

121 FERC ¶ 61,047  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Gulf South Pipeline Company, LP

Docket Nos. RP07-179-002  
RP07-179-001

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued October 18, 2007)

1. On April 30, 2007, Gulf South Pipeline Company, LP (Gulf South) filed a request for rehearing of the Commission's March 30, 2007 order (March 30 Order) in this proceeding.<sup>1</sup> In addition, on April 19, 2007, Gulf South filed revised tariff sheets to comply with the March 30 Order. Among other things the March 30 Order conditionally accepted Gulf South's February 20, 2007 tariff filing to (1) include *pro forma* negotiated rate letter agreements for its firm transportation service (FTS) and No Notice Service (NNS) in its FERC Gas Tariff, (2) offer evergreen provisions in certain NNS and FTS service agreements, and (3) clarify its ability to offer a contractual right of first refusal (ROFR).

2. As discussed below, the Commission grants Gulf South's request for rehearing. In addition, the Commission finds that Gulf South's revised tariff sheets fully comply with the Commission's March 30 Order and accepts the revised tariff sheets effective April 1, 2007, as proposed.

**Background**

3. On February 20, 2007, Gulf South filed tariff sheets to (1) include *pro forma* negotiated rate letter agreements for its NNS and FTS services in its FERC Gas Tariff, (2) offer evergreen provisions in certain NNS and FTS service agreements, and (3) clarify

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<sup>1</sup> *Gulf South Pipeline Company, LP*, 118 FERC ¶ 61,262 (2007).

its ability to offer a contractual ROFR to NNS and FTS customers not eligible for the regulatory ROFR.

4. Gulf South stated that the proposed *pro forma* NNS and FTS negotiated rate agreements were intended to establish a framework for all negotiated rate agreements executed by Gulf South and ensure that the agreements do not contain material deviations from Gulf South's tariff. Shippers entering into negotiated rate agreements would continue to execute the existing *pro forma* master service agreement in addition to the new *pro forma* negotiated rate letter agreements. Gulf South proposed to include in the new *pro forma* NNS and FTS negotiated rate letter agreements the following optional language:

In consideration of the negotiated rate described above, during the term of this Agreement, [Company Name] will not file, initiate, or support any action filed pursuant to Section 5 of the Natural Gas Act against Gulf South that would have the effect of reducing Gulf South's maximum Tariff rate or fuel charge established in this Agreement.

Gulf South did not propose to add this language to its existing *pro forma* discounted rate agreements or its existing *pro forma* service agreements.

5. Additionally, Gulf South proposed revised tariff language to clarify its ability to grant a contractual ROFR. Under current section 30.2 of Gulf South's General Terms and Conditions (GT&C), a customer that is not eligible for the regulatory ROFR provided by section 30 of the GT&C<sup>2</sup> may negotiate a contractual ROFR. Gulf South proposed language to clarify that a contractual ROFR is available in the FTS and NNS rate schedules and service agreements. Finally, Gulf South proposed a revision to its tariff to allow Gulf South and its customers to agree to include an evergreen right provision in an NNS and FTS discounted rate or negotiated rate letter agreement. The evergreen provision would permit the shipper the right to extend its service agreement at the end of its initial term at an established rate or rate to be mutually agreed upon.

6. In the March 30 Order, the Commission accepted the proposed tariff sheets to become effective April 1, 2007, subject to Gulf South filing revised tariff sheets reflecting modifications to its proposed *pro forma* negotiated rate letter agreements. The Commission found that the section 5 waiver provision was overly broad, because it was not limited to the particular negotiated rate transaction in question, and thus could limit a shipper's statutory rights in an unduly discriminatory manner. The order required Gulf

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<sup>2</sup> The regulatory ROFR is provided to firm shippers with contracts of a year or more who are paying the maximum rate.

