UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell and Joseph T. Kelliher.

AES Ocean Express LLC Docket No. CP02-92-002

ORDER ON COMPLIANCE FILING

(Issued May 31, 2005)

1. On March 29, 2004, AES Ocean Express LLC (Ocean Express) filed a *pro forma* tariff to comply with the Commission's April 10, 2003 Order on Preliminary Determination on Non-Environmental Issues (PD).[1] The order directed Ocean Express to file revised *pro forma* tariff sheets and rates within 60 days after the issuance of the certificate order in this proceeding. This order approves Ocean Express's *pro forma* tariff subject to certain modifications discussed below, and directs Ocean Express to file its actual tariff sheets at least 30 days, but not more than 60 days prior to the commencement of service. This order benefits the public by ensuring that Ocean Express's tariff is consistent with Commission policy.

I. Background

2. The PD approved Ocean Express's proposal to construct, own, and operate a natural gas pipeline that would provide service from an offshore receipt point at the boundary between the Exclusive Economic Zone of the United States and the Commonwealth of the Bahamas to onshore delivery points in Broward County, Florida. Subsequently, the Commission issued a Presidential Permit and Natural Gas Act Sections 3 and 7 authorizations in its January 29, 2004 order.[2] The PD also approved initial rates

[1] *AES Ocean Express LLC*, 103 FERC ¶ 61,030 (2003).

[2] *AES Ocean Express LLC*, 106 FERC ¶ 61,090 (2004).

and issued a blanket transportation certificate under Subpart G of Part 284 of the Commission's regulations.

3. The PD required Ocean Express to file revised *pro forma* tariff sheets and revise its rates to comply with Order No. 637[3] and the standards promulgated by the North American Energy Standards Board (NAESB),[4] as well as to address other tariff issues.

II. Public Notices, Interventions and Protests

4. Public notice of the Ocean Express filing was issued on April 7, 2004. Interventions and protests were due as provided in section 385.210 of the Commission's regulations (18 C.F.R. § 385.210 (2004)). None was filed.

III. Discussion

A. Revised *Pro Forma* FERC Gas Tariff

5. The PD required Ocean Express to: (1) recalculate its rates to reflect a Florida state income tax assessment based on 27.8 percent rather than 100 percent of its pipeline facilities; (2) provide support and documentation for a specific Transporter's Use Gas Percentage, or else to reflect zero percent; (3) modify its tariff to require it to obtain specific Commission approval before seeking to recover any incidental charges from its customers; (4) modify its proposed language in section 10.5(b) of the GT&C to specify the number of days for receipt of the required security or deposit from the shipper before it is no longer required to continue service, and to provide 30 days written notice of termination to shippers. Ocean Express filed revised *pro forma* tariff sheets to comply with the conditions in the Commission's PD. We find that the revised *pro forma* tariff sheets satisfactorily comply with these Commission directives.

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[3] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, 65 Fed. Reg. 10,156 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,091 (2000) (Order No. 637), *order on reh'g*, Order No. 637-A, 65 Fed. Reg. 35,706 (June 5, 2000), FERC Stats. & Regs. ¶ 31,099 (2000) (Order No. 637-A), *order on reh'g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002).

[4] *Standards for Business Practices of Interstate Natural Gas Pipelines*, Order No. 587-R, 68 Fed. Reg. 13,813 (Mar. 21, 2003), FERC Stats. & Regs. ¶ 31,141 (2003) (Order No. 587-R).

B. NAESB and Order No. 637 Requirements

1. NAESB

6. In Order No. 587-R, the Commission adopted version 1.6 of the NAESB standards and, among other things, certain partial day recall standards not included in version 1.6.[5] The PD directed Ocean Express to provide a detailed narrative explaining how it complies with the NAESB Standards, and each standard's location in Ocean Express's tariff. Ocean Express has not fully complied with this directive since its tariff proposal does not include standards related to partial day recalls.[6] Ocean Express is directed to either incorporate these standards by reference in its tariff or include the text of the standard verbatim in its tariff. Further, Ocean Express should delete Standard 4.3.4 from GT&C section 33 (Incorporation by Reference) since this standard has not been adopted by the Commission.

