



2. As discussed below, the Commission substantially rejects the explanations given in the compliance filing concerning the MDQ adjustment and primary point change provisions, denies rehearing in part, and grants rehearing in part. This decision benefits the public interest because it rejects contract provisions that could potentially permit undue discrimination among shippers and approves provisions that are consistent with our policy and provide flexibility to meet the needs of specific shippers and the pipeline.

## I. Background

### A. Description of Agreements

3. On June 4, 2001, pursuant to the Commission's Alternative Rate Policy Statement,<sup>3</sup> ANR filed numerous service agreements with WPSC,<sup>4</sup> Dynegy, Reliant and NG Energy, Utilicorp, GM<sup>5</sup>, PCS,<sup>6</sup> and West Tennessee seeking Commission approval of these agreements as either negotiated rate agreements or non-conforming service agreements. ANR requested the Commission to find certain provisions in the agreements do not materially deviate from ANR's *pro forma* service agreement, and do not, in and of themselves, cause the agreements to be nonconforming with the *pro forma* service

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<sup>3</sup>Statement of Policy on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines, 74 FERC ¶ 61,076 (1996). This Policy Statement requires pipelines, when implementing a negotiated rate contract, to file either the contract or a Statement of Rate Sheet identifying the transaction. ANR filed a copy of the negotiated rate agreements rather than the tariff sheets

<sup>4</sup>The filing in Docket No. RP99-301-016 included 27 service agreements, a May 31, 2001 buyout agreement and letter agreement.

<sup>5</sup>Even though the agreements filed in Docket No. RP99-301-021 are discounted rate agreements and not negotiated rate agreements, ANR explained that it made the filing pursuant to its negotiated rate authority because the Commission previously treated agreements that contain non-rate provisions, such as termination options, as negotiated rate agreements. Citing Tennessee Gas Pipeline Co., 91 FERC ¶61,292 (2000).

<sup>6</sup>ANR stated that, although the PCS agreements contain discounted recourse rates that cannot exceed the applicable maximum tariff rates, it filed the agreements as negotiated rate agreements because it agreed, subject to specified limitations, to charge shippers minimum rates when plant facilities are shut down.

agreement. ANR requested waiver of all Commission regulations necessary to approve the agreements effective June 1, 2001.

4. Some of the filed agreements contain provisions giving the shipper the unilateral option to increase or reduce its maximum daily quantity (MDQ). Some allow shippers to change the primary receipt point subject to various conditions or to redistribute MDQ levels among a specified group of agreements, effectively permitting delivery point changes within a defined group of points. The agreements specify how the shipper can exercise the MDQ adjustment rights. For example, some provisions give the shipper a right to increase or decrease MDQ that corresponds to adjustments in ANR's fuel use percentage. Others permit shippers to reduce their MDQ if: (1) required by a regulatory or legislative body to unbundle its merchant and transportation functions, (2) a plant served by its contract closes, is sold, or experiences a major production scale-down, and/or (3) any of a shipper's customers bypass the shipper, files for bankruptcy, dissolves, liquidates, or ceases to pay invoices for two consecutive months.<sup>7</sup>

5. Some agreements provide that, under certain conditions, ANR would not seek reimbursement from the releasing shipper if a replacement shipper defaulted on the payment. Another agreement allows the aggregation of gate stations. Some agreements give a contractual ROFO, despite the fact that the shipper would otherwise be eligible for this right under Section 22.2 of the General Terms and Conditions of ANR's FERC Gas Tariff (GT&C).

### **B. Commission Decision in the Letter Orders**

6. On July 3, 2001, the Commission issued letter orders in these proceedings which granted the requested waivers and accepted and suspended the filings to be effective as

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<sup>7</sup>Three of the agreements contain a provision allowing termination of the agreement if a force majeure event occurred resulting in the shut down of a plant. The buyout agreement with WPSC allows WPSC to pay a formula-based fee to buy-out of a capacity contract that exceeds its needs as a result of a state mandated unbundling requirement. Another agreement provided that the shipper would have the right to receive any enhancements or improvements that ANR makes to any of its services, and providing that other specified agreements would be simultaneously amended to make offsetting adjustments (increases or decreases) such that the combined city gate MDQ of these agreements would remain unchanged.

requested, subject to conditions.<sup>8</sup> The Commission determined that all of the agreements contain provisions that are not in ANR's *pro forma* service agreement, applicable rate schedules, or generally applicable tariffs and that the provisions described above are therefore material deviations. The Commission found that a provision permitting shippers to increase or reduce MDQ and change primary delivery points across contracts is a material deviation because this type of provision effectively negotiates a term and condition of service. The Commission reasoned that accepting such provisions in a negotiated rate agreement, which is not available to all shippers, would be unduly discriminatory and preferential. Therefore, the Commission directed ANR to demonstrate why it could not offer the service provided by these agreements under a generally applicable rate schedule developed consistently with other aspects of ANR's tariff. In the alternative, the Commission directed ANR to file revised agreements without the non-conforming provision.

