

133 FERC ¶ 61,050
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Portland Natural Gas Transmission System

Docket No. RP10-758-000

ORDER ON NON-CONFORMING SERVICE AGREEMENTS

(Issued October 21, 2010)

1. Portland Natural Gas Transmission System (Portland Natural) has filed for review, pursuant to section 154.1(d) of the Commission's Regulations,¹ multiple non-conforming service agreements that potentially materially deviate from its Form of Service Agreements. On June 28, 2010, the Commission accepted Portland Natural's non-conforming agreements, effective on the dates requested, subject to further review.² Having reviewed the agreements further, we require Portland Natural to eliminate certain deviations or provide further explanations as discussed below in this order.

Discussion

2. As noted in the June 28 Order, Portland Natural has conducted a review of its currently effective agreements. Portland Natural reports 58 agreements that deviate in some way from its respective *pro forma* Form of Service Agreements. Portland Natural now asks the Commission to accept those agreements. Portland Natural organizes its filing based on the rate schedule applicable to the non-conforming agreements: FT (Firm Transportation); IT (Interruptible Transportation); PL (Park and Loan); and CR (Capacity Release). We discuss the deviating service agreements below in the order suggested by Portland Natural.

3. In general, when reviewing any provision that differs from a *pro forma* service agreement, the Commission first determines whether it is a material deviation. The

¹ 18 C.F.R. §154.1(d) (2010).

² *Portland Natural Gas Transmission System*, 131 FERC ¶ 61,276 (2010) (June 28 Order).

Commission has held that a material deviation is any provision which (1) goes beyond filling in the blank spaces in the form of service agreement with appropriate information allowed by the tariff, and (2) affects the substantive rights of the parties.³ The Commission prohibits negotiated terms and conditions of service that result in a customer receiving a different quality of service than that offered to other customers under the pipeline's generally applicable tariff,⁴ or that affect the quality of service received by others.⁵ Finally, the Commission need not accept non-conforming provisions for which the filer has failed to provide "a detailed narrative outlining the terms of its negotiated contract, the manner in which such terms differ from its form of service agreement, the effect of such terms on the rights of the parties, and why such deviation does not present a risk of undue discrimination."⁶

Deviations specific to FT Agreements with Wausau Papers and Mead

4. Wausau Papers and Mead are original shippers on Portland Natural, whose service agreements took effect on February 11, 1999, when Portland Natural commenced service. Their service agreements contain numerous material deviations.

5. Portland Natural states that its FT agreement with Wausau Papers of New Hampshire, Inc. (Wausau Papers) "deletes the de-contracting provisions."⁷ Portland Natural claims that this deletion does not change the conditions under which service is being provided or present a risk of undue discrimination. We disagree. Upon review, it

³ *Monroe Gas Storage Company, LLC*, 130 FERC ¶ 61,113, at P 28 (2010) (*Monroe*). See generally *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001) (*Columbia*).

⁴ *Texas Eastern Transmission, LP*, 123 FERC ¶ 61,095, at P 14 n.6 (2008).

⁵ See *Dominion Transmission, Inc.*, 93 FERC ¶ 61,177 (2000).

⁶ *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 33 (2003). See also *East Tennessee Natural Gas Co.*, 107 FERC ¶ 61,197, at P 10 (2004). Portland Natural, in its descriptions of some of its individual deviations, urges the Commission to approve them on the grounds that the deviation "reflects the mutual agreement reached between the parties" or "applies only to this shipper." These proffered grounds do not comply with the Commission's standards for reviewing material deviations.

⁷ Portland Natural May 24, 2010 filing at Appendix C-1 at #4. See generally Portland Natural Contract FT-1997-007, Wausau Papers FT agreement.

appears that “de-contracting provisions” refers to the provision quoted below in the *pro forma* FT agreement:

Transporter will provide a notice to Shipper after all the following conditions are satisfied: (a) Transporter on a pro forma basis is projected to receive during the next 12 month period revenues at least equal to its annualized Cost of Service (as hereinafter defined), (b) Transporter has executed an agreement with a new or existing replacement shipper for firm capacity which, together with all other transportation agreements (including the Firm Transportation Contracts), will provide revenues in excess of Transporter's Cost of Service, and (c) the replacement shipper has a creditworthiness rating of BBB (investment grade) or better. Within sixty (60) days after giving such notice, Shipper will be permitted to request a reduction in the Maximum Contract Demand in its Firm Transportation Contracts.

