

130 FERC ¶ 61,114  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Texas Gas Transmission, LLC

Docket No. RP09-505-002

ORDER ON CLARIFICATION

(Issued February 18, 2010)

1. On December 18, 2009, Texas Gas Transmission, LLC (Texas Gas) filed a request for clarification or, in the alternative, rehearing of the Commission's November 24, 2009 Order in this proceeding.<sup>1</sup> While Texas Gas does not object to the Commission's rejection of its proposed tariff sheets, it requests clarification, or in the alternative rehearing, of a statement made in the November 24 Order. In this order, we clarify the November 24 Order, as discussed below. In light of this clarification, Texas Gas's request for rehearing is dismissed as moot.

**I. Background**

2. In this proceeding, Texas Gas proposed to revise section 10 of its General Terms and Conditions (GT&C) to include the following language: "If a service agreement is extended in accordance with any of the provisions in this Section 10, Customer shall execute a new service agreement as provided in the then-current tariff." Section 10 of Texas Gas's GT&C provides for three types of contract extension rights to be included in transportation service agreements: (1) a bilateral evergreen clause, under which the service agreement is automatically extended unless either the pipeline or the shipper provides notice of termination, (2) a unilateral rollover right, under which the shipper has a unilateral right to extend the service agreement subject to certain conditions,<sup>2</sup> and (3) a right of first refusal (ROFR). Texas Gas argued that the proposed tariff revision was intended to allow Texas Gas and shippers to renegotiate service agreements at the time of

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<sup>1</sup> *Texas Gas Transmission, LLC*, 129 FERC ¶ 61,176 (2009) (November 24 Order).

<sup>2</sup> The conditions are that the shipper must extend the contract for at least five years and agree to pay the maximum rate.

their extension. Texas Gas indicated that such renegotiations would allow Texas Gas to seek removal of any material deviations in existing service agreements that may be inconsistent with Texas Gas's tariff and/or Commission policy. Although Texas Gas's proposal would nominally apply to the three modes of contract extension described in section 10, the Commission found that the only real substantive effect would be with respect to service agreements containing unilateral rollover rights.<sup>3</sup> That is because, in service agreements with a bilateral evergreen provision or a ROFR, any contract extension would involve Texas Gas and a shipper executing a new service agreement regardless of its proposed change to section 10. Therefore, Texas Gas's proposal would substantively affect only those service agreements with unilateral rollover rights.

3. In the November 24 Order, the Commission rejected this proposal, finding that "without examining the specific contracts with unilateral rollover rights and the non-conforming provisions that Texas Gas wishes to change or eliminate, and without knowing whether these non-conforming agreements have been filed with the Commission, we cannot find just and reasonable Texas Gas's proposed tariff language giving it a blanket authorization to renegotiate all such contracts when they are rolled over."<sup>4</sup>

4. Texas Gas also argued that its proposal was necessary to ensure ongoing compliance with the Commission's regulations requiring the filing of non-conforming service agreements, stating that some of its customers have long-term, historical agreements that may have provisions that could be viewed as not conforming with Texas Gas's current tariff and/or Commission policy. For example, Texas Gas stated that it should not be required to support a hypothetical agreement that requires Texas Gas to reserve capacity on specific facilities for the sole use of the shipper and could be viewed as requiring Texas Gas to withhold capacity, contrary to Commission policy. Responding to these arguments, the Commission explained:

To the extent that Texas Gas identifies service agreements that deviate materially from its current *pro forma* service agreement and which have not been filed with the Commission, section 154.112(b) of the Commission's regulations requires Texas Gas to file those contracts as soon as possible, regardless of any rollover rights. Texas Gas may

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<sup>3</sup> November 24 Order, 129 FERC ¶ 61,176 at P 18.

<sup>4</sup> *Id.* P 19.

not wait until the time of contract extension to file those agreements.<sup>5</sup>

5. The Commission further explained that at the time when Texas Gas files any non-conforming agreements, the Commission will consider the nature of the specific non-conforming terms and the views of relevant parties before determining whether agreements containing those terms should be revised. The Commission would not, however, grant Texas Gas blanket approval to revise existing agreements that contain the unilateral rollover right set forth in Texas Gas's tariff.<sup>6</sup>