7. In addition, in several of these orders, the Commission directed ANR to explain why it agreed to provide certain shippers with a contractual ROFR, when it appears the shipper would be eligible for this right under Section 22.2 of the GT&C. The Commission also directed ANR to explain why the agreements with WPSC do not contain a Section 9, Operational Flow Orders (OFO), that ANR included in its *pro forma* service agreement.

8. Finally, ANR did not file certain contracts with Dynegy, Reliant and NG Energy that provide for transportation under the FTS-1 rate schedule. These agreements have the same provision as the storage agreements under the FSS rate schedule which would entitle the shippers to extend the term of the FTS-1 agreements commensurate with the extension of the FSS agreement. The Commission directed ANR to file these FTS-1 agreements for the record.

9. Subsequently, on August 2, 2001, ANR sought rehearing and, on August 10, 2001, WDG filed comments emphasizing the importance of shippers being able to contract with confidence for the types of provisions at issue.

## **II. Compliance Filing**

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<sup>8</sup>See note 1, supra.

10. On September 17, 2001, ANR made the compliance filing as directed by the Commission's letter orders.<sup>9</sup> On September 28, 2001, WPSC filed comments stating that it supports ANR and the explanations in ANR's compliance filing. WPSC believes that, except for the provisions governing ROFR and those for which tariff language would render the provisions generally applicable, the primary receipt point changes and MDQ adjustment provisions are proper negotiated rate provisions because they are inextricably tied to the rate charged for the services received. WPSC believes that none of the provisions are discriminatory or give any particular shipper an unfair advantage. WPSC argues that these provisions do not affect the rates or terms and conditions of service provided to any other shipper. It contends that all increases in MDQ or primary point changes are subject to available capacity at the time a request is made. WPSC requests that the Commission accept the service agreements as negotiated rate agreements and consider ANR's response in the September 17 filing as fully complying with the July 3 letter orders.

11. In its compliance filing, ANR did not attempt to respond to each compliance provision in detail. Instead, in its compliance filing, ANR incorporated by reference and relied on the detailed discussion of the provisions set forth in its request for rehearing as compliance with the letter orders.<sup>10</sup> However, ANR does address the two major categories of provisions that were the focus of the letter orders: (1) the primary point change provision; and (2) the MDQ adjustment provision.

12. With regard to the primary point change provisions, ANR submits that it has already complied with the letter orders by recently filing generally applicable tariff provisions that formalize its policy with respect to changes in primary points. ANR states that it submitted

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<sup>9</sup>Notice of the compliance filing was issued, providing for the filing of interventions and protests in accordance with Section 154.210 of the Commission's regulations. 18 C.F.R. § 154.210. Pursuant to Rule 214, all timely filed motions to intervene are granted and any motions to intervene out-of-time filed before the issuance of this order are granted. Granting late intervention at this stage of the proceedings will not disrupt the proceedings or place undue additional burdens on existing parties.

<sup>10</sup>Specifically, pointing to its rehearing request of the July 3 letter order in Docket No. RP99-301-016 involving WPSC, ANR states that several of the provisions in WPSC's agreements are consistent with ANR's tariff, including provisions addressing: (1) discharge of liability upon permanent release; (2) rights to enhanced or improved services; (3) Rate Schedule ETS gate station aggregation; (4) minimum delivery pressures; (5) an obligation to increase throughput at the Pembine gate station; and (6) no-harm-no foul penalties. Compliance Filing at 2, note 2 (citing to Rehearing Request at 20-24).

an Offer of Settlement in Docket No. RP00-332-000 (ANR's Order No. 637 proceeding), which, if approved, will provide generally applicable criteria governing the right to change primary points.<sup>11</sup>

13. With regard to the MDQ adjustment provisions, ANR states that all of the various provisions in the different agreements were tailored to meet the particular circumstances of each shipper. ANR, therefore, argues that it is inappropriate to insert these narrowly drawn provisions into generally applicable rate schedules. ANR contends that it is also inappropriate to provide all shippers with a right that was negotiated by it with one shipper in light of the risks and rewards relating to that one shipper. Furthermore, ANR contends that each provision was part of an overall negotiation in which it agreed to provide a shipper with desired flexibility based on the unique economic circumstances associated with the particular service agreement and the requested flexibility. ANR explains that the decision to provide the flexibility to adjust MDQ involves a cost-benefit analysis that differs in every negotiation, and therefore it is inappropriate to include a right to adjust MDQ in a generally applicable rate schedule.

