

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

February 15, 2007

In Reply Refer To:
Maritimes & Northeast Pipeline, L.L.C.
Docket No. RP06-361-000

Maritimes & Northeast Pipeline, L.L.C.
5400 Westheimer Court
P.O. Box 1642
Houston, TX 77251-1642

Attention: Richard J. Kruse, Vice President, Rates & Regulatory Affairs

Reference: Negotiated Rate Agreement – Contract No. 210107

Dear Mr. Kruse:

1. On May 17, 2006, Maritimes & Northeast Pipeline, L.L.C. (Maritimes) filed: (1) tariff sheets;¹ (2) a negotiated rate agreement (Rate Agreement); and (3) a non-conforming service agreement under Rate Schedule MN365 (Service Agreement) to implement a negotiated rate transaction between Maritimes and Repsol Energy North America Corporation (Repsol). Maritimes states that the service agreement is a non-conforming agreement, and therefore, it has submitted the service agreement for Commission review. Maritimes requests waiver of the Commission's notice requirements to allow the tariff sheets, Negotiated Rate Agreement, and Service Agreement to become effective November 1, 2008, or the date on which service commences on Maritimes' Phase IV Project facilities, whichever is later. Waiver of the notice period is granted and the tariff sheets, Negotiated Rate Agreement and Service Agreement are accepted effective the later of November 1, 2008, or the date on which service commences on Maritimes' Phase IV Project. Such acceptance, however, is subject to Maritimes filing a revised Negotiated Rate Agreement and tariff sheets within 60 days of this order to incorporate revisions as detailed below. Maritimes is also required to notify the Commission of the date that the tariff sheets should be placed into effect.

¹ See Appendix.

Background

2. On May 16, 2006, Maritimes filed an application in Docket No. CP06-335-000 for construction of pipeline facilities to expand its system through the Phase IV Project pursuant to sections 3 and 7(c) of the Natural Gas Act (NGA). The proposed Phase IV Project is an expansion of Maritimes' mainline system to accommodate additional throughput from a proposed LNG import terminal in Saint John, New Brunswick, Canada (Canaport Terminal). Maritimes states that the anchor shipper for the Phase IV Project is Repsol, whose affiliate is constructing the Canaport Terminal.

Details of Filing

3. In its filing Maritimes has included two contracts, a firm service agreement under Rate Schedule MN365 and a negotiated rate letter agreement. In addition, Maritimes has included tariff sheets which include verbatim all substantive provisions contained in the negotiated rate letter agreement. Maritimes states that it entered into the agreements with Repsol in order to achieve rate certainty for Repsol and revenue certainty for Maritimes. Maritimes further states the Negotiated Rate and Service Agreements filed in the instant docket represents the economic underpinning for Maritimes' capital investment in the Phase IV Project. Finally, Maritimes states that while the agreements contain deviations from the applicable form of service agreement, the deviations are either not material or they do not present a risk of undue discrimination.

Service Agreement

4. The Service Agreement in which Maritimes entered into with Repsol provides for Repsol to be the sole shipper anchoring the Phase IV Project. The Service Agreement is in the form of Maritimes' pro forma service agreement with certain non-conforming provisions. The service agreement contains non-conforming "whereas" clauses, which state that Maritimes will seek the necessary regulatory authorizations for the Phase IV facilities, obtain and provide service subject to the terms and conditions of Rate Schedule MN365, and that the parties have entered into a negotiated rate agreement that will apply to the agreed to service.

5. Article I contains the throughput quantities based on both the Stand-Alone and Combined Service option. Article II provides that service will commence on the Service Commencement date. Article II also provides for the extension of service for a secondary term of 30 years. Finally, Article II provides that the Service Agreement will terminate if the Precedent Agreement terminates for any reason other than achievement

of the Service Commencement Date.