Shipper will be permitted to reduce the Maximum Contract Demand and the associated term in an amount equivalent to the quantity and term covered in the Firm Transportation Contract with the replacement shipper; provided, however, that any such reduction in quantity and term, after conversion of the units of quantity, term and rates to revenues, shall be permitted only to the extent it does not reduce the recovery of revenues equal to Transporter's Cost of Service. Maximum Contract Demand will be reduced among all shippers entitled to and requesting reductions in Firm Transportation Contracts, pro rata, based on annual revenue contributions.

For purposes of this paragraph, the Cost of Service shall be the cost of service to be collected by Transporter calculated on the basis of the principles established in its Certificate of Public Convenience and Necessity, or any amendments thereto, issued by the FERC, or the cost of service in effect pursuant to Transporter's general rate filing under Section 4 of the Natural Gas Act. In the event the replacement shipper causes an increase in the cost of service, the Cost of Service shall be increased by an equivalent amount.

If Shipper does not timely request a reduction in its Maximum Contract Demand as provided herein, the amount by which Shipper would have been entitled to reduce its

Maximum Contract Demand shall be deemed Ineligible Capacity. With respect to such Ineligible Capacity, Shipper permanently relinquishes the rights to reduce its Maximum Contract Demand under this paragraph in a quantity equivalent to the Ineligible Capacity. The right relinquished under this paragraph shall take effect concurrently with the relinquishment.⁸

6. A shipper's right to reduce its contract demand before the expiration of its agreement is a valuable right since it can enable the shipper to avoid significant liability for future reservation charges. The Commission has held that such a valuable right must be granted in a not unduly discriminatory manner.⁹ Portland Natural provides no explanation as to why this provision was deleted for Wausau Papers. Accordingly, we direct Portland Natural to either provide an explanation or restore the deleted provision.

7. The Mead Corporation (Mead) FT agreement allows the shipper to exceed its Maximum Daily Quantity in order to deliver make-up quantities when capacity is available, subject to the tariff's capacity allocation procedures.¹⁰ Portland Natural claims that this deviation does not adversely affect any other shippers. Because this term is subject to the tariff's capacity allocation procedures, we read it as simply acknowledging rights that all shippers have under the tariff, and accept it accordingly.

8. The Mead FT agreement also allows the shipper to change its Primary Receipt Point from its specified point to an interconnection with the Maritimes & Northeast Pipeline, in the event that such an interconnection is built.¹¹ Portland Natural claims that

⁸ The quoted version appears in Article V of the currently effective *pro forma* FT agreement. The current version differs from the version effective in 1998 when the non-conforming contract was issued in several, non-substantive ways. The currently effective *pro forma* version is the one relevant for comparison, however, because the Wausau Papers agreement also contains a non-conforming section that purports to treat Wausau Papers differently for *Memphis* clause purposes, as explained further below.

⁹ *Questar Pipeline Co.*, 132 FERC ¶ 61,152, at P 2, 7-8 (2010). *See also TransColorado Gas Transmission Company*, 121 FERC ¶ 61,217, at P 10 (2007) (citing *Colorado Interstate Gas*, 105 FERC ¶ 61,124, at P 26 (2003)).

¹⁰ Portland Natural Appendix C-1 at #5; Portland Natural Contract FT-1998-002, Mead FT Agreement, at Article III, §8(a).

¹¹ Portland Natural Appendix C-1 at #6; Mead FT Agreement at Article III, §8(a).

this deviation does not adversely affect any other shippers. Portland Natural's tariff at sections 9.4 and 9.5 allows any shipper to revise its Primary Receipt and Delivery Points from time to time as capacity becomes available, and the non-conforming provision states that it applies only when "consistent with the terms of the FERC Tariff." Allowing Mead to change its Primary Receipt Point when a new interconnection is built merely clarifies an existing right, and we accept it accordingly.

9. The Mead FT agreement also grants the shipper the option to purchase an additional 18,000 MMBtu per day of transportation capacity, over and above its present capacity.¹² If Mead seeks to exercise this option after November 1, 1998, Portland Natural may require up to 24 months notice before commencement of service. After such notice, the parties shall enter into a precedent agreement consistent with the terms of Portland Natural's tariff. Mead may revoke or reduce the quantity of additional capacity requested, but must reimburse Portland Natural for any out-of-pocket costs directly incurred by Portland Natural after November 1, 1998 to carry out the terms of the precedent agreement. Portland Natural asserts that this deviation should be approved, because it does not change the conditions under which service is provided to Mead, does not adversely affect any other shippers, and is a longstanding provision relied on by the parties. The Commission requires additional explanation of this provision, before it can determine whether the provision is a permissible material deviation.