## **II. Texas Gas's Request for Clarification or, in the Alternative, Rehearing**

6. In its request for clarification/rehearing, Texas Gas states that it does not object to the Commission's rejection of its proposed tariff sheets in the November 24 Order.<sup>7</sup> However, Texas Gas asserts that the requirement for Texas Gas to file service agreements that materially deviate from the "current" *pro forma* service agreement is unclear and potentially inconsistent with Commission policy. Texas Gas asserts that the November 24 Order does not explain the meaning of the word "current," noting that the word does not appear in section 154.112(b) of the Commission's regulations,<sup>8</sup> and arguing that it is inconsistent with Commission precedent as well as guidance provided by the Commission's Office of Enforcement. Texas Gas requests that the Commission clarify that a pipeline is not required to file contracts that contain language deviating from the currently effective *pro forma* agreement when the contract conformed to the *pro forma* agreement in effect at the time of execution and became non-conforming because the *pro forma* service agreement was later modified. If the Commission does not grant its

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<sup>5</sup> *Id.* P 21.

<sup>6</sup> Section 10.2 of Texas Gas's GT&C grants shippers a unilateral rollover right so long as the shipper agrees to a five-year term at the maximum tariff rate, and which Texas Gas did not propose to qualify as part of this proceeding. *See* Texas Gas, FERC Gas Tariff, Third Revised Vol. No. 1, First Revised Sheet No. 2200 ("[Except in certain cases], Pipeline will agree to a continuous unilateral rollover term, exercisable only by Customer; however, such rollover term must be for at least five (5) years, and customer must agree to pay the applicable maximum rate. Such rollover will be automatic unless Customer notifies Pipeline in writing at least one year in advance of the expiration of the primary term of its agreement, or any succeeding rollover term, that it intends to exercise its right of first refusal or wishes to negotiate a different extension period.").

<sup>7</sup> Texas Gas, December 18, 2009 Request for Clarification/Rehearing at 4.

<sup>8</sup> 18 C.F.R. § 154.112(b) (2009).

request for clarification, Texas Gas seeks rehearing of the November 24 Order to the extent it requires that Texas Gas file contracts that materially deviate from a revised *pro forma* agreement, when such contracts conformed to the *pro forma* agreement in effect when the contract was executed.

7. Texas Gas states that section 154.112(b) requires only that agreements that “deviate in any material aspect from the form of service agreement” be filed with the Commission.<sup>9</sup> Texas Gas argues that the use of the phrase “the form of service agreement” in section 154.112(b) implies the *pro forma* service agreement in effect at the time a service agreement was executed and upon which that agreement is based. Texas Gas states that the November 24 Order marks the first time the Commission has interpreted section 154.112(b)’s filing requirement to refer to a pipeline’s “current” *pro forma* service agreement, arguing that the Commission has not explained how it intends the word “current” to be applied. Texas Gas asserts that the most appropriate interpretation of “current” in the November 24 Order is “current at the time the agreement was entered into.” Texas Gas states that such an interpretation is consistent with the purpose of the regulation and provides a clear mechanism to determine whether an agreement contains non-conforming language and if so, whether that language is just and reasonable.

8. Texas Gas argues that because *pro forma* service agreements are, by definition, just and reasonable, neither a *pro forma* agreement nor the actual agreements based thereon become unjust and unreasonable simply because the *pro forma* agreement is superseded or modified. Further, Texas Gas states that requiring a service agreement that was based on an earlier version of the *pro forma* agreement to be filed merely because it contains language that is different from a subsequent version of the *pro forma* agreement is tantamount to making a finding under section 5 of the Natural Gas Act (NGA) that the original *pro forma* agreement has become unjust and unreasonable simply because it was later revised. Accordingly, Texas Gas contends that agreements that become non-conforming as a result of subsequent changes to the *pro forma* agreement do not have to be filed in order for the Commission to ensure that they are just, reasonable, and not unduly discriminatory.

9. Texas Gas also argues that the November 24 Order is inconsistent with the Commission’s decision in *Cheyenne Plains Gas Pipeline Co.*,<sup>10</sup> and potentially conflicts with guidance provided by the Office of Enforcement. Texas Gas states that the November 24 Order makes no effort to reconcile a statement in *Cheyenne Plains* that

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<sup>9</sup> *Id.*

<sup>10</sup> *Cheyenne Plains Gas Pipeline Co.*, 110 FERC ¶ 61,037 (2005) (*Cheyenne Plains*).