14. ANR states that it sought to develop generally applicable MDQ reduction provisions but was not successful in this endeavor. ANR explains that the shippers overwhelmingly preferred to retain the individually negotiated provisions because they were tailored to meet their particular needs as opposed to generally applicable provisions. ANR adds that the shippers were reluctant to modify their existing contracts until the Commission clarifies its policies on negotiated rates, negotiated terms and conditions, material deviations and non-conforming agreements. Until this happens, ANR argues that it and its shippers do not have a clear and mutual understanding of what types of provisions it can or cannot individually negotiate. Consequently, ANR asks the Commission to accept its compliance filing, find that ANR cannot provide the MDQ adjustment provisions under a generally applicable rate schedule, and approve the agreements as either negotiated rate or non-conforming agreements. If the Commission does not accept its compliance filing on this issue, ANR requests the Commission to grant rehearing.

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<sup>11</sup>The Commission found that ANR's compliance filing on this issue did not fully comply with the December 20 order or the Commission's Order No. 636 and 637 policies concerning the ability of the replacement shipper to obtain or change primary points. Therefore, in Docket Nos. RP00-332-002, RP00-332-003, RP00-597-002 and RP03-182-000, the Commission accepted the proposal subject to modification.

### **III. Request for Rehearing**

15. In its request for rehearing, ANR argues that the Commission erred by accepting the agreements subject to conditions because the agreements are negotiated rate agreements that are consistent with Commission policy, precedent and ANR's tariff. ANR contends that the Commission also erred when it found that the provisions contained in the subject agreements are negotiated terms and conditions. ANR also contends that the Commission erred when it modified existing policy with respect to negotiated rates and the submission of non-conforming agreements because ANR believes the Commission ignores its history of allowing it to mutually negotiate agreeable terms and conditions in service agreements. In its comments, WDG agrees with ANR and states that the Commission previously permitted parties to negotiate non-rate provisions that do not relate to operational conditions and that do not adversely affect service to any other shipper.<sup>12</sup>

16. With regard to the specific MDQ adjustment provisions, ANR states that several of the WPSC agreements contain detailed rights to decrease and increase MDQ which were negotiated in exchange for the agreed-to-rate, and were designed to address specific requirements of WPSC.<sup>13</sup> Once ANR effectuates a reduction, it states that WPSC has the right to increase its MDQ to restore the quantities previously reduced, subject to specified limitations and conditions. ANR contends that it makes little sense for it to insert into a generally applicable rate schedule a provision that allows MDQ reductions up to 57% of the total MDQ, not to exceed a stated aggregate MDQ level in several contracts, particularly since the provision was designed only for WPSC's specific circumstances. Therefore, ANR asserts that these provisions are not conducive to inclusion in a generally applicable rate schedule.

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<sup>12</sup>WDG Comments at 1 (citing ANR's Request for Rehearing at 5-11).

<sup>13</sup>ANR negotiated various reduction right provisions: (1) conditioned upon the state requiring the unbundling of the merchant and transportation function; (2) permitting a reduction of MDQ by no more than 15% in any year, nor more than 57% in total during the term of the contract, and no more than an aggregate annual amount under a group of agreements; and (3) providing WPSC with the right to seasonally adjust the no-notice entitlement of its no-notice service, provided that ANR receives the same revenues in the twelve months following the adjustment after taking into consideration WPSC's other reduction rights.

17. ANR states its belief that the Commission accepted the Utilicorp MDQ reduction provision and the buyout provision in the July 3 letter order<sup>14</sup> because it does not appear that the Commission required any further demonstration with respect to these provisions. Therefore, ANR seeks clarification about whether the Commission accepted the subject provisions. If the Commission denies clarification and refuses to accept the MDQ and buyout provisions as part of the negotiated rate agreements, ANR seeks rehearing of the July 3 letter order.<sup>15</sup>

18. ANR also argues that the Commission erroneously treated the provision allowing changes in MDQ, maximum storage, and injection and withdrawal quantities under storage agreements as a negotiated term and condition.<sup>16</sup> ANR explains that, in its filing to change the fuel use percentage in Docket No. RP01-467-000 (filed a few days before the July 3 letter orders were issued), it sought to make the MDQ storage provisions generally applicable by adding the provisions to its *pro forma* service agreement. ANR states that several of the WPSC agreements contain a similar provision which allows WPSC to fully utilize its MDQ on an upstream pipeline. ANR argues the Commission should approve this provision because it is not materially different from the provision in Docket No. RP01-

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<sup>14</sup>See 96 FERC ¶ 61,016 (2001).