6. Exhibits A and B contain footnotes that set forth Repsol's secondary point rights on Maritimes' system.

Negotiated Rate Agreement and Tariff Sheets

7. During the open season that concluded March 31, 2005, Repsol and Anadarko Petroleum Corporation (Anadarko) both executed precedent agreements with Maritimes; however, since that time, Anadarko announced a change in the development schedule for its LNG import terminal project. Although the Negotiated Rate Agreement contains provisions for both a Combined Project which includes Repsol and Anadarko as shippers and a Stand-Alone provision which provides for Repsol to be the sole shipper, we will assume the project will be a Stand-Alone project since the time frame provided in the Negotiated Rate Agreement for commitment by Anadarko to participate in the project has passed.

8. The Negotiated Rate Agreement for a Stand-Alone Project provides: (1) that Maritimes will be paid a monthly reservation rate of \$16.1208 per Dth; (2) a usage rate of \$0.00 per Dth delivered; (3) surcharges which are not permitted to be discounted including fuel and lost and unaccounted for charges; and (4) transportation quantity not to exceed 730,000 Dth per day. The service period commences the later of November 1, 2008, or the service commencement date of the Phase IV Project.

9. The Negotiated Rate Agreement also provides for a reservation charge adjustment, plus or minus, if the cost of the project reflects any differences to the \$300 million estimated cost. The increase or decrease in reservation costs will be determined by a formula set forth in the Negotiated Rate Agreement. The cost differences will be determined by comparing the estimated costs and the final cost report of the project. In addition, the Negotiated Rate Agreement provides for a true-up of rates for any differences between the Reservation Charges that were paid for services prior to the rate adjustment as described above. Finally, the Negotiated Rate Agreement includes two non-conforming provisions. Section 4(a) of the Negotiated Rate Agreement states that Repsol will not oppose Maritimes positions regarding cost of service, cost allocation or rate design issues in any section 4 proceedings for a period of 10 years. Section 4(b) states that Repsol will support or not oppose Maritimes' position regarding rolled-in rate treatment for the costs associated with construction projects in any NGA section 7(c) proceedings for a period of 10 years.

Public Notice and Interventions

10. Public notice of Maritimes' filing was issued on May 23, 2006. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2006)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2006)), all timely filed motions to intervene and any motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

Discussion

11. Maritimes' proposed Service Agreement and Negotiated Rate Agreement each contain material deviations from the *pro forma* agreement found in Maritimes' tariff. However, not all material deviations are impermissible. If the Commission finds that the deviations do not constitute a substantial risk of undue discrimination the Commission may permit such deviations. The filed Service Agreement provides for Rate Schedule MN365 service as described in Maritimes' tariff and does not create a risk of undue discrimination against other shippers. The non-conforming provisions are accepted because they relate to the specific project described in the filing and are therefore permissible under Commission policy. As such, the deviations contained in the non-conforming Service Agreement are permissible. Therefore, the Commission will accept the Service Agreement as filed.

12. Maritimes' proposed Negotiated Rate Agreement reflects negotiated rates describing the specific elements of the contract for the Phase IV Project if the project would be constructed as either a Combined Project or as a Stand-Alone Project. The footnotes to Maritimes' proposed tariff sheets generally copy the text of the Negotiated Rate Agreement; we will refer herein to these footnotes on the tariff sheet and the Negotiated Rate Agreement together as the Negotiated Rate Agreement. Since it is presumed that the project will be constructed as a Stand-Alone Project and not as a Combined Project, we will require Maritimes to file a revised Negotiated Rate Agreement to delete all references to the Combined Project because those rates will not go into effect. It is Commission policy that accepted tariff sheets should not include rates that will not be made effective without service. Therefore, within 60 days of this order, Maritimes is directed to file a revised Negotiated Rate Agreement that includes only the information related to the Stand-Alone project that will go into effect.

13. Section 1(a)(iii) and section 1(b)(iii) of Agreement deal with the Fuel Retainage Percentage that will be paid by Repsol for each of the two projects. Section 1(a)(iii) pertains to the proposed Combined Project and contains the phrase "that has been approved by FERC" to identify the electric power costs that will be recovered as part of the negotiated rate contract. Section 1(b)(iii) pertains to the Stand-Alone project but does

not contain the phrase “that has been approved by FERC.” Accordingly, in its filing directed above to remove the provisions regarding the Combined Project, Maritimes is further directed to include the words, “that has been approved by FERC,” in section 1(b)(iii) in the Negotiated Rate Agreement, as discussed herein.

