

125 FERC ¶ 61,043
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.

Columbia Gas Transmission Corporation

Docket No. RP07-655-001

ORDER ON REHEARING

(Issued October 16, 2008)

1. On September 28, 2007, the Commission issued an order accepting revised tariff sheets¹ filed by Columbia Gas Transmission Corporation (Columbia Gas) to be effective October 1, 2007.² Columbia Gas's revised tariff sheets were filed to, among other things, remove the requirement that a shipper holding capacity subject to a right of first refusal (ROFR) need only match a competing bid up to a term of five years in order to retain the capacity. On October 26, 2007, CNX Gas Company LLC (CNX Gas) filed a request for rehearing of the September 28 Order. For the reasons discussed below, the Commission denies CNX Gas's request for rehearing.

I. Background

2. On August 31, 2007, Columbia Gas filed to revise sections 4.1(c)(1)(c) and 4.2(d) of the General Terms and Conditions (GT&C) of its Tariff to remove the five year term matching cap. As a result of this revision, an existing shipper seeking to renew an expiring contract through the ROFR process will be required to match the highest acceptable bid for capacity, including term, in order to retain the capacity.

¹ Tenth Revised Sheet No. 280, First Revised Sheet No. 280A, Thirteenth Revised Sheet No. 281, and Seventh Revised Sheet No. 283 to Columbia Gas' FERC Gas Tariff, Second Revised Volume No. 1 (Tariff).

² *Columbia Gas Transmission Corp.*, 120 FERC ¶ 61,289 (2007) (September 28 Order).

3. In the September 28 Order, the Commission accepted the revised tariff sheets to be effective October 1, 2007. The Commission found that Columbia Gas's proposal to remove the five year term matching cap was reasonable and consistent with Commission policy. The Commission explained that, in its October 31, 2002 Order on Remand of Order No. 637, it found that a term cap is not necessary to protect existing long-term shippers from the pipeline's exercise of market power, and the D.C. Circuit affirmed the Order on Remand.³

4. In its request for rehearing, CNX Gas argues that the Commission erred in its acceptance of Columbia Gas's removal of the five year term matching cap on the grounds that the change is unreasonable and unduly discriminatory. CNX Gas states that the availability of the five year term matching cap pursuant to Columbia Gas's tariff made a difference to it in building and sizing facilities to interconnect with Columbia Gas's system as well as in making major investments in gas production feeding Columbia Gas's system.⁴ Further, CNX Gas states that it relied upon the five year term matching cap in arranging for and entering into long-term transportation contracts for service on Columbia Gas's system. CNX Gas states that it entered into two of those contracts on November 1, 2004, with terms of 2 years and 13 months respectively, and subsequently extended each of those contracts for five years, consistent with Columbia Gas's five year term matching cap. CNX Gas states that on May 1, 2005 and December 1, 2007, it entered into two additional contracts with Columbia Gas, with 10 and 15 year terms. CNX Gas maintains that the removal of the five year matching cap from Columbia Gas's tariff will result in a material detriment to CNX Gas.

5. CNX Gas also argues that the Commission erred by arbitrarily relying upon its approval of other pipelines' earlier elimination of the five year term matching cap after the Order on Remand. CNX Gas contends that the circumstances surrounding the other pipelines' earlier removal of the term-matching cap are fundamentally different from those that now exist on Columbia Gas's system due to the many years that have passed since the Commission's Order on Remand. CNX Gas contends that it would be unreasonable for the Commission to ignore CNX Gas's reliance on the five year term

³ See *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, 101 FERC ¶ 61,127 (2002)(Order on Remand), *order on reh'g and clarification*, 106 FERC ¶ 61,088 (2004)(Order on Rehearing), *aff'd sub nom., American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005)(AGA).

⁴ CNX Gas states that between November 2004 and September 2007 CNX Gas invested capital dollars in production and gathering facilities on Columbia Gas's system in excess of \$300 million. CNX Gas Request for Rehearing at 4, n.4.

matching cap in its contracts and investments during the intervening years. CNX Gas requests that the Commission direct Columbia Gas to grandfather the five year term matching cap for existing eligible contracts.