“previously executed [interruptible] agreements that conformed to the previous Form of Service Agreement are not required to be submitted to the Commission for material deviation review simply because they no longer conform to the revised Form of Service Agreement.”<sup>11</sup> Texas Gas further states that the November 24 Order does not acknowledge guidance from the Office of Enforcement regarding a pipeline’s obligation to review its contracts and file those that are non-conforming. Texas Gas cites the following passage from *Material Deviations: Frequently Asked Questions* (FAQs):

Under current Commission policy, if a contract in effect today, no matter when initially effective, contains a material deviation, from the *pro forma* agreement currently in place, the pipeline must file it. However, if the contract contains a material deviation from the currently effective version of the *pro forma* service agreement but the contract conforms to the *pro forma* service agreement in effect at the time the contract became effective and the tariff contains a Memphis clause, the pipeline would not have to file the contract. A Memphis clause allows a pipeline to reserve the right to make section 4 filings to propose changes in the rates and terms and conditions of service in settlements and in contracts (*See United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division* 358 U.S. 103 (1958)).<sup>12</sup>

Texas Gas argues that the Commission should clarify how the November 24 Order is to be reconciled with *Cheyenne Plains* as well as the above-quoted portion of the FAQs.

10. Texas Gas argues that requiring it to file agreements that deviate from the *pro forma* agreement currently in its tariff, even though such agreements conformed to the *pro forma* agreement at the time of execution, serves no meaningful purpose and yields absurd results. Texas Gas states that if it were required to file all previously executed service agreements that conformed to a prior version of the *pro forma* agreement and now contain language different from its currently effective *pro forma* agreements simply because of revisions to the *pro forma* agreement, it could be required to file all 680 of its currently active agreements any time its *pro forma* agreements are modified. Texas Gas asserts that such a requirement would be triggered when a pipeline modifies either its *pro forma* service agreement or its GT&C to provide a new contractual

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<sup>11</sup> *Id.* P 9.

<sup>12</sup> Office of Enforcement, Fed. Energy Regulatory Comm’n, *Material Deviations: Frequently Asked Questions* 5-6, available at <http://www.ferc.gov/legal/acct-matts/material-deviations-FAQ.pdf> (last accessed February 18, 2010).

right,<sup>13</sup> thereby providing a strong disincentive to pipelines to modify their tariffs to adapt to changing market conditions.

11. Texas Gas states that the FAQs sets forth a potentially more workable approach—requiring a pipeline to file executed service agreements that are based on a previous *pro forma* agreement only if the pipeline’s tariff does not contain a *Memphis* clause.<sup>14</sup> Texas Gas states that because the rate schedules in its tariff all have *Memphis* clauses, this approach would protect Texas Gas from being required to file all of its agreements that conformed to prior versions of the *pro forma* agreement, but no longer conform to the currently effective *pro forma* agreement due to changes made to the *pro forma* agreement. Notwithstanding, Texas Gas asserts that the Commission’s application of this approach would still fail to reconcile the above-referenced guidance set forth by the Office of Enforcement with *Cheyenne Plains*. Accordingly, Texas Gas seeks clarification of the November 24 Order.

12. To the extent the Commission does not grant clarification, Texas Gas seeks rehearing of the November 24 Order, arguing that the requirement that Texas Gas file service agreements that deviate from its current *pro forma* service agreement is inconsistent with *Cheyenne Plains*, that the requirement marks an unexplained change in Commission policy, that it is not supported by the plain text of the regulation, and that it does not advance the Commission’s policy objectives of requiring review of non-conforming language.

### **III. Discussion**

13. In this order, we clarify the portion of the November 24 Order requiring Texas Gas to file service agreements that deviate materially from its current *pro forma* service

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<sup>13</sup> Texas Gas, December 18, 2009 Request for Clarification/Rehearing at 9 (citing Office of Enforcement, Fed. Energy Regulatory Comm’n, *Material Deviations: Frequently Asked Questions 2*, available at <http://www.ferc.gov/legal/acct-matts/material-deviations-FAQ.pdf> (“If a pipeline makes changes only to its General Terms and Conditions, and not its *pro forma* service agreement, to offer a contractual right to all shippers, the contract would still have to be filed as non-conforming because the *pro forma* service agreement would not contain a blank for filling in the provision authorized by the tariff.”)).

<sup>14</sup> *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division* 358 U.S. 103 (1958). A *Memphis* clause allows a pipeline to reserve the right to make section 4 filings to propose changes in the rates and terms and conditions of service in settlements and in contracts, which the Commission evaluates under the just and reasonable standard of review.

agreement and which have not yet been filed with the Commission. Because we clarify this statement, we dismiss Texas Gas's alternative request for rehearing as moot.