<sup>15</sup>ANR alleges that in a May 2, 2000 letter order the Commission accepted negotiated rate agreements between ANR and WPSC that contained similar MDQ adjustment provisions. According to ANR, the Commission stated that "ANR's contracts with WPSC are treated as negotiated rate transactions because they all contain provisions allowing adjustments of rate components as a result of surcharges effectuated after November 5, 1999, and or permit reductions or increases in entitlements." As more fully discussed below, the MDQ adjustment provision in any of the subject agreements constitutes a material deviation in a non-conforming contract because it is a negotiated term and condition of service, thereby requiring ANR to modify its tariff to offer the negotiated service to all its customers.

<sup>16</sup>According to ANR, this provision allows the shipper to maintain the MDQ delivered to its city gate by taking a certain amount of gas from storage depending upon what its annual fuel use percentage may be, as determined by what is approved when ANR files annually to recalculate its fuel use percentage.

467-000<sup>17</sup> And, because it does not affect the operation of ANR's system, ANR argues that the provision is properly included in a negotiated rate agreement.

19. With regard to the provisions giving shippers the right to change primary points, ANR states that the agreements in Docket No. RP99-301-021 with GM allow GM to change primary points (1) subject to available capacity and an agreement as to price<sup>18</sup> and (2) by redistributing GM's MDQ in its four FTS-1 agreements, all of which have different primary routes.<sup>19</sup> ANR also explains that the agreements with WPSC have different receipt points within ANR's Joliet Hub and a delivery point at the Joliet Hub, and therefore effectively provide a hub-to-hub transportation service. ANR argues that, by providing for such rights, it allows WPSC to change its receipt points within the hub by reducing MDQ under some contracts and increasing MDQ under other contracts. ANR states this provision is akin to a right to change primary points through an MDQ redistribution. ANR explains that it included this same provision on a tariff sheet that it filed in an earlier WPSC negotiated rate agreement that the Commission approved last year.<sup>20</sup>

20. Finally, ANR believes that the Commission should approve the provision in the Utilicorp, GM and PCS agreements that permits a shipper to redistribute its MDQ among various primary points because it will provide the flexibility those shipper desires. ANR argues that none of the three mechanisms the Commission referenced in the letter orders (capacity release, capacity trading or contract amendments) permit the redistribution of capacity by the same shipper operating under different contracts at different receipt or delivery points. ANR explains that releasing or trading capacity requires another party and it does not apply to contracts held by the same shipper. ANR explains further that releasing

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<sup>17</sup>On July 25, 2001, the Commission conditionally accepted the service agreements subject to ANR filing a detailed description of one provision. See 96 FERC ¶ 61,107 (2001). ANR filed that information on August 9, 2001. In an unpublished director's letter order issued on January 23, 2002, we accepted the August 9th filing as complying with our directives.

<sup>18</sup>One PCS agreement (Contract No. 10327) allows the shipper to change the primary point to any receipt point with a certain HUB, subject to available capacity, twice a year.

<sup>19</sup>These provisions are also found in the PCS, Dynegy and Reliant agreements.

<sup>20</sup>ANR Request for Rehearing at 16, note 22 (citing the redlined Substitute Original Sheet No. 14R that ANR filed and seeks to cancel in Docket No. RP99-301-016).

capacity would only reduce MDQ; it would not effectuate a change in a primary point by also increasing MDQ at another point as contemplated by the MDQ redistribution provision. ANR states that the ability to request an amendment is not the same thing as a contractual right because, at the time it negotiates a contract, a shipper can negotiate for this right in exchange for the rate that it is willing to pay and the term of service to which it is willing to commit. ANR argues that, although a shipper can always negotiate a different rate or term when it seeks to change a primary point by amendment, the Commission should also permit the shipper to negotiate for that right when initially negotiating the contract, since the result is the same and no shipper is harmed. ANR argues that the Commission's decision ignores precedent in which the Commission held that changes to primary points "is a contractual matter to be negotiated by the parties."<sup>21</sup>

#### **IV. Discussion**

##### **A. MDQ Adjustment Provision**

21. ANR argues that the Commission should have accepted the MDQ adjustment provisions as part of a negotiated rate agreement. The Commission has addressed almost identical MDQ provisions and the arguments raised on rehearing in a prior ANR negotiated rate proceedings in Docket No. GT01-25-000.<sup>22</sup> We determined that:

. . . the MDQ adjustment provision is an impermissible negotiated term and condition of service because it presents too much potential for undue discrimination, unless it is offered in ANR's tariff pursuant to generally applicable conditions. . . . While a pipeline may place reasonable conditions on the negotiation of contract demand reduction rights,<sup>23</sup> these conditions must not be unduly discriminatory.

