiute or a shipper elects termination of an evergreen provision, Paiute shall not be obligated to continue a shipper's evergreen rights on a contract extended through the ROFR process. The Commission is persuaded by NNIGU's arguments that these tariff revisions may erode the rights of long-term captive shippers, and that tying the expansion open season process into the ROFR process is contrary to Commission policy.⁷

8. The May 2 Order thereafter focused its discussion exclusively on Paiute's proposed addition of section 16.2(c), i.e., the Capacity Rationalization Provision.⁸ The Commission concluded that section 16.2(c) was unjust and unreasonable and contrary to the Commission's policy.⁹

⁶ May 2 Order, 139 FERC ¶ 61,089 at P 69.

⁷ *Id.*

⁸ *Id.* PP 70-73.

⁹ *Id.* (citing *Gas Transmission Northwest*, 117 FERC ¶ 61,315, at PP 54, 58 (2006); *Southern Natural Gas*, 128 FERC ¶ 61,211, at P 88 (2009)).

2. Paiute's Request for Clarification/Rehearing

9. Paiute requests that the Commission clarify that the May 2 Order rejects only the Capacity Rationalization Provision in section 16.2(c) of Paiute's proposed GT&C, not the entirety of section 16.2. In support, Paiute states that a number of the proposed changes to section 16.2 are uncontested, noting that the May 2 Order does not directly address these uncontested provisions.¹⁰ Paiute therefore contends that the first sentence of paragraph 69 erred by purporting to reject all of the proposed revisions to section 16.2.¹¹

10. Paiute also requests that the Commission clarify that it has not rejected Paiute's proposed Evergreen Continuation Provision (the second sentence of the second paragraph of section 16.2). Paiute argues that while paragraph 69 of the May 2 Order references this sentence, it does so only in the context of the proposed change to section 16.2(c). Paiute argues that because the proposed Evergreen Continuation Provision is independent of section 16.2(c), the Commission should clarify that the May 2 Order did not reject this provision.

11. To the extent the Commission does not grant these clarifications, Paiute seeks rehearing. Paiute asserts that if the Commission intended to reject the uncontested portions of section 16.2, it provided no rationale for doing so, and therefore failed to engage in reasoned decision-making. With respect to the Evergreen Continuation Provision, Paiute emphasizes that it is not inextricably tied to the proposed section 16.2(c). Paiute states that the Evergreen Continuation Provision is intended to accomplish two objectives: (1) to clarify the timing of when section 16.2 becomes applicable—after notice is given under the evergreen provisions; and (2) to clarify that there is not a ROFR right to retain an evergreen contract provision, which has always been, and continues to be, subject to mutual agreement.¹² Absent mutual agreement,

¹⁰ Rehearing Request at 4 (noting that the first paragraph of section 16.2, the first sentence of the second paragraph of section 16.2, section 16.2(a), and section 16.2(b) are uncontested proposed revisions to section 16.2 of the GT&C).

¹¹ *Id.* The first sentence of paragraph 69 of the May 2 Order states: "For the reasons discussed below, the Commission rejects Paiute's proposed revisions to section 16.2 of its tariff." May 2 Order, 139 FERC ¶ 61,089 at P 69.

¹² *Id.* at 6-7 (citing *Natural Gas Pipeline Co. of America*, 93 FERC ¶ 61,075, at 61,201 (2000) (asserting that shippers and pipelines may enter into contractual rollover or evergreen clauses that go beyond the regulatory ROFR on a non-discriminatory basis)).

Paiute states that the replacement contract becomes the tariff's form of service agreement without an evergreen provision.¹³

12. Paiute asserts NNIGU's objections to its proposal are based not on the proposed Evergreen Continuation Provision, but instead on the fact that the evergreen clauses in NNIGU companies' contracts permit Paiute, as well as shippers to give notice of termination.¹⁴ Paiute asserts that the only thing that the proposed Evergreen Continuation Provision adds is that if Paiute provides notice of termination, and if the shipper retains the capacity at the end of the ROFR process, its service agreement may not have an evergreen clause absent mutual agreement.

3. Paiute's Compliance Filing

13. On June 1, 2012, Paiute filed revisions to its GT&C, as directed by the Commission's May 2 Order. With respect to section 16.2, Paiute states that the Commission's May 2 Order was unclear. Paiute notes that the Commission clearly held that section 16.2(c) of its GT&C should be amended, which Paiute did in its compliance filing. Paiute states, however, that it does not believe the Commission intended to reject all of the proposed revisions to section 16.2, particularly those portions of section 16.2 that were not in dispute. Paiute points to the finding in paragraph 73 of the May 2 Order, which clearly rejected section 16.2(c), and contrasts it with prior paragraphs that address section 16.2 generally, which Paiute describes as unclear and confusing. Paiute asserts that the Commission appears to have conflated the dispute over the Capacity Rationalization Provision in section 16.2(c) with the dispute over the Evergreen Continuation Provision in the second sentence in the second paragraph of section 16.2—when in fact the two issues are separate and distinct.¹⁵

14. Accordingly, Paiute states that its compliance filing includes the provisions reflected in section 16.2 of Paiute's February 23 Filing, with the exception of 16.2(c) of the GT&C, which has been amended in compliance with the May 2 Order. Paiute acknowledges that the Commission may still need to issue a specific finding on the disputed Evergreen Continuation Provision.