14. Section 154.112(b) of the Commission's regulations states: "Contracts for service . . . that deviate in any material aspect from the form of service agreement must be filed."<sup>15</sup> The Commission has defined material deviations as "any provision of a service agreement which goes beyond the filling in of the spaces in the form of service agreement with the appropriate information provided for in the tariff and that affects the substantive rights of the parties."<sup>16</sup>

15. As articulated in the November 24 Order, the Commission interprets section 154.112(b) as requiring contracts that materially deviate from the current *pro forma* agreement to be filed with the Commission.<sup>17</sup> However, as a general matter, the fact a pipeline changes its *pro forma* agreement need not require the pipeline to file all its existing contracts that followed the previously effective *pro forma* agreement. As the Commission has previously recognized,<sup>18</sup> pipelines' *pro forma* service agreements uniformly include *Memphis* clauses,<sup>19</sup> allowing the pipelines to change their rates, rate schedules, and terms of conditions of service by making unilateral filings pursuant to NGA Section 4; also, *pro forma* service agreements include provisions that incorporate the terms and conditions in the pipeline's tariff into the service agreement.

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<sup>15</sup> 18 C.F.R. § 154.112(b) (2009).

<sup>16</sup> *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia*). See also *Southern Star Central Gas Pipeline, Inc.*, 125 FERC ¶ 61,082, at P 7 (2008).

<sup>17</sup> This interpretation of section 154.112(b) appears to be consistent with Texas Gas's understanding of this provision in the earlier stages of this proceeding. See Texas Gas, April 28, 2009 Answer at 6 ("The Commission's general rule is that gas pipelines do have a continuing obligation to ensure that jurisdictional agreements either conform to the *current pro forma* agreements or are filed with the Commission as non-conforming contracts.") (emphasis added).

<sup>18</sup> *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127, at P 45 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005) (addressing challenges to the Order No. 637).

<sup>19</sup> *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division* 358 U.S. 103 (1958).

16. Because *pro forma* agreements contain such clauses, the general rule is that existing agreements that conformed to the *pro forma* agreement when they were executed should automatically incorporate subsequent changes to the terms and conditions in the tariff, including corresponding changes implemented through a revision to the *pro forma* agreement. Therefore, changes to a *pro forma* agreement that contains a *Memphis* clause need not cause existing agreements, which conformed to the earlier version of the *pro forma* agreement, to materially deviate from the new *pro forma* agreement. It follows that such existing agreements would not need to be filed with the Commission as non-conforming in circumstances where the pipeline reasonably interprets the *Memphis* clause in its existing service agreements as extending to its current shippers the same terms and conditions of service as reflected in the new *pro forma* agreement. As articulated in its request for clarification/rehearing, Texas Gas interprets its tariff in this manner, noting that all of its rate schedules contain *Memphis* clauses.<sup>20</sup> Therefore, changes to Texas Gas's *pro forma* service agreements should not render existing contracts that conform to earlier versions of the *pro forma* agreement materially deviating.<sup>21</sup>

17. However, in the request for rehearing addressed by the November 24 Order, Texas Gas suggested that it may have some long-term, historical service agreements that predate Order No. 636<sup>22</sup> and contain provisions that do not conform to its existing *pro forma* agreement or Commission policy. Specifically, Texas Gas proffered a hypothetical situation involving a non-conforming agreement containing a provision requiring Texas Gas to reserve capacity on specific facilities for the sole use of a shipper, and Texas Gas stated that such a provision could be viewed as requiring it to withhold capacity, contrary to Commission policy.<sup>23</sup> Texas Gas did not state that its hypothetical

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<sup>20</sup> Texas Gas, December 18, 2009 Request for Clarification/Rehearing at 10.

<sup>21</sup> Thus, where service agreements contain a *Memphis* clause, we agree with Texas Gas's assertion that agreements based a *pro forma* agreement do not become unjust and unreasonable simply because the *pro forma* agreement is superseded or modified.

<sup>22</sup> *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

<sup>23</sup> Texas Gas, June 8, 2009, Request for Clarification/Rehearing at 16.

agreement had conformed to any prior *pro forma* agreement or that the Commission had previously reviewed and accepted the agreement.