South to either: (1) remove the limitations on section 5 rights from the proposed *pro forma* negotiated rate letter agreements, (2) refile those agreements to adopt the language suggested by Indicated Shippers in their response regarding the affect of a shipper's action in any section 5 proceeding, or (3) refile those agreements to include new language that restricts only the shipper's right to seek a reduction in the negotiated rate applicable to the particular transaction at issue and does not prevent the shipper from exercising its section 5 rights with respect to other services or to Gulf South's maximum tariff rates. The order also required Gulf South to file revised *pro forma* negotiated rate letter agreements with language that clearly states that the section 5 waiver provision applies only to shippers that agree to the language as part of their negotiated rate letter agreement.

7. The March 30 Order directed Gulf South to file revised tariff sheets implementing certain changes agreed to by Gulf South to conform the language in the proposed *pro forma* negotiated rate letter agreements related to capacity rights (primary points, additional primary points, and maximum daily quantity (MDQ)) to the language in the currently effective *pro forma* firm transportation service letter agreement.

8. Finally, the order also required Gulf South to remove language from the *pro forma* negotiated rate letter agreements stating, "In the event the language of this Agreement conflicts with the Contract, the language of this Agreement will control." The Commission stated that *pro forma* letter agreements should be the starting point when crafting a negotiated rate agreement. To the extent provisions in the negotiated agreement are intended to be different from the corresponding provision contained in the *pro forma* negotiated rate agreement, such provisions must be placed in the appropriate section of the letter agreement with the changes highlighted with redline and strikeout.

### **Rehearing Request**

9. On rehearing, Gulf south contends that the Commission erred in requiring it to remove from its *pro forma* negotiated rate letter agreements the provision that, "In the event the language of this Agreement conflicts with the Contract, the language of this Agreement will control." Gulf South contends that the Commission has misinterpreted the purpose of this language. Gulf South explains that this language is necessary to ensure that the rate provisions of a *pro forma* negotiated rate letter agreement govern a specific transaction instead of the otherwise applicable recourse rate reflected in a customer's *pro forma* master service agreement (*i.e.*, the contract), both of which a negotiated rate customer must execute. Gulf South asserts the language, which is

contained in its Commission approved *pro forma* discounted rate letter agreements,<sup>3</sup> is necessary to resolve an inherent conflict between the *pro forma* negotiated rate letter agreement and the *pro forma* master service agreement. Gulf South states the intent of the proposed language is not to permit executed negotiated rate letter agreements to contain language that does not conform to the *pro forma* negotiated rate letter agreement, but to acknowledge that the *pro forma* negotiated rate letter agreement contains rate provisions that are inherently different from the *pro forma* master service agreement for a given service. The *pro forma* master service agreement assumes that the customer will pay the maximum recourse rate and the *pro forma* negotiated rate letter agreement modifies the otherwise applicable recourse rate.

10. Gulf South declares that the proposed language does not, as suggested by the March 30 Order, provide Gulf South carte blanche to make material changes to its *pro forma* agreements, but is a tool routinely used by parties entering into multiple contracts to choose a controlling document. Gulf South adds that the negotiated rate letter agreements clearly provide that, to the extent conflict arises between the tariff and the letter agreements, the tariff controls to comply with Commission policy.

11. Based on the circumstances in this case, upon reexamination the Commission grants Gulf South's request for rehearing to allow Gulf South to include in its *pro forma* negotiated rate letter agreements a provision that, in the event of a conflict between the provisions of a shipper's master service agreement and its negotiated rate letter agreement, the provisions of the negotiated rate letter agreement will control. The Commission has held that pipelines may structure their service agreements so that shippers with negotiated (or discounted) rates must execute both a service agreement and a separate rate agreement setting forth the agreed-upon negotiated or discounted rate. Such a separate rate agreement must be limited to setting forth the agreed-upon rate, together with any provisions that are solely related to implementing the agreed-upon rate.<sup>4</sup> This ensures that the rate document does not provide negotiated and discounted rate shippers different terms and conditions of service than are provided to maximum rate shippers. Including *pro forma* negotiated and discounted rate letter agreements in the pipeline's tariff, as proposed by Gulf South, helps minimize the need for the parties to

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<sup>3</sup> *Gulf South Pipeline Company, LP*, Docket No. RP04-256-000 (May 4, 2004) (unpublished letter order).