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<sup>21</sup>ANR Request for Rehearing at 19 (citing ANR Pipeline Co., 73 FERC ¶ 61,288 at 61,800 (1995), reh'g denied, 75 FERC ¶ 61,083 (1996).

<sup>22</sup>See 97 FERC ¶ 61,224 at 62,021-62,026.

<sup>23</sup>We stated that, for example, it may be reasonable for a pipeline to tie contract demand reduction rights to certain events, such as the closure of the plant being served by a particular contract or, in the case of an LDC, a loss of customers through retail unbundling or a bypass.

We continue to believe that our concern about the potential for undue discrimination in the offering of contract demand adjustment rights is justified when a pipeline negotiates narrowly drawn rights to reduce contract demand with customers who have larger contract demands. We remain convinced that requiring the pipeline to file generally applicable tariff provisions setting forth the conditions under which it will offer contract demand reduction rights is the best means of assuring that the shipper will negotiate those rights in a not unduly discriminatory manner because it will require the pipeline to grant similar rights to similarly situated customers.<sup>24</sup> In fact in May 2002, after ANR submitted the instant rehearing request, ANR filed under Section 4 of the Natural Gas Act (NGA) to include in its tariff a tariff provision setting forth the generally applicable conditions under which it would offer contract demand reductions. The Commission approved that proposal with modifications.<sup>25</sup> Therefore, ANR now offers contract demand reduction rights through generally applicable tariff provisions, consistent with Commission policy. ANR presents nothing in its arguments in the compliance filing or on rehearing that would cause us to change our position that the implementation of such a generally applicable tariff provision is the best means of assuring that these valuable rights are offered on a not unduly discriminatory basis.

22. We also reject ANR's argument that we should approve the provision in the WPSC agreements allowing changes in MDQ, maximum storage, and injection and withdrawal quantities under storage agreements because it is similar to the Commission's approval of ANR's storage service in RP01-467-000.<sup>26</sup> We approved the MDQ adjustment provision in that proceeding to reflect the increase or decrease in the Commission-approved fuel reimbursement percentage, which is independent of any shipper action or the result of any specific negotiation between ANR and a shipper. Therefore, we deny the request for rehearing of our decision concerning the MDQ adjustment provision.

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<sup>24</sup>As the parties point out, in two cases involving Tennessee Gas Pipeline Co. (Tennessee), the Commission held that the parties may negotiate provisions permitting the termination or reduction of service as part of negotiated rate agreements. We treated those provisions as covering the rate and the term of the agreement, concluding that such matters could be negotiated under the Commission's negotiated rate policy. See 87 FERC ¶ 61,206 (1999) and 89 FERC ¶ 61,033 (1999). However, we reconsidered that holding and changed the policy. See 97 FERC ¶ 61,225 (2001).

<sup>25</sup>See ANR Pipeline Co., 99 FERC ¶ 61,310 (2002), clarification granted in part, 101 FERC ¶ 61,246 (2002).

<sup>26</sup>See note 17 supra.

23. The parties also contend that the Commission's compliance filing requirement effectively treats the MDQ adjustment and buyout provisions as negotiated terms and conditions of service of the type Order No. 637 refused to authorize. In essence they argue, the Commission equates material deviations with negotiated terms and conditions of service. The parties believe that Order No. 637 defined negotiated terms and conditions of service more narrowly to involve only matters related to operational conditions of transportation service on the pipeline. They argue that the level of a customer's MDQ and the buyout of the contract do not relate to operational conditions. Therefore, ANR contends the Commission should consider the provisions at issue here as permissible negotiated rates since Section 30 of ANR's GT&C authorizes it to negotiate rates. For the reasons stated in prior orders addressing ANR's negotiated rate filings, the Commission rejects these arguments.<sup>27</sup>

#### **B. Primary Point Provisions**

24. The provisions permitting primary point changes are non-conforming provisions. Applying the Commission's analysis in ANR's Docket Nos. GT01-25-001, RP99-301-049 and RP99-301-051 proceedings,<sup>28</sup> we find that the special provision permitting shippers to change a primary point without following the regular tariff procedures could adversely affect other shippers seeking primary point capacity from the pipeline. It follows that the shipper with the special provision would have a priority for obtaining the primary point capacity. Thus, this special right to change primary points is contrary to Commission policy.