7. In addition, Ocean Express has not included the verbatim text of Standard 5.3.2, setting forth the capacity release timeline, in Section 21. The timelines for bidding set forth in paragraphs (b) (1) and (2) of section 21.4 (Bidding Process) have left out the phrases "on a Business day" and "Where match required" and are therefore not consistent with NAESB Standard 5.3.2 as adopted in Order No. 587-R. In addition, paragraph (2) should require a releasing shipper to post notice on the Website by 12:00 p.m. rather than 1:00 p.m. as stated. Also, the time deadlines stated in paragraph (h) of section 21. 4 should be revised to be consistent with paragraph (b). Accordingly, Ocean Express is directed to include the verbatim text of Standard 5.3.2 in its tariff. We also note that the citation to the Commission's regulations in Section 33 should be revised from 18 C.F.R. Part 284.10(b) to 18 C.F.R. § 284.12.

8. On May 9, 2005, the Commission issued Order No. 654 amending its regulations, which among other things, adopted Version 1.7 of the NAESB standards.[7] Therefore,

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[5] *Id.*

[6] Specifically, NAESB Standards 5.3.44 through 5.3.58.

[7] *Standards For Business Practices of Interstate Natural Gas Pipelines*, Order No. 654, 111 FERC ¶ 61,203 (2005) (amending the regulations to incorporate by reference the most recent version of the standards: Version 1.7 of the consensus standards promulgated December 31, 2003 by the Western Gas Quadrant (WGQ) of the NAESB; the standards ratified by NAESB on June 25, 2004 to implement Order 2004; the standards ratified by NAESB on May 3, 2005 to implement the Order 2004-A; and the

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when it files actual tariff sheets in this proceeding, Ocean Express is directed to revise its tariff to be compliant with Order No. 654 as modified by any future NAESB requirements then in effect.

2. Order No. 637

a. Segmentation

9. Order No. 637 required pipelines to permit a shipper to make use of the firm capacity that it has contracted by segmenting that capacity into separate parts for its own use or for the purpose of releasing that capacity to replacement shippers to the extent such segmentation is operationally feasible.[8]

10. Further, in the Order on Remand of Order No. 637, the Commission required pipelines to allow shippers, to the extent operationally feasible, to make segmented transactions consisting of forwardhauls up to the contract demand and backhauls up to contract demand to the same point at the same time.[9]

i. Ocean Express's Proposal

11. Section 17.3 of the GT&C permits any shipper receiving transportation service to segment, to the extent operationally feasible, its contract path into two or more discrete segments for its own use or in connection with a capacity release pursuant to section 21 of the GT&C. Contract path is defined as the portion of Transporter's Pipeline Facilities from Shipper's Primary Point of Receipt to Shipper's Primary Point of Delivery. If a shipper utilizes two or more discrete pipeline segments, the sum of the quantities of gas nominated at all points of receipt or at all points of delivery by the shipper and, if applicable, the releasing shipper may exceed the Maximum Daily Quantity (MDQ) specified in the service agreement so long as the total quantities nominated for transportation in a pipeline segment do not exceed the MDQ applicable to the segment. A Shipper can segment its contract path to forwardhaul and backhaul quantities of gas to the same point of receipt or to the same point of delivery. In such a segmented transaction, the Shipper may exceed its MDQ at that point of receipt or point of delivery and may nominate quantities of gas in each segment up to Shipper's MDQ assigned to

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standards implementing gas quality requirements ratified by NAESB on October 20, 2004).

[8] 18 C.F.R. § 284.7 (d) (2004).

[9] 101 FERC ¶ 61,127 (2002).

such segment, however, the quantities nominated to flow in the opposite direction of the flow of the contract path shall be considered to be outside the shipper's contract path.