6. CNX Gas maintains that the Commission has previously recognized that changes in tariff provisions merit review in light of a party's reliance on past tariff provisions for contracts and investments, citing *Columbia Gas Transmission Corporation*, 64 FERC ¶ 61,364, at 63,526 (1993)(Columbia Gas 1993).⁵ CNX Gas also maintains that, in moving to open access under Order No. 636, the Commission recognized that pipelines and customers could be harmed by the changes in tariff services and therefore, provided for pipelines to mitigate stranded costs as well as provisions for stranded cost recovery, citing Order No. 636⁶ and *Equitrans, Inc.*, 64 FERC ¶ 61,374 (1993).⁷

II. Discussion

7. The Commission rejects CNX Gas's request to direct Columbia Gas to grandfather the five year term matching cap for existing eligible contracts. Columbia Gas's removal of the five year term matching cap is consistent with Commission policy. CNX Gas has not shown a sufficient reliance interest to justify exempting Columbia Gas's existing long-term contracts from application of Commission policy concerning the term matching cap.

8. In *Interstate Natural Gas Association of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002)(*INGAA*), the United States Court of Appeals for the District of Columbia Circuit vacated and remanded Order No. 637's continuation of the five year term matching cap

⁵ *Columbia Gas 1993* was an unbundling case following Order No. 636. In *Columbia Gas 1993*, MarkWest Hydrocarbon Partners, Ltd. (MarkWest) and Columbia Gas were parties to a certain private, non-jurisdictional fractionation contract. Columbia Gas was proposing, as part of its Order No. 636 compliance filing, certain tariff changes that would have given shippers the right to make alternative arrangements for disposal of liquefiabiles extracted at Columbia's plants, which previously MarkWest had the entire right to purchase. The Commission reinstated the existing tariff provisions pending a new agreement to be negotiated between Columbia Gas and MarkWest.

⁶ See CNX Gas Request for Rehearing at 7, n.13, citing Order No. 636.

⁷ *Equitrans* involved revised tariff sheets filed pursuant to section 4 of the Natural Gas Act following Order No. 636. The revised tariff sheets contained proposals concerning the pipeline's treatment of certain transition costs, including stranded costs, as part of its reorganization.

originally adopted in 1997 in Order No. 636-C.⁸ The court stated that the Commission had failed to explain why the five year term matching cap appropriately balanced the protection of captive customers with the “furtherance of market values (putting capacity in the hands of those who value it most).”⁹ In its Order on Remand, the Commission stated that whether a term-matching cap must be required as part of the ROFR turns on whether such a term-matching cap is necessary to protect the existing long-term shipper from the pipeline’s exercise of market power. The Commission found that a term-matching cap is not necessary because its existing regulatory controls are sufficient to constrain pipelines from withholding capacity to pressure shippers into longer contracts than they desire, without the need for any term-matching cap.¹⁰ The Commission therefore concluded that, since the “matching cap is not necessary to limit the exercise of market power by pipelines”, there is “no justification for distorting the bidding process and not allocating scarce pipeline capacity to the shipper placing the highest value on obtaining” it,¹¹ and the court agreed.¹² Accordingly, the Order on Remand permitted pipelines to remove the five year term matching cap from their tariffs, without any requirement that the pipelines grandfather existing long-term contracts. Since the Order on Remand, the Commission has consistently accepted pipeline proposals to remove the five year term matching cap from their tariffs and has never required that existing contracts be grandfathered.¹³

9. Also, we do not find CNX Gas’s reliance argument persuasive. As Columbia Gas noted, its shippers are on notice that the GT&C of its Tariff are subject to change and that such changes will be incorporated into their service agreements. Each of Columbia Gas’s *pro forma* service agreements provides for service in accordance with the GT&C of the Tariff “as the same may be amended or superseded in accordance with the rules and

⁸ 78 FERC ¶ 61,186 (1997).