10. First, it is unclear whether this provision gives Mead a preferential right to obtain additional existing capacity on Portland Natural outside the usual tariff procedures for obtaining existing unsubscribed capacity, or whether the provision simply allows Mead to request Portland Natural to build new capacity in order to permit Mead to increase its contract demand. It is also unclear whether Portland Natural offered similar provisions to its original shippers as part any open season conducted before the pipeline was built. If the provision gives Mead a preferential right to obtain existing unsubscribed capacity outside of the normal tariff procedures and such a provision was not offered to other similarly situated shippers on a not unduly discriminatory, it would be contrary to Commission policy. The Commission has generally held that contractual provisions which permit shippers to adjust contract demand without following the usual tariff procedures are valuable rights which may only be provided under generally applicable tariff provisions.¹³ Accordingly, we direct Portland Natural to provide a further explanation of the circumstances under which it offered this provision to Mead and

¹² Portland Natural Appendix C-1 at #7; Mead FT Agreement at Article III, §8(b).

¹³ *ANR Pipeline Co.*, 103 FERC ¶ 61,223, at P 21-23 and cases cited, *reh'g denied as here relevant*, 105 FERC ¶ 61,112, at P 15 (2003), *cited in Iroquois Gas Transmission Sys., L.P.*, 122 FERC ¶ 61,102, at P 9 (2008) (*Iroquois*).

whether the provision gives Mead any right to obtain existing unsubscribed capacity outside of the normal tariff procedures for obtaining such capacity.

11. Portland Natural's *pro forma* service agreement contains a provision entitled "Allocation of Off-Peak Capacity." The service agreements of Hydro-Quebec, Energy North, Mead, and Wausau Papers all modify this provision as shown by italics and strikeout below;

On any Day during the period from April 1 through October 31 (*Off-Peak Period*) that System Capacity is not otherwise scheduled under any Rate Schedule, such capacity will be allocated pro rata to *Shipper and other Rate Schedule FT Shippers-shipper(s)* whose Gas Transportation Contracts have initial terms of twenty (20) Years or longer; *and, to the extent such shipper(s) had under its contract Maximum Contract Demand during the Off-Peak Period, based on these Shippers-those shippers'* annual reservation charges under Rate Schedules FT.

Portland Natural states that these deviations clarify that its off-peak season is April 1 through October 31 and the allocation of unsubscribed off-peak capacity will apply only to the extent that a shipper has FT contract demand during the off-peak season. Portland Natural also states that this provision is consistent with agreements it filed with the Commission in Docket Nos. CP96-248-000 and CP96-249-000 which the Commission approved. The Commission accepts these longstanding provisions, which clarify Portland Natural's generally applicable method of allocating unsubscribed off-peak capacity. Since Portland Natural applies this methodology to all firm shippers seeking unsubscribed off-peak capacity, the provision is not unduly discriminatory.

12. The Mead FT agreement further adds an entirely new section providing for a special arrangement in the event that Portland Natural "ceases to have in its Tariff a FERC-approved Recourse Rate that is based on Transporter's cost-of-service." Were this to occur, the non-conforming provision would give Mead the choice to either "accept the non-cost-of-service rate or [else] initiate an arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association to establish" a cost-of-service rate.¹⁴ This deviating section is not permissible. The only lawful way under the Natural Gas Act that Portland Natural could omit a Commission-approved Recourse Rate based on cost-of-service from its tariff would be through a proceeding before the Commission. If such a proceeding were to occur, Mead and all other interested parties would be open to participate, and the Commission would address matters such as future rate calculations

¹⁴ Portland Natural Appendix C-1 at #8; Mead FT Agreement at Article V, §14.

or the need for alternative dispute resolution at that time. Accordingly, we direct Portland Natural to remove the impermissible provision.

13. Mead obtained its FT agreement in order to ship gas to its pulp and paper mill in Rumford, Maine. In the Mead FT agreement, Portland Natural modifies the terms for transfer and assignment to address the possibility that Mead might sell the mill.¹⁵ Under the *pro forma* agreement, neither party can assign the service agreement to a non-affiliate without the prior written consent of the other, but the consent “shall not be unreasonably withheld.” The deviation specifies that, without the need for prior consent, Mead may assign its service agreement to an entity that purchases the mill from Mead, if that entity has at least a BBB credit rating. The Commission will allow this material deviation. It is limited to permitting Mead to assign its capacity to another shipper who will use it for the same purpose as Mead is using the capacity – to serve the paper mill in Rumford. Also, the requirement that the purchaser of the mill have at least a BBB credit rating is consistent with the generally applicable creditworthiness provisions in Portland Natural’s tariff.¹⁶ Finally, the provision does not affect the rights of other shippers. We accept it accordingly.