12. Section 17.2 of the GTC permits shippers to request to nominate service at any secondary receipt or delivery point but provides that any transportation from secondary receipt and/or to any delivery points outside the contract path shall be subject to incremental charges associated with transporter's Rate Schedule FTS maximum 100 percent load factor rates from such secondary points of receipt to such secondary points of delivery unless transporter shall agree otherwise.

ii. Commission Ruling

13. Ocean Express's proposal in section 17.3 complies with Order No. 637's requirement that pipelines permit segmentation where operationally feasible and is accepted with one modification. Ocean Express's proposal improperly inhibits shippers from scheduling segmented transactions that use secondary points outside their contract paths despite the fact that the reservation charge they pay covers service on any part of Ocean Express's system. In Order No. 637-A, the Commission stated that shippers should be given the right to use secondary points and segments outside of their contract path. This follows from the fact that a shipper may move to any point within the zone for which it has paid even if that point is outside of the contractual path because a shipper has the right to utilize all points, including secondary points, within the zone for which it has paid.[10] Further, we find Ocean Express's provision addressing backhauls and forwardhauls to the same point is consistent with the Commission's order on remand except for its capacity path limitation. The Commission also finds Ocean Express's proposal to collect incremental charges for any transportation from secondary receipt and/or to any delivery points outside the contract path is inconsistent with the Commission's flexible receipt and delivery point policy described herein. Accordingly, we direct Ocean Express to remove the contact path limitations from 17.3 and remove the incremental charge provision in section 17.2 when it files actual tariff sheets.

b. Flexible Point Rights

14. In Order No. 637, the Commission found that permitting flexibility in the selection of primary points in segmented releases can be important to creating effective competition between pipeline services and released capacity. The Commission required pipelines to justify restrictions on shippers' ability to use additional primary points in

[10] Order No. 637-A, at p. 31,592.

segmentation transactions and any deviation from the *Texas Eastern/El Paso* policy.[11] Under this policy, the releasing and replacement shippers are both able to choose primary points consistent with their mainline contract demand.

i. Ocean Express's Proposal

15. Section 17.1 permits shippers to request to add or delete firm primary receipt or delivery points provided that such capacity is available and subject to two days notice to Ocean Express.

ii. Commission Ruling

16. Under the *Texas Eastern/El Paso* policy, a replacement shipper for a capacity release transaction should be able to request primary points at least up to its mainline contract demand, subject to available capacity.[12] Section 17.1 of Ocean Express's *pro forma* tariff complies with the requirements of Order No. 637 since the section reasonably affords all of Ocean Express's shippers, including replacement shippers, the ability to designate primary points of their own choosing up to their mainline contract demand.

c. Within Path Allocation Priority and Curtailment

17. Order No. 637-A provides that each pipeline must afford a higher priority over mainline capacity to shippers seeking to use a secondary point within their capacity path than shippers seeking to use mainline capacity outside of their path, unless the pipeline can demonstrate that such an approach is operationally infeasible or leads to anticompetitive outcomes on the system.[13]

i. Ocean Express's Proposal

18. Section 12.2 of the GT&C provides that service will be scheduled in the following order:

(1) Firm transportation of Natural Gas from a Shipper's Primary Point(s) of Receipt and to its Primary Point(s) of Delivery.

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[11] Order No. 637, at p. 31,304.

[12] *Texas Eastern Transmission Corporation*, 63 FERC ¶ 61,100, at p. 61,452 (1993); *El Paso Natural Gas Company*, 62 FERC ¶ 61,311, at p. 62,991 (1993).

[13] Order No. 637-A, at pp. 31,596-98.

(2) Firm transportation of Natural Gas within the Contract Path from a Shipper's Secondary Point(s) of Receipt and/or Secondary Point(s) of Delivery.

(3) Firm transportation of Natural Gas outside the Contract Path from a Shipper's Secondary Point(s) of Receipt and/or Secondary Point(s) of Delivery.

Section 12.3 provides for the curtailment of flowing gas in the reverse order of the scheduling priorities set forth in section 12.2.

ii. Commission Ruling

19. The Commission finds that Ocean Express's proposed scheduling provisions conform to the within-the-path priority for secondary points as required in Order No. 637. However, Ocean Express's proposal in section 12.3 of its GT&C to curtail service in the reverse order of its scheduling priorities is inconsistent with Commission policy that requires that firm service be curtailed on a pro-rata basis.[14] Accordingly, these curtailment provisions should be revised so that all applicable firm quantities are curtailed on a pro rata basis.

d. Discount Provisions

20. In Order No. 637-A, the Commission stated that the current policy permitting pipelines to limit discounts to particular points needs to be reexamined in the compliance filings, as part of the examination of restrictions on capacity release and segmentation.[15] In *CIG/Granite State*,[16] the Commission adopted a new policy that permits a shipper to retain a discount when it moves to segmented points or secondary points through a streamlined request process in which the pipeline processes a request for discounts within 2 hours. However, in its Second Order on Remand in *Williston Basin Interstate Pipeline Co.*,[17] the Commission vacated the policy adapted in *CIG/Granite State*.