25. ANR states that, in its Order No. 637 proceeding in Docket No. RP00-332-000, it has proposed a tariff provision as part of a settlement agreement that would give all its shippers a right to change primary points subject to generally applicable conditions. Although the Commission approved the settlement in an order issued on December 20, 2001,<sup>29</sup> subject to modification and conditions, we did not approve the primary point provision which proposed to give shippers a limited right to change primary points and not

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<sup>27</sup>See ANR Pipeline Co., 97 FERC ¶ 61,224 (2001); 98 FERC ¶ 61,170 (2002); 98 FERC ¶ 61,175 (2002); 100 FERC ¶ 61,348 (2002) and 100 FERC ¶ 61,350.

<sup>28</sup>See ANR Pipeline Co., 100 FERC 61,348 and 100 FERC 61,352 (2002).

<sup>29</sup>ANR Pipeline Co., 97 FERC ¶ 61,323 (2001).

as broad a right as proposed in the provisions at issue in the instant proceedings.<sup>30</sup> This aspect of the settlement was renegotiated and in an order issued in April 2003, in Docket Nos. RP00-332-002, RP00-332-003, RP00-597-002 and RP03-182-000, the Commission found that the revised provisions still failed to comply with our policy and required further changes. In any event, there is no need for a separate primary point change provision in the instant agreements because the shippers here will have the same right to change primary points as ANR's other customers, as provided in whatever tariff provisions we ultimately approve in ANR's Order No. 637 proceeding. Accordingly, ANR must remove the provision from the agreements at issue.

26. Finally, we view as erroneous ANR's contention that we have a policy that a change to a primary point is a negotiable contract matter.<sup>31</sup> ANR takes the Commission's statement in a prior ANR proceeding out of context.<sup>32</sup> Any changes to primary points, though a matter of contract between the parties, may not be unduly discriminatory and must be pursuant to generally applicable tariff provisions. Accordingly, we reject ANR's argument on this issue.

### C. Right of First Refusal

27. In its compliance filing, ANR argues that the ROFR provision is not a material deviation because negotiated rate agreements entered into after the effective date of Order No. 637 are not eligible for ROFR.<sup>33</sup> The agreements at issue here provide that the shipper would have a ROFR under Section 22 of ANR's GT&C, notwithstanding the fact that the shipper would otherwise have been ineligible for this right under Section 22.2. The Commission directed ANR to explain why it considers the shipper ineligible for a regulatory ROFR, since the current tariff provides a ROFR to all firm shippers with contract terms of a year or more.

28. In response, ANR points out that it has filed *pro forma* tariff language in its Order No. 637 compliance filing that would limit the ROFR to maximum rate shippers, unless

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<sup>30</sup>See id. at 62,478-62,482.

<sup>31</sup>See ANR Request for Rehearing at 19.

<sup>32</sup>See note 19, supra.

<sup>33</sup>ANR Rehearing at 27 (citing Order No. 637-A, FERC Stats. & Regs.[Reg. Preambles] ¶ 31,099 at 31,634-35 (2000)).

ANR and the shipper agree otherwise.<sup>34</sup> ANR requests the Commission to find that the contractual ROFR provision addresses the term of the contract and is not a material deviation under Order No. 582.<sup>35</sup> However, ANR states that it agrees with the Commission that, if the contracts at issue are accepted as a non-conforming recourse rate agreement, the shippers would be eligible for ROFR under Section 22.2 of the GT&C as revised pursuant to Order No. 637 because the agreements are maximum rate contracts.

29. Since the Commission previously accepted the contracts at issue here as non-conforming recourse rate agreements, it is clear that the shippers will have a ROFR, regardless of the acceptance of ANR's Order No. 637 filing. Accordingly, the ROFR provision in the service agreements is superfluous. We direct ANR to remove this provision from the agreements.