18. It was in response to this hypothetical that the Commission stated that “[t]o the extent that Texas Gas identifies service agreements that deviate materially from its current *pro forma* service agreement and which have not been filed with the Commission, section 154.112(b) of the Commission’s regulations requires Texas Gas to file those contracts as soon as possible, regardless of any rollover rights.”<sup>24</sup> The Commission interpreted the hypothetical as a situation in which Texas Gas believed that, at least arguably, it remains contractually bound to honor the non-conforming provisions of the contract, regardless of any *Memphis* clause or other provision in the contract incorporating subsequent changes in the terms and conditions of the pipeline’s tariff. It also appeared unlikely that the agreement had conformed to any prior *pro forma* service agreement, since the Commission is not aware that it has ever approved a *pro forma* service agreement that would require the pipeline to reserve capacity on specific facilities for the sole use of a specific shipper. In that type of situation, the Commission reaffirms its holding in the November 24 Order that the pipeline should file the non-conforming contract with the Commission as soon as possible, so that the Commission can consider whether such a material deviation affecting the substantive rights of the parties should be removed from the contract.<sup>25</sup>

19. In its rehearing request, Texas Gas characterizes the Commission’s November 24 Order as containing a “new interpretation of section 154.112(b)” by requiring pipelines to file agreements that materially deviate from the current *pro forma* service agreement.<sup>26</sup> Texas Gas asserts that this interpretation is at odds with *Cheyenne Plains*, and that the

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<sup>24</sup> November 24 Order, 129 FERC ¶ 61,176 at P 21.

<sup>25</sup> As the Commission explained in the November 24 Order, when the agreement is filed, Texas Gas may make its case for retaining non-conforming provisions or revising them. *Id.* P 22. At that point, the Commission will determine how to proceed and under what statutory authority to do so.

<sup>26</sup> Texas Gas, December 18, 2009 Request for Clarification/Rehearing at 14. Although Texas Gas takes the position in its request for clarification/rehearing that the Commission’s interpretation of section 154.112(b) is somehow “new,” we remind Texas Gas that it espoused the same interpretation in the earlier stages of this proceeding. *See* Texas Gas, April 28, 2009 Answer at 6 (“The Commission’s general rule is that gas pipelines do have a continuing obligation to ensure that jurisdictional agreements either conform to the current *pro forma* agreements or are filed with the Commission as non-conforming contracts.”).

Commission must reconcile the November 24 Order with *Cheyenne Plains*.<sup>27</sup> We disagree. In *Cheyenne Plains*, the Commission addressed a proposal by the pipeline to revise both its interruptible service rate schedule and *pro forma* agreement to eliminate provisions that were either no longer needed or which unnecessarily restricted shipper flexibility.<sup>28</sup> *Cheyenne Plains* made clear that it would give both its existing and new interruptible shippers the benefit of its proposed changes, and it sought confirmation that previously executed agreements that conformed to its existing *pro forma* agreement would not need to be filed as a result of the change.<sup>29</sup> Because the overall changes, including the changes to the *pro forma* agreements, would result in all shippers receiving the same treatment, the Commission confirmed that “previously executed [interruptible] agreements that conformed to the previous Form of Service Agreement are not required to be submitted to the Commission for material deviation review simply because they no longer conform to the revised Form of Service Agreement.”<sup>30</sup>

20. We find no inconsistency between the November 24 Order, as clarified herein, and *Cheyenne Plains*. As indicated above, the November 24 Order specifically addressed the hypothetical agreements postulated by Texas Gas, under which the shippers subject to those agreements would be treated differently from how all other shippers are treated. The Commission relied upon these limited “hypothetical” facts under which Texas Gas appeared to believe that it was contractually bound to honor this non-conforming provision regardless of any *Memphis* clause. Such a fact pattern is distinct from the facts of *Cheyenne Plains*, in which the revision to the *pro forma* agreement was part of an overall change that was intended to apply evenhandedly to all shippers. Accordingly, Texas Gas’s reliance on *Cheyenne Plains* for the proposition that the November 24 Order marks a change in Commission policy is incorrect.

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<sup>27</sup> Texas Gas also asserts that the Commission must reconcile statements made in the Office of Enforcement’s FAQs with the November 24 Order. We note that guidance offered by Office of Enforcement in the FAQs is informal advice offered by Commission staff pursuant to 18 C.F.R. § 388.104(a) (2009). As such, it does not represent the official views of the Commission, nor is it binding on the Commission. In any event, the informal advice offered by the Office of Enforcement in the FAQs is consistent with the clarifications discussed above. Therefore, no reconciliation is needed.

<sup>28</sup> *Cheyenne Plains*, 110 FERC ¶ 61,037 at P 4.

<sup>29</sup> *Id.* P 9.

<sup>30</sup> *Id.*

The Commission orders:

(A) Texas Gas's request for clarification of the November 24 Order is granted, consistent with the discussion in the body of this order.

(B) Texas Gas's alternative request for rehearing is denied as moot.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.