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[14] *See Texas Eastern Transmission, LP*, 103 FERC ¶ 61,278 at P 37 (2003).

[15] *See* Order No. 637-A, at p. 31,595.

[16] *See Colorado Interstate Gas Co*., 95 FERC ¶ 61,321 (2001); *Granite State Gas Transmission, Inc.*, 96 FERC ¶ 61,273 (2001), *order on reh'g*, 98 FERC ¶ 61,019 (2002).

[17] 110 FERC ¶ 61,210 (2004).

i. Ocean Express's Proposal

21. Ocean Express has revised its *pro forma* tariff to add section 29.10 to its GT&C, setting forth a discounting policy based on the Commission's policy articulated in *CIG/Granite State*.

ii. Commission Ruling

22. In light of our order in *Williston Basin Interstate Pipeline Co.*,[18] when Ocean Express files its actual tariff sheets, it may choose not to include this provision in its tariff.

e. Imbalance Services

23. Order No. 637 requires pipelines with imbalance penalty provisions in their tariffs to provide, to the extent operationally practicable, imbalance management services, such as park and loan service. Pipelines are prohibited from giving undue preference to their own balancing services over services provided by a third party.[19]

i. Ocean Express's Proposal

24. Ocean Express proposes to implement a gas parking service under Rate Schedule GPS. GPS service is only available on an interruptible basis, after all service has been scheduled and to the extent permitted by Ocean Express's system. The parking point may be any point on its system that has been designated as the parking point in shipper's GPS Agreement. Gas may be parked for a minimum of one day and a maximum of thirty-one days. Ocean Express proposes to charge a maximum rate of $0.0527 per Dth for this service, which is equivalent to a 100 percent load factor derivative of the FTS rates and is to be charged on a usage basis. In addition Ocean Express permits all shippers to net and trade imbalances.

25. Section 19.4 of the GT&C, Third-Party Imbalance Management Services, provides: "[n]othing in this tariff is intended to inhibit development of, or discriminate against the use of imbalance management services provided by third parties or transporter's shippers. Any party interested in imbalance management services must coordinate with transporter."

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[18] *See* 110 FERC ¶ 61,210 (2004).

[19] 18 C.F.R. § 284.12 (b)(2)(iii) (2004).

ii. Commission Ruling

26. Ocean Express's proposal to provide a gas parking service (Rate Schedule GPS) and to permit the netting and trading of imbalances complies with the requirements of Order No. 637 that pipelines offer imbalance management services.

f. Penalties

27. Order No. 637 requires that a pipeline's penalties adhere to three principles.[20] First, a pipeline may include transportation penalties in its tariff only to the extent necessary to prevent the impairment of reliable service. Second, a pipeline must credit to shippers all revenues from all penalties net of costs. Third, a pipeline must provide to shippers, on a timely basis, as much information as possible about the imbalance and overrun status of each shipper and the imbalance of the pipeline's system as a whole.

i. Scheduling Charges and Penalties

(a) Ocean Express's Proposal

28. Section 14.1 of the GT&C provides for Ocean Express to assess a "scheduling charge" on a shipper whose "actual daily quantity received by Shipper, in aggregate, at Point(s) of Receipt or the actual daily quantity delivered by Transporter to Shipper, in aggregate, at Point(s) of Delivery vary by more than … 5% from scheduled quantities at Point(s) of Receipt or Point(s) of Delivery, in aggregate, whichever is applicable" in cases where the variance is not caused by Ocean Express. The charge is "an additional charge" equal to the 100 percent load factor maximum rate under the Rate Schedule associated with the transported volumes, calculated on a volumetric basis. However, the charge will not be assessed to the extent the shipper is subject to unauthorized overcharges under Rate Schedule FTS.