14. Portland Natural’s *pro forma* FT Agreement obligates shippers to deliver supporting documentation to Portland Natural’s lenders in order to assist it in the process of obtaining a possible future refinancing of its system. This clause exists in Article IX with substantively the same language in both the historic and currently effective *pro forma* FT Agreement. The Mead FT agreement deletes this clause.¹⁷ Portland Natural claims that this deletion does not change the conditions under which service is being provided or present a risk of undue discrimination. We disagree. Portland Natural is removing a condition for one shipper which all of its other shippers must comply with in order to obtain FT service. It provides no explanation as to why this provision was deleted for Mead, or why Portland Natural could not remove this provision for other similarly situated shippers. Accordingly, we direct Portland Natural to either provide such an explanation or else to restore the deleted provision.

¹⁵ Portland Natural Appendix C-1 at #11; Mead FT Agreement at Article X, §25.

¹⁶ GT&C 3.5(a) (Original Sheet No. 313) states, “The determination of Shipper's creditworthiness shall be based upon: (a) Shipper's long-term unsecured debt securities ... are rated BBB or better.” Article V(c) of the *pro forma* FT Agreement (First Revised Sheet No. 504) requires that “the replacement shipper has a creditworthiness rating of BBB (investment grade) or better.”

¹⁷ Portland Natural Appendix C-1 at #14; Mead FT Agreement at Article X, §26.

15. In the Wausau Papers and Mead FT agreements, Portland Natural modifies each agreement's *Memphis* clause¹⁸ to exempt numerous specific sections of the non-conforming contracts. For example, section 29 of the Mead FT agreement provides that Portland Natural "will have the unilateral right to file with the" Commission "any changes, *which are not inconsistent with the terms of Sections 1(a), 2, 5, 6, 10, 11, 12, 14, 15, 16, 17, 18, 20, 21, 25, 29, 30, and Schedules 1 and 2 of this contract*, in any of the provisions of its Tariff, including of [sic] any of its Rate Schedules, or the General Terms and Conditions." [non-conforming language is italicized]. The Wausau Papers deviation is similarly worded. The Commission finds that these deviations are not permissible. As presently drafted, these provisions commit Portland Natural not to file unilaterally to modify in various ways generally applicable provisions of its tariff that govern service to all its shippers, not just Wausau Papers and Mead. Therefore, this provision potentially affects all shippers on Portland Natural, not just the two shippers in whose service agreements the commitments have been made. Including such commitments in the contracts of some shippers but not others gives the shippers in whose contracts the commitments are placed greater notice of the commitment, than other shippers whose contracts do not contain such provisions. It is also potentially discriminatory, since shippers with greater bargaining power may obtain commitments from the pipeline not to change particular terms and conditions of service of importance to them, while other shippers with less bargaining power are unable to obtain such commitments with respect to other terms and conditions of service of more importance to them.

16. While the Commission finds that these deviations from the *pro forma Memphis* clause are not permissible in their present form, the Commission recognizes that it may be reasonable for a pipeline to agree not to file unilaterally to change a non-conforming provision in a particular shipper's service agreement which the Commission has approved. Such an agreement would not affect the generally applicable provisions of the pipeline's tariff which govern service to all shippers, but would only represent a commitment by the pipeline not to modify a non-conforming provision in a contract which the Commission had found to be reasonable. Therefore, our requirement that Portland Natural remove the non-conforming language from the *Memphis* clauses in the Wausau Papers and Mead FT agreements is without prejudice to Portland Natural and the shippers renegotiating those provisions consistent with the above discussion.

¹⁸ See *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 79 S. Ct. 194, 3 L. Ed. 2d 153 (1958). A *Memphis* clause permits a pipeline to reserve the right to make NGA section 4 filings to unilaterally 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.

Deviations in other FT Agreements

17. Portland Natural's FT agreement with EnergyNorth Natural Gas grants the shipper the option to reduce its firm Maximum Daily Quantity, "in the event that Transporter enters into a ... contract for firm transportation service with any other shipper, excluding Crown Vantage ... that calls for delivery at the Berlin Station."¹⁹ A shipper's right to reduce its contract demand before the expiration of its agreement is a valuable right since it can enable the shipper to avoid significant liability for future reservation charges and must be granted in a not unduly discriminatory manner.²⁰ Accordingly we direct Portland Natural to remove this provision from the EnergyNorth Natural Gas contract or offer it on a non-discriminatory basis to all shippers.