⁹ *INGAA*, 285 F.3d at 52.

¹⁰ *See AGA*, 428 F.3d at 258, summarizing the existing regulatory controls the Commission relied upon in making this finding.

¹¹ Order on Rehearing, 106 FERC at 61,300.

¹² *AGA*, 428 F.3d at 259.

¹³ *See Texas Eastern Transmission, LP*, 113 FERC ¶ 61307 (2005); *Dominion Transmission, Inc.*, 106 FERC ¶ 61,257 (2004); *Enbridge Pipeline (Midla) L.L.C.*, 106 FERC ¶ 61,069 (2004); *Southern Star Central Gas Pipeline, Inc.*, 103 FERC ¶ 61,172 (2003); *Transwestern Pipeline Co.*, 103 FERC ¶ 61,075 (2003); *Northern Natural Gas Co.*, 102 FERC ¶ 61,020, *reh’g denied*, 103 FERC ¶ 61,296 (2003).

regulations of the Commission.” The ROFR rights of long-term firm shippers on Columbia Gas’s system are set forth in section 4 of the GT&C of its tariff. Accordingly, CNX Gas had notice that its ROFR rights were subject to change, if the Commission approved a proposal by Columbia Gas to modify the ROFR provisions in its GT&C. Because Commission policy at the time CNX Gas entered into each of the relevant contracts permitted pipelines to remove the five year term matching cap from their tariffs and the Commission had consistently accepted such tariff changes without grandfathering existing contracts, CNX Gas as a knowledgeable participant in the natural gas industry should reasonably have anticipated that Columbia Gas might make such a filing and the Commission would accept the filing without grandfathering existing contracts.

10. In addition, while CNX Gas states that it relied on the five year term matching cap in making substantial investments in production and gathering facilities which feed gas into the Columbia Gas system, CNX Gas does not explain what it would have done differently had it known when it made the investments that Columbia Gas would remove the five year term matching cap.¹⁴ CNX Gas does not state that it gave up opportunities to make different gas production investments or enter into different gas transportation contracts as a result of its reliance on Columbia Gas’s five year term matching cap. Nor does it state that it would not have invested in gas production at all, absent the five year term matching cap. In any event, it is not enough that CNX Gas may have been harmed by Columbia Gas’s removal of the five year term matching cap. CNX Gas’s reliance must have also been reasonable,¹⁵ which, for the reasons discussed above, it was not.

11. Further, we do not find the Order No. 636 restructuring cases cited by CNX Gas compelling. Those cases involved filings made by pipelines to comply with Order No. 636, which required a comprehensive restructuring of the natural gas industry, including the unbundling of services. Thus, each of the cases cited by CNX Gas involved situations where the Commission had fundamentally altered its policies after the parties had entered into contracts, and accordingly the Commission gave the parties an opportunity to renegotiate those contracts or gave the pipeline an opportunity to recover costs incurred as a result of the change in policy. Here, however, there has been no change in policy since CNX Gas entered into the contracts at issue.¹⁶ Here, the Commission has simply authorized Columbia Gas to make a tariff change which Commission policy permitted at the time the relevant contracts were entered into.

¹⁴ See *Public Service Co. of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996).

¹⁵ See *Id.* at 1490-91.

¹⁶ See *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554-5 (D.C. Cir. 1993).

12. In these circumstances, we find that the public interest in permitting Columbia Gas to allocate capacity to the highest valued use upon the expiration of CNX Gas's current contracts, consistent with Commission policy, outweighs any reliance by CNX Gas on Columbia Gas's prior tariff provision. Columbia Gas's tariff still provides CNX Gas the ability to extend its current contracts so long as it matches the value of the highest third party bid, and CNX Gas cannot be required to pay more than the just and reasonable maximum rate approved by the Commission.

The Commission orders:

The request for rehearing of CNX Gas is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.