29. Under section 14.2, when Ocean Express experiences "constraints or operational difficulties at certain Points of Receipt or Points of Delivery" due to the variance between "Shippers' scheduled quantities . . . and actual receipts and/or deliveries to or for Shippers' accounts, unless otherwise required to protect the integrity of the pipeline facilities," then Ocean Express will issue a notice 24 hours prior to the applicable gas day, that each Shipper must reduce its variance to 5 percent or less until further notice and that the penalty under section 14.2 will be assessed on volumes in excess of the allowed variance. The tariff describes this penalty as a scheduling penalty which is equal

[20] Order No. 637, at p. 31,314. *See also* 18 C.F.R. § 284.12 (b)(2)(v) (2004).

the higher of $15 or 200 percent of the Gas Price Index[21] for the flow date multiplied by the quantity in excess of the allowed variance.

(b) Commission Ruling

30. The Commission has held that pipelines may impose substantial penalties during critical periods. During non-critical periods, the Commission has found that a scheduling penalty equal to the interruptible rate is appropriate to provide an incentive for shippers to schedule accurately.[22] Ocean Express's scheduling penalties meet these criteria and are approved.

ii. Unauthorized Overrun Penalty

(a) Ocean Express's Proposal

31. Section 7 of Rate Schedule FTS provides for an unauthorized overrun penalty equal to two times its maximum ITS rate when the unauthorized overrun will not impair service. When such unauthorized overrun impairs reliable service, Transporter shall provide shipper with notice to cease immediately such unauthorized overrun. After the issuance of such a notice, Shipper shall pay for each dekatherm of unauthorized overrun a penalty equal to the greater of $10 or two-hundred percent of the Gas Price Index for the flow date on which the gas is transported.

(b) Commission Ruling

32. The Commission's policy is that substantial unauthorized overrun penalties are justified only in critical periods. For non-critical time periods, the Commission has ruled that pipelines can have some nominal penalty not to exceed twice the pipeline's IT rate; or, pipelines can charge substantial penalties but must waive the penalty if the unauthorized overrun does not cause operational problems. [23] Ocean Express's unauthorized overrun penalty provisions are consistent with Commission policy and are approved.

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[21] Defined in GT&C Section 2(m) as the midpoint in the range of prices reported for "Transco St. 65," as published in Gas Daily.

[22] *See Guardian Pipeline, L.L.C.*, 101 FERC ¶ 61,271 (2002). *See also Questar Pipeline Co.*, 98 FERC ¶ 61,159 (2002).

[23] *See Williston Basin Interstate Pipeline Co.*, 98 FERC ¶ 61,212, at p. 61,810 (2002).

iii. Curtailment, Interruption and OFO Penalties

(a) Ocean Express's Proposal

33. Section 12.3(f) provides for the assessment of penalties on gas quantities received and/or taken after providing shipper with notice of a curtailment or interruption. This section also provides for penalties on gas quantities received into or delivered out of Ocean Express's pipeline facilities when such receipts or deliveries are not in compliance with any operational flow order (OFO) in effect. Ocean Express's *pro forma* tariff provides that all quantities received and/or taken in violation of Transporter's curtailment, OFO or interruption orders shall constitute unauthorized receipts or deliveries for which a charge ranging from $10 Per Dth to the higher of $15 per Dth or 200 percent of the Gas Price Index for the flow date shall be assessed based on the percent of excess quantities and the gas that is transported.

(b) Commission Ruling

34. Since the proposed penalties for violating a curtailment, OFO or interruption order are only assessed in situations where necessary to prevent the impairment of reliable service, the Commission finds these penalties are acceptable in order to deter shipper conduct that may be harmful to the system.

iv. Confiscated Parked Gas

(a) Ocean Express's Proposal

35. Section 2.4 of Rate Schedule GPS, Gas Parking Service, allows Ocean Express to confiscate gas if the shipper fails to remove the gas as directed. Further, section 32.5(d) of the GT&C states that if Ocean Express confiscates any gas pursuant to section 2.4 of Rate Schedule GPS, it will credit the value of the gas retained to its existing customers via the Transporters Use Gas Adjustment.