¹³ *Id.* at 7 (distinguishing *Tennessee Gas Pipeline Co.*, 64 FERC ¶ 61,020, at 61,279-80 (1993) (holding that a pipeline cannot eliminate the rollover provision through contract negotiations if the pipeline's *pro forma* agreement requires it to offer the provisions in all long-term contracts)).

¹⁴ *Id.* at 8.

¹⁵ Compliance Filing at 5.

4. NNIGU's Limited Protest & Answer to Request for Clarification

15. In its protest, NNIGU asserts that Paiute failed to fully comply with the May 2 Order concerning the Evergreen Continuation Provision. NNIGU also argues that the Commission should deny Paiute's request for clarification of the May 2 Order.¹⁶

16. NNIGU largely re-states its arguments regarding the importance of maintaining NNIGU companies' existing contract rights and negotiated value as well as preserving its Commission-approved ROFR.¹⁷ NNIGU asserts that the Commission has consistently recognized the importance of protecting long-term captive customers, and has adopted special protections for captive customers where circumstances warrant such protection. NNIGU contends that the circumstances here warrant such protection because Paiute is attempting to eliminate a mutually-agreed to provision of its tariff that Paiute and shippers have long relied on and which NNIGU characterizes as integral to its agreement to a settlement of Paiute's last general rate case.¹⁸ NNIGU also argues that Paiute's inclusion of the Evergreen Provision is unduly discriminatory because it improperly ties affected NNIGU companies' ROFR rights to the elimination of existing evergreen provisions in contracts that may be extended through the ROFR process.

17. NNIGU contends that the Commission's May 2 Order did not intend to reject *all* provisions of section 16.2 of Paiute's GT&C, including uncontested provisions. Instead, NNIGU argues that the Commission intended only to reject the *contested* provisions of section 16.2, which would include the Evergreen Continuation Provision. Accordingly, NNIGU asserts that Paiute's compliance filing fails to fully implement the requirements of the May 2 Order because Paiute removed only the Capacity Rationalization Provision in section 16.2(c) of its GT&C and not the Evergreen Continuation Provision. NNIGU therefore requests that the Commission reject Paiute's request for clarification, reaffirm the Commission's intent to reject all *contested* language from section 16.2, including the Evergreen Continuation Provision, and require Paiute to comply fully with the May 2 Order.

5. Commission Determination

18. For the reasons discussed below, the Commission grants Paiute's request for rehearing and clarification of the May 2 Order. The language rejecting all of "Paiute's proposed revisions to section 16.2 of its tariff" in paragraph 69 of the May 2 Order was

¹⁶ NNIGU June 13, 2012 Comments at 3.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 3.

too broad. The Commission did not intend to reject those revisions to section 16.2 that were unopposed by any of the parties. Neither the parties nor the Commission raised any objections to these provisions, and we find on rehearing that they are just and reasonable revisions to section 16.2.

19. The sole remaining issue is whether the Evergreen Continuation Provision should have been rejected. In the May 2 Order, the Commission's basis for rejecting this provision was that it "may erode the rights of long-term captive shippers."¹⁹ The remainder of the Commission's discussion addressed the Capacity Rationalization Provisions contained in section 16.2(c). Upon further consideration, we find that the Evergreen Continuation Provision in section 16.2 is just and reasonable. The starting place for our analysis is the Commission's longstanding policy that pipelines need not offer such evergreen provisions in the first place.²⁰ Indeed, Paiute's form of service agreement specifically mentions an evergreen provision as a term that the parties may or may not choose to include in the service agreement. Accordingly, when entering into a new service agreement, Paiute is free to negotiate whether or not to include an evergreen provision, the only limit being that Paiute must not exercise its discretion in an unduly discriminatory manner.²¹

20. The Evergreen Continuation Provision does little more than clarify that when a new service agreement is executed as a result of the ROFR process, the issue of whether or not the new agreement will contain an evergreen contract provision is a matter subject to mutual agreement. Thus, the Commission grants rehearing with respect to the May 2 Order's determination that the Evergreen Continuation Provision may erode the rights of long-term captive shippers. Because the underlying evergreen provision is a subject to mutual agreement, and because Paiute is otherwise not obligated to incorporate such a provision into its tariff, long-term captive shippers have no entitlement to such a provision (or the "negotiated value" associated therewith) as suggested by NNIGU. Shippers remain protected by the ROFR provisions required by the Commission and currently reflected in Paiute's tariff. The fact that Paiute offered evergreen provisions over and above the protections required by the Commission does not mean they are required to maintain such provisions in perpetuity.