14. As noted above, Section 4 of the Negotiated Rate Agreement contains non-conforming provisions that limit Repsol’s rights in future Maritimes section 4 and section 7 proceedings. Section 4(a) of the Negotiated Rate Agreement states that Repsol will not oppose Maritimes positions regarding cost of service, cost allocation or rate design issues in any section 4 proceedings for a period of 10 years. Section 4(b) states that Repsol will support or not oppose Maritimes’ position regarding rolled-in rate treatment for the costs associated with construction projects in any NGA section 7(c) proceedings for a period of 10 years. These provisions are more restrictive than the rights that are afforded to Maritimes’ current customers as explained in sections 1.6, 1.7 and 1.9 of the Settlement Agreement approved in Docket No. RP04-360-000² and, therefore, appear to create an undue risk of discrimination. Further, given that gas pipelines have market power, in *Columbia*, the Commission stated that it has been reluctant to allow pipelines to include in service agreements with individual shippers a waiver of the shipper’s statutory rights under NGA section 5 to challenge not only the rates for its particular transaction, but also the pipeline’s rates for all services.³ The Commission stated that it does not believe that the pipeline should be permitted to condition the offering of a discount for one service for which a shipper may have competitive alternatives on limiting the shipper’s section 5 rights to challenge the pipeline rates for other services over which the pipeline does have market power.⁴

15. The Commission also stated in *Columbia* that it was concerned that a pipeline may offer favorable rates solely to its larger customers with greater resources to litigate the justness and reasonableness of the pipeline’s recourse rates, in return for their agreement not to challenge the pipeline’s recourse rates and rate structure. The larger customers may be willing to accept such an offer, since they obtain the benefit of reduced rates for the services of interest to them.⁵

² *Maritimes & Northeast Pipeline, L.L.C.*, 115 FERC ¶ 61,176 (2006).

³ *Columbia Gas Transmission Corp.*, 111 FERC ¶ 61,338, at P 14 (2005) (*Columbia*), *aff’d Columbia Gas Transmission Corp. v. FERC*, No. 05-1285 (D.C. Cir. 2007).

⁴ *Id.*

⁵ *Id.* P 15.

16. For these reasons, we find that the subject non-conforming provisions are unjust and unreasonable and create an undue risk of discrimination. The instant filing is accepted subject to Maritimes filing, within 60 days of this order, a revised Negotiated Rate Agreement and tariff sheets reflecting the removal of subsections (a) and (b) from section 4 of the Negotiated Rate Agreement.

17. Section 10 of the Negotiated Rate Agreement discusses the regulatory approval necessary to implement the negotiated rates set forth in the proposed tariff sheets. Section 10 also discusses the procedures to be followed by the parties if certain features of the Negotiated Rate Agreement are modified by the Commission. The last sentence of section 10 provides that if the parties cannot come up with a new negotiated arrangement, either party may file a petition with the Commission requesting that the Commission set a rate for the service. We condition acceptance of this filing on Maritimes filing to remove this last sentence in section 10, within 60 days of the date of this order, as the Commission is not an arbitrator and is not responsible for setting rates for disputed negotiated rate agreements.

18. Finally, the Commission will waive the 60-day filing requirement to permit the proposed tariff sheets, Service Agreement, and Negotiated Rate Agreement to be effective the later of November 1, 2008, or the date service commences on Maritimes' Phase IV Project facilities, subject to the filing conditions of this order. Maritimes is required to notify the Commission of the exact effective date of the tariff sheets.

By direction of the Commission.

Magalie R. Salas,
Secretary.

APPENDIX

Maritimes & Northeast Pipeline, L.L.C
Docket No. RP06-361-000

First Revised Volume No. 1

Original Sheet No. 9A
Original Sheet No. 9B
Original Sheet No. 9C
Original Sheet No. 9D
Original Sheet No. 9E
Original Sheet No. 9F
Original Sheet No. 9G