#### **D. Other Provisions**

##### **1. Aggregation of Gate Stations**

30. ANR states that the provisions relating to the aggregation of gate stations are expressly contemplated by Rate Schedule ETS (enhanced transportation service). According to ANR, Section 2(e) of this rate schedule allows a shipper to obtain additional swing capability by aggregating gate stations into a single delivery point and to take gas at a higher hourly rate than under ANR's other rate schedules. ANR states that the several WPSC agreements reflect the parties' agreement to this aggregation and describe the types of events that might affect ANR's ability to operationally include all of the gate stations that are currently included in WPSC's delivery point grouping. These provisions also confirm that specific events will not result in the removal of any gate stations from the group.<sup>36</sup>

31. ANR asserts that it cannot make these types of provisions generally available because they are unique to the gate stations involved and highly fact-specific. Consequently, ANR requests the Commission to accept these provisions on rehearing. We grant rehearing on this issue. Since the right to aggregate gate station is expressly contemplated by the ETS rate schedule, it does not constitute a negotiated term and

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<sup>34</sup>*Id.* (citing to Fifth Revised Sheet No. 162 of ANR's GT&C filed in Docket No. RP00-332-000 on July 10, 2001).

<sup>35</sup>Filing Requirements for Interstate Natural Gas Companies, Docket No. RM95-3-000, 72 FERC ¶ 61,300 (1995).

<sup>36</sup>ANR Request for Rehearing at 22.

condition of service. Inclusion of such terms in any individual shipper's contract does not give that shipper a different quality of service than that offered all shippers under the rate schedule.

## **2. Enhancement Rights**

32. ANR states that the provision (giving WPSC the right to receive any enhancements or improvements to its services and ANR the right to collect incremental charges for such enhancements) simply clarifies that, if ANR amends its rate schedules to improve or enhance its services, WPSC would be entitled to such enhancements. ANR explains that, instead of deviating from its tariff, this provision just assures WPSC that it is entitled to any future improvements or enhancements provided for in the tariff. WPSC receives service under an effective rate schedule in ANR's tariff. Any changes to the rate schedule, including improvements or enhancements would apply equally to both negotiated rate and recourse rate customers. Consequently, we find these provisions superfluous and, therefore, direct ANR to remove these provisions from the agreements.

## **3. Increase of Throughput Provision**

33. ANR states that the provision in the WPSC agreement allowing ANR to increase the daily authorized throughput of the Pembine gate station conforms to certain tariffs filed in Docket No. RP01-493-000.<sup>37</sup> ANR states that it serves this gate station by delivering gas to an interconnection with Michigan Consolidated Gas Company (MichCon) where it is redelivered by MichCon to Pembine through an exchange agreement between ANR and MichCon. According to ANR, WPSC desired the assurance that it will have sufficient capacity to serve an additional load behind that gate station, and given the small load involved, ANR states that it was confident it could obtain such rights from MichCon to provide this assurance.<sup>38</sup>

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<sup>37</sup>The tariff sheets provide for a general waiver of the "shipper must have title" rule to enable it to transport gas for others on acquired off-system capacity. The subject tariff sheets were accepted, effective August 22, 2001, by a Director's Letter Order issued on August 16, 2001.

<sup>38</sup>ANR Request for Rehearing at 23. The specific contract provision at issue provides that "ANR agrees to increase the authorized delivery throughput of the Pembine gate station from 2,650 Dth/day to 4,000 Dth/day. Such increase shall become effective six (6) months after WPSC provides written notice to ANR requesting the increase."

34. The tariff sheets filed and accepted by the Commission in the August 22, 2001 Directors Letter Order in Docket No. RP01-493-000 merely allow ANR to purchase off-system capacity and use it for the benefit of its customers without ANR having title to the gas. The tariff sheets do not provide shippers on ANR's system with an automatic right to increase capacity under existing contracts. To the extent a contract for off-system capacity creates additional capacity on ANR's system, the otherwise applicable capacity allocation provisions of ANR's tariff would control the awarding of capacity. Accordingly, we deny rehearing on this issue.

#### **4. Waiver of Penalty Provision**

35. ANR states that, consistent with Order No. 637's requirement that pipelines adopt a no-harm, no-foul rule regarding the imposition of penalties, the Order No. 637 settlement proposal filed in Docket No. RP00-332-000 amends its tariff to provide for the waiver of penalties where the imposition of penalties was unnecessary to prevent the impairment of reliable service. ANR states that it agreed to the tariff change, even if the parties reject the settlement to satisfy WPSC's wish for exemption from penalties that were beyond ANR's control. ANR asserts that it is inappropriate to include such a provision in a generally applicable tariff.