¹⁹ May 2 Order, 139 FERC ¶ 61,089 at P 69.

²⁰ See *Columbia Gas Transmission Corp.*, 94 FERC ¶ 61,301, at 62,113 (2001) ("The Commission has found that pipelines are not required to offer rollover or evergreen contracts.").

²¹ *Id.*

21. Accordingly, we find that the Evergreen Continuation Provision to be just and reasonable, and accept that provision.²² Because Paiute's compliance filing reflects that provision, we accept it (and the remaining uncontested portions of section) 16.2 here.

B. Odorization Liability

22. In its February 23 Filing, Paiute proposed incorporating a liability disclaimer into section 3.2(d) of its GT&C. The proposed disclaimer would require shippers to indemnify Paiute against any claims related to Paiute's "passive or actively negligent failure" to odorize gas. Paiute argued this disclaimer is common in the industry, citing other pipelines' tariff language. Sierra protested the addition of Paiute's proposed indemnification language in section 3.2(d) of its GT&C asserting the language is overbroad.

1. May 2 Order

23. The May 2 Order found Paiute's proposed odorization indemnity provisions unjust and unreasonable. The Commission found that Paiute's proposed indemnification clause may shield Paiute from all liability, even liability resulting from its own gross negligence or willful misconduct, in contravention of Commission policy prohibiting pipelines from limiting their liability in a way that would immunize them from direct damages resulting from simple negligence.²³ The Commission also found Paiute's claim—that its proposed indemnification clause is similar to other clauses in the industry—to be misleading, explaining that these clauses are distinguishable from Paiute's proposed language for several reasons.²⁴ Consequently, the Commission rejected revised section 3.2(d) and directed Paiute to modify its indemnification clause in accordance with established Commission policies.²⁵

²² We note that the settlement agreement the Commission approved in Docket No. RP09-406 *et al.*, does not prohibit Paiute from revising the evergreen provisions set forth in its tariff over the term of that settlement.

²³ May 2 Order, 139 FERC ¶ 61,089 at P 43 (citing *Orbit Gas Storage, Inc.*, 126 FERC ¶ 61,095, at P 58 (2009)).

²⁴ *Id.* P 44.

²⁵ *Id.* The Commission noted that indemnification language suggested by Sierra in its comments would appear to be an acceptable alternative, but that some other formulation would also be acceptable, so long as it is consistent with the Commission's policies on indemnification language.

2. Paiute's Compliance Filing & Responsive Pleadings

24. In its compliance filing, Paiute revised section 3.2(d) of its GT&C. Paiute states that it adopted Sierra's suggested changes and added additional wording in two locations to add clarity. Paiute further explains that has retained other paragraphs of section 3.2(d) set forth in the February 23 Filing that were not in dispute.

25. In its protest, Sierra states that Paiute's compliance filing has introduced more ambiguity and new issues into the section 3.2(d), which should not be raised for the first time in a compliance filing. Broadly speaking, Sierra asserts that Paiute's proposed indemnification provision incorrectly suggests that shippers have an obligation to odorize gas delivered by Paiute.²⁶ Sierra states that it contacted Paiute about its concerns regarding Paiute's revised indemnity clause and Paiute stated that it was not its intent to nullify its obligation to odorize gas or to shift the burden of odorization onto its shippers through this added language.²⁷ Sierra nonetheless states that Sierra and Paiute have been unable to agree on how to modify the indemnification clause in section 3.2(d) of Paiute's GT&C.

26. In its answer, Paiute maintains that its revised section 3.2(d) is consistent with the May 2 Order. However, Paiute nonetheless requests permission to withdraw the disputed indemnification paragraph from section 3.2(d). Paiute notes that the indemnification paragraph is very complex and that it has become apparent that regardless of whether the Commission agrees with Paiute's proposed language, the provision would be a source of ongoing dispute among Paiute and its shippers. Accordingly, Paiute states that it would prefer simply to withdraw the entire third paragraph of section 3.2(d) to resolve the issue. Paiute states that it has discussed this proposal with all active parties (Sierra, NNIGU, and Southwest Gas) and that all such parties support Paiute's proposal and have authorized Paiute to represent their concurrence

3. Commission Determination

27. Because no party opposes Paiute's request to withdraw the disputed third paragraph of section 3.2(d), we grant the request here. Paiute is directed to file revised tariff records reflecting the removal of this paragraph within 30 days of the date this order issues.

²⁶ Sierra June 13, 2012 Comments at 2.

²⁷ *Id.* at 4.

The Commission orders:

(A) Paiute's request for rehearing of the May 2 Order is granted, consistent with the discussion in the body of this order.

(B) The tariff records contained in Paiute's compliance filing are accepted, to be effective May 3, 2012, subject to the conditions discussed in the body of this order.

(C) Paiute is hereby directed to file revised tariff records within 30 days of the date this order issues, as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.