(b) Commission Ruling

36. We find that the retention of gas improperly left on its system under Rate Schedule GPS is an operationally justified deterrent to shipper behavior that could threaten the system or degrade service to firm shippers.[24] In addition, Ocean Express's proposal to

[24] *See, e.g., Blue Lake Gas Storage Co.*, 96 FERC ¶ 61,164 (2001).

credit the value of the confiscated gas to existing customers is consistent with Commission policy and is approved.[25]

v. Imbalance Cash–out Penalty

(a) Ocean Express's Proposal

37. Under section 19 of the GT&C, Ocean Express has the ability to assess a monthly imbalance penalty for imbalances that exceed a two percent tolerance level. Imbalances that exceed the tolerance level are cashed out at an average monthly spot price plus or minus a penalty starting at ten percent of that price for a net imbalance of 2-5 percent, with increasing penalties for greater net imbalances.

(b) Commission Ruling

38. The Commission finds that Ocean Express's proposed imbalance penalties are consistent with Order No. 637. As discussed above, Ocean Express offers shippers sufficient tools to manage imbalances and avoid imbalance charges both during the month and after the month in which imbalances occur. Ocean Express's tiered cash-out mechanism that imposes penalties for an imbalance that exceeds a 2 percent monthly tolerance level starting at a monthly midpoint spot price subject to a 10 percent premium or discount is reasonable given the imbalance management services available to shippers on Ocean Express's system.[26]

vi. Flow through of Penalties in Excess of Costs

39. Order No. 637 requires that pipelines must credit to shippers all revenues from all penalties net of cost.[27]

(a) Ocean Express's Proposal

40. Ocean Express proposes in section 34.2 of its GT&C to provide for the flow through of penalties received under GT&C sections 12.3(f) (impairment of service), 14.1 (scheduling charge), 14.2 (scheduling penalty), and 18.5 (OFOs), and section 7

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[25] *See id.* at p. 61,729. *See also Young Gas Storage Company, Ltd.*, 111 FERC ¶ 61,209 (2005).

[26] *See Colorado Interstate Gas Co.*, 95 FERC ¶ 61,321, at p. 62,124 (2001).

[27] *See* Order No. 637-A, at pp. 31,609-11. *See also Panhandle Eastern Pipeline Co.*, 97 FERC ¶ 61,046, at 61,274 (2001).

(unauthorized overrun) of Rate Schedule FTS, in excess of costs, on a monthly basis, to non-offending firm shippers under Rate Schedule FTS. Each non-offending firm shipper's credit, which will be through an adjustment on the firm shipper's next monthly bill, will be based on the ratio of actual revenues collected for that non-offending shipper's services to the total revenues received for all non-offending shippers' revenues that month.

(b) Commission Ruling

41. The Commission finds that Ocean Express's *pro forma* section 34.2, concerning penalty revenue crediting, does not fully comply with Order No. 637, which relies on the principle that a pipeline must credit to shippers all revenues from all penalties net of costs. Ocean Express proposes to credit these amounts only to firm shippers. The Commission has previously stated that all shippers including interruptible shippers are subject to penalties, and therefore should receive their proportional share of any net penalty revenues.[28] The Commission directs Ocean Express to revise its GT&C to provide for the crediting of penalty revenues to all shippers, regardless of whether they are firm or interruptible customers.

g. Operational Flow Orders

42. Order No. 637 requires a pipeline to take all reasonable actions to minimize the issuance and adverse impacts of operational flow orders (OFOs) or other measures taken to respond to adverse operational events on its system. Pipelines are required to adopt objective standards and procedures for the use of OFOs.[29] Specifically, the Commission required each pipeline's tariff to: (1) state clear, individualized standards, based on objective operational conditions, for when OFOs begin and end; (2) require the pipeline to post information about the status of operational variables that determine when an OFO will begin and end; (3) state the steps and order of operational remedies that will be followed before an OFO is issued; (4) set forth standards for different levels or degrees of severity of OFOs to correspond to different degrees of system emergencies the pipeline may confront; and (5) establish reporting requirements that provide information after OFOs are issued on the factors that caused the OFO to be issued and then lifted.[30]

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[28] *See Trailblazer Pipeline Co*., 97 FERC¶ 61,056 (2001); *Paiute Pipeline Co.*, 96 FERC ¶ 61,167 (2001).