36. It does not appear that there is a provision in any of the WPSC agreements pertaining to this issue, nor did the Commission address this issue in its initial order on the WPSC agreements. It is not clear why ANR raised this issue on rehearing. Nevertheless, the waiver of penalty provision was proposed as part of ANR's generally applicable tariff in ANR's Order No. 637 settlement proceeding. Therefore, there exists no need for a separate waiver of penalty provision in the individually negotiated agreements since penalty waiver rights inure to all shippers as provided in ANR's generally applicable tariff.

#### **5. Discharge of Liability**

37. ANR states that it agreed not to seek reimbursement from WPSC in the event of a payment default by a replacement shipper if certain conditions are met. According to ANR this provision conforms to Section 21.2 (c) of its GT&C which provides that:

Transporter and Shipper may, in connection with a Negotiated Rate Agreement under a firm rate schedule, agree upon payment obligations and crediting mechanisms in the event of a capacity release that varies from, or are in addition to, those set forth in section 21.2, provided, however, that terms and conditions of service may not be negotiated.

In addition, ANR states that, on June 25, 2001 in Docket No. RP01-467-000, the Commission accepted a revision to Section 21.2(a) of ANR's tariff that now permits ANR and a shipper to agree that a releasing shipper will not be liable to ANR for payment defaults by replacement shippers even when the release is not at maximum rates.<sup>39</sup> Thus, inclusion of such a provision in the agreements at issue does not give a shipper a different quality of service from other shippers since such a right is offered pursuant to a generally applicable tariff provision. Therefore, we grant rehearing on this issue.

## 6. Lack of an OFO Provision

38. ANR states that the Commission erred in its belief that certain agreements with WPSC are not consistent with Section 9 of ANR's *pro forma* service agreement because they do not contain OFO provisions. ANR explains that the agreements do not have OFO provisions because, in a June 25, 2001 order issued in Docket No. RP01-467-000,<sup>40</sup> the Commission accepted ANR's proposed deletion of Section 9 from its *pro forma* service agreement. ANR states that the agreements at issue now conform to ANR's tariff which contains ANR's OFO provisions. The Commission accepts ANR's explanation and grants rehearing.

## 7. Extension of Terms

39. The Dynegy and Reliant negotiated rate agreements had a provision that would allow them to redesignate their primary delivery points and/or redistribute their MDQ among the FTS-1 transportation agreements and the FSS (Storage) agreements which effectively allow the shippers to change delivery points within a defined group of points.<sup>41</sup> The Commission determined a provision that redistributes MDQ and changes primary delivery points across

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<sup>39</sup>Section 21.2(a) provides, in pertinent part, that "[u]nless otherwise agreed by Transporter, the Releasing Shipper shall remain fully liable to Transporter for all reservation charges, including reservation type surcharges and direct bills, unless placement Shipper has agreed to pay Transporter maximum rates, and to accept all obligations of the Releasing Shipper under the Releasing Shipper's Agreement for the remaining term of such Releasing Shippers' Agreement."

<sup>40</sup>ANR Pipeline Co., 96 FERC ¶ 61,107 (2001).

<sup>41</sup>ANR stated that, concurrently with the June 4, 2001 negotiated rate filings, it made another negotiated rate filing seeking a determination that this provisions is not a material deviation to its pro forma service agreements. We stated in the July 3 letter order that we would rule on this issue in that filing.

contracts is a material deviation and effectively negotiates a term and condition of service. ANR claimed that the terms of the FTS-1 and the FSS agreements were the same. However, because ANR did not file the FTS-1 agreements in the June 4, 2001 filing, we directed ANR to file them in the compliance filing. ANR filed the subject agreements; therefore, they are in compliance.

The Commission orders:

(A) ANR's explanation in its compliance filing about its inability to provide primary point changes or MDQ adjustment rights through generally applicable tariff provisions is rejected because such rights must be provided via generally applicable tariff provisions to prevent undue discrimination among shippers.

(B) ANR's explanation in its compliance filing concerning the ROFR provision is accepted.

(C) Rehearing is denied concerning the primary point changes and MDQ adjustment provisions because such provisions are a material deviation in a non-conforming contract constituting a negotiated term and condition of service and requiring ANR to modify its tariff to offer the negotiated service to all its customers. Rehearing is also denied concerning increasing the daily authorized throughput.

(D) Rehearing is granted concerning: (1) the aggregation of gate station provisions; (2) the right to receive any enhancements or improvements in services; (3) relieving the shipper of liability the event of a payment default by a replacement shipper; and (4) the OFO provisions because such rights are consistent with, or expressly permitted by, ANR's tariff or contemplated by rate schedules.

(E) ANR is directed to refile all agreements that are not yet in compliance.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.