18. In the FT agreement with Hydro-Quebec, the standard termination notice period has been amended, so as to grant a longer period of notice before either party may terminate (24 months instead of 12 months).²¹ While this termination notice provision constitutes a material deviation, we accept it as not presenting a risk of undue discrimination.²²

19. Portland Natural notes several other provisions in its FT agreements that only apply to situations that occurred or could have occurred before or around the initial in-service date.²³ Portland Natural has been in service for several years, so these pre-service provisions are now moot. As such, they are unique to the service provided to anchor shippers and do not result in undue discrimination to any of Portland Natural's other shippers. Accordingly, we approve these provisions.²⁴

¹⁹ Portland Natural Appendix C-1 at #9; Portland Natural Contract FT-1999-001, EnergyNorth Natural Gas FT Agreement, at Article III, §11.

²⁰ *Questar Pipeline Co.*, 132 FERC ¶ 61,152 at P 2, 7-8. *See also TransColorado*, 121 FERC ¶ 61,217 at P 10 (citing *Colorado Interstate Gas*, 105 FERC ¶ 61,124, at P 26).

²¹ Portland Natural Appendix C-1 at #17; Portland Natural Contract FT-1999-002, Hydro-Quebec FT Agreement, at Article VIII, §21.

²² *See Dominion Transmission, Inc.*, 111 FERC ¶ 61,007, at P 4, 6 (2005).

²³ Portland Natural Appendix C-1 at #2, 3, 10, 16, and 18.

²⁴ *Monroe*, 130 FERC ¶ 61,113 at P 46.

20. We find that the remaining deviations to the FT Agreements²⁵ do not affect the substantive rights of the parties. We remind Portland Natural, however, that unnecessary deviations from the *pro forma* agreement “hinder the Commission’s ability to assess whether the transaction is unduly discriminatory as well as the assessment of the transaction by shippers attempting to determine if they are similarly situated to the shipper in the negotiated transaction.”²⁶ We accept these provisions subject to the conditions on the *Memphis* carve-out clauses discussed above in this order.

IT Agreements

21. In the IT agreement with Mead, Portland Natural modifies the terms for transfer and assignment of the contract.²⁷ Under the *pro forma* agreement, Portland Natural’s consent to a shipper assigning the agreement to another party “shall not be unreasonably withheld.” The deviation in the IT agreement specifies that Portland Natural shall allow assignment to an entity that purchases a specific mill serviced by Mead, if that entity has at least a BBB credit rating. The Commission accepts this deviation for same reasons as discussed above with respect to the similar deviation in Mead’s FT agreement.

22. Portland Natural also notes four IT agreements in which the standard termination notice period has been amended, so as to grant a longer period of notice before either party may terminate (12 months instead of 90 days).²⁸ While these termination notice provisions constitute material deviations, we accept them as not presenting a risk of undue discrimination.²⁹

23. We find that the remaining deviations to the IT Agreements do not affect the substantive rights of the parties, and we accept them accordingly.

²⁵ Portland Natural Appendix C-1 at #1, 13, 19, and 20.

²⁶ *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 31 (2003).

²⁷ Portland Natural Appendix C-2 at #1; Portland Natural Contract IT-1998-001, Mead IT Agreement, at Article VII.

²⁸ Portland Natural Appendix C-3 at #1.

²⁹ *Dominion Transmission, Inc.*, 111 FERC ¶ 61,007 at P 4, 6.

PL Agreements

24. Portland Natural notes twenty PL agreements in which it has replaced the term “bid” with “nominate” in reference to the process for nominating transactions under pre-existing PL contracts.³⁰ Portland Natural argues that this change is a clarifying reference, in order to correctly reflect Portland Natural’s practices. We find that the deviation appears to correct an error that remains in Portland Natural’s *pro forma* PL agreement. Accordingly, we accept the deviation on the condition that Portland Natural file to amend its *pro forma* PL agreement so as to use the correct nomination nomenclature.

25. We find that the remaining deviations to the PL Agreements do not affect the substantive rights of the parties, and we accept them accordingly.

CR Agreements

26. We find that the deviations to the CR Agreements do not affect the substantive rights of the parties, and we accept them accordingly.

The Commission orders:

Within 60 days of the date of this order, Portland Natural must submit a compliance filing, revising its non-conforming agreements or its tariff provisions, and providing further explanations, as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁰ Portland Natural Appendix C-5 at #1.