<sup>4</sup> *East Tennessee Natural Gas Co.*, 107 FERC ¶ 61,197 at P 14 (2004).

include in service agreement nonconforming provisions which must be filed with the Commission for individual approval.<sup>5</sup>

12. Consistent with Commission policy, the provisions of Gulf South's proposed *pro forma* negotiated rate letter agreements are limited to setting forth the agreed-upon rate and certain other provisions solely related to implementing that rate. For example, the rate letter agreements include provisions concerning the receipt and delivery points at which the negotiated rate will apply and a prohibition on the shipper seeking a change in the negotiated rate pursuant to section 5 of the Natural Gas Act.

13. In light of the fact the *pro forma* negotiated rate letter agreements only address rate-related matters, the Commission finds it acceptable for Gulf South to include a provision that, where there is a conflict between the master service agreement and the rate agreement, the provisions of the rate agreement will govern. As Gulf South explains, its *pro forma* master service agreement provides for service at the maximum recourse rate. Thus, the language to choose a controlling document between the *pro forma* negotiated rate letter agreement and the *pro forma* master service agreement is required to ensure that the negotiated rate provisions control.

14. Furthermore, Gulf South clarifies that the intent of the subject language is not to permit executed negotiated rate letter agreements to contain language that does not conform to the *pro forma* negotiated rate letter agreements. If Gulf South executes any agreement with a shipper that deviates from the *pro forma* agreements in its tariff, it will have to file that agreement with the Commission, as required by section 154.1(d) of the Commission's regulations.<sup>6</sup> Finally, granting rehearing is consistent with the Commission's prior acceptance of Gulf South's *pro forma* discount rate letter agreements which include similar language. Accordingly, Gulf South may file revised tariff sheets to include the subject language in its *pro forma* negotiated rate letter agreements.

### **Compliance Filing**

15. The March 30 Order required Gulf South to modify the negotiated rate letter agreements with narrower section 5 waiver language. Gulf South has complied with the March 30 Order by revising its section 5 waiver language as follows:

In consideration of the negotiated rate described above, during the term of this Agreement, [Company Name] will not file, initiate, or support any

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<sup>5</sup> See *Natural Gas Pipeline Co.*, 111 FERC ¶ 61,376 at P 12 (2005).

<sup>6</sup> 18 C.F.R. § 154.1(d) (2007).

action filed pursuant to Section 5 of the Natural Gas Act against Gulf South that would have the effect of reducing ~~Gulf South's NNS maximum Tariff~~ the specific rate or fuel charge established in this (s) agreed to under this Agreement.

The proposed language complies with the Commission's requirement that the section 5 waiver be limited to the rates for the particular transaction covered by the letter agreement. Such language would not prevent a shipper from exercising its section 5 rights with respect to other services or to Gulf South's maximum applicable tariff rates.

16. The March 30 Order also required Gulf South to include language in its negotiated rate letter agreement clearly stating that the section 5 waiver would apply only to a shipper who specifically agreed to the inclusion of such provision as part of its negotiated rate letter agreement. Gulf South added the following provision to its *pro forma* negotiated rate letter agreement to comply with the March 30 Order:

(Note: A section 5 waiver provision as provided in this section shall apply only to shippers that agree to the inclusion of this language as part of a negotiated rate letter agreement.)

17. In addition, Gulf South's April 19 filing clarified that the rights relating to primary points, additional primary points, and contract MDQ contained in the proposed *pro forma* negotiated rate letter agreements are consistent with the rights granted to shippers under a maximum rate or discounted rate agreement. Gulf South has conformed its agreements and modified its proposed tariff sheets accordingly.

18. Finally, as directed by the March 30 Order, Gulf South removed the phrase, "In the event the language of this Agreement conflicts with the Contract, the language of this Agreement will control." Consistent with the Commission's determination in the rehearing portion of its order, Gulf South may file revised tariff sheet to include language so that the rate provision of a *pro forma* negotiated rate agreement control conflicts with the *pro forma* master service agreement for the subject service.

The Commission orders:

(A) Gulf South's request for rehearing is granted, as discussed in the body of this order.

(B) Gulf South's April 19, 2007 compliance filing is accepted as in compliance with the March 30 Order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Acting Deputy Secretary.