[29] 18 C.F.R. § 284.12 (b)(2)(iv)(2004).

[30] Order No. 637, at pp. 31,312-13.

i. Ocean Express's Proposal

43. Ocean Express proposes OFO provisions in section 18 of the GT&C that allow it to issue an OFO to alleviate conditions which threaten the safe operations or integrity of its transportation system. These provisions provide examples of the operating conditions that may cause the issuance of an OFO, require Ocean Express to take all reasonable actions to minimize the issuance and adverse consequences of the OFO, and specify the actions an OFO may require shippers to take and the amount of time they have to comply. Ocean Express will post notice of an OFO on its website that includes information concerning the reason for issuing the OFO together with the operating variables that provide the basis for issuing the OFO.

ii. Commission Ruling

44. The Commission finds that Ocean Express's OFO provisions comply with the requirements of Order No. 637 to minimize the use and adverse impact of OFOs. Accordingly, we approve Ocean Express's proposed OFO provisions.

h. Right of First Refusal (ROFR)

45. In Order No. 637, the Commission permitted pipelines to limit the ROFR to firm shippers paying the maximum rate in contracts for 12 or more consecutive months of service.[31] In Order No. 637-A, the Commission clarified that the ROFR will apply to multi-year contracts at the maximum rate for services not offered by the pipeline for a full 12 months.[32]

i. Ocean Express's Proposal

46. Section 23.1 of the *pro forma* GT&C provides that the ROFR automatically applies to (1) maximum rate contracts of twelve or more consecutive months and (2) maximum rate contracts that have a term of more than one year where the service is not available for twelve consecutive months.

ii. Commission Ruling

47. We find that Ocean Express's proposed ROFR provisions are consistent with Commission policy and are approved.

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[31] Order No. 637, at p. 31,337.

[32] Order No. 637-A, at p. 31,631.

i. Other Provisions

i. Damages

48. Ocean Express has revised sections 12.3(h), 21.7(b), and 29.5 of the GT&C to provide that "Transporter shall be responsible for direct damages, if any, resulting from Transporter's own negligence." The Commission has allowed pipelines to limit their liability for negligence to direct damages so that they are only liable for indirect, consequential, incidental, or punitive damages where there is gross negligence, willful misconduct, or bad faith.[33] Ocean Express's proposal is consistent with these requirements and is approved.

ii. Use of Gas Price Indexes

49. Ocean Express proposes to use a commodity gas price index[34] in several provisions of its tariff. Ocean Express is directed to demonstrate that this index is in compliance with the Commission's Order Regarding Future Monitoring of Voluntary Price Formation, Use of Price Indices in Jurisdictional Tariffs, and Closing Certain Tariff Dockets issued on November 19, 2004.[35]

50. Ocean Express is directed to file actual tariffs consistent with the directives in this order and with the requirements in the Commission order issued on May 11, 2005 in Docket Nos. CP02-90-003 and CP02-93-002[36] at least 30 days but not more than 60 days prior to the commencement of service. Ocean Express should also file redlined tariff sheets reflecting how its actual tariff filing differs from the latest *pro forma* filing.

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[33] *Guardian Pipeline L.L.C.*, 101 FERC ¶ 61,107, at 61,442 (2002).

[34] Section 2(m) of the tariff defines Gas Price Index as the midpoint in the range of prices as reported for "Transco, St. 65," as published in Gas Daily, or if no longer published, an equivalent index or indicator, which substitution shall be posted on Transporter's website, and Transporter shall revise this definition to reflect such substitute index or indicator.

[35] 109 FERC ¶ 61,184 (2004)

[36] *AES Ocean Express LLC*, 111 FERC ¶ 61,219 (2005) (amending presidential permit and NGA Sections 3 and 7 authorizations).

The Commission orders:

(A) Ocean Express's revised *pro forma* tariff sheets listed herein are hereby approved, subject to conditions, as discussed in the body of this order.

(B) Ocean Express is directed to file actual tariff sheets, revised to reflect the modifications discussed herein, at least 30 but not more than 60 days prior to the commencement of service, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.