

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Columbia Gas Transmission Corporation

Docket No. RP04-255-002

ORDER ON CLARIFICATION AND REHEARING

(Issued January 26, 2005)

1. On May 7, 2004, the Commission issued an order in this proceeding accepting Columbia Gas Transmission Corporation's (Columbia) April 8, 2004 filing to add new tariff language to provide that when Columbia mutually agrees with a shipper on minimum pressures and/or hourly flow rates, Columbia may also agree with the shipper to condition the minimum pressures and hourly flow rate agreements to ensure Columbia's system is not adversely affected. The acceptance was subject to Columbia filing additional tariff language.¹ Eight requests for clarification and/or rehearing of the May 7, 2004 Order have been filed. As discussed below, the Commission will grant the requests for clarification and/or rehearing. This order benefits customers because it protects existing shippers' right of first refusal (ROFR) and provides clarity to the parties.

Background

2. At the time of its April 8, 2004 filing in the instant proceeding, section 9.3 (Hourly Flow) and section 13 (Pressure) of the General Terms and Conditions (GT&C) of its tariff provided that Columbia had the right, but not the obligation, to mutually agree on an hourly flow rate and/or specific minimum pressure with any shipper. On April 8, 2004, Columbia filed, along with other minor revisions to its tariff, to revise section 9.3 and section 13 of the GT&C to provide that when Columbia mutually agrees with its shipper on a minimum pressure and/or hourly flow rate, Columbia may also agree with the shipper on conditions to those minimum pressure and/or hourly flow rate agreements necessary to ensure that such agreements do not adversely affect Columbia's system.

¹ *Columbia Gas Transmission Corp.*, 107 FERC ¶ 61,130 (2004).

3. On May 7, 2004, the Commission issued an order accepting Columbia's tariff filing, subject to Columbia filing revised tariff language to state that Columbia will not enter into minimum pressure or hourly flow rate obligations or conditions that would adversely affect an existing firm shipper's service.² The May 7, 2004 Order also denied a request for clarification that pressure or hourly flow commitments in existing service agreements that are not currently subject to conditions may not be conditioned when the service agreements are renewed. The Commission stated that new contracts may be subject to previously un-required conditions in order for Columbia to operate its system effectively. The Commission clarified that changes in operations or in factors affecting the design of Columbia's system would need to have occurred that prevent the continuation of a previously-unconditioned pressure and/or hourly flow obligation.

4. The American Gas Association (AGA); the East Ohio Gas Company d/b/a Dominion East Ohio and Hope Gas, Inc. d/b/a Dominion Hope (collectively Dominion); the Cities of Charlottesville and Richmond, Virginia (Cities); the American Public Gas Association (American Public); Virginia Power Energy Marketing, Inc. (Virginia Power); Washington Gas Light Company (Washington Gas); National Fuel Gas Distribution Corporation (National Fuel); and Virginia Natural Gas, Inc. (VNG) and Orange and Rockland Utilities, Inc. (collectively Virginia-Rockland) have requested clarification and/or rehearing of the May 7, 2004 Order. The requests are discussed below. Columbia filed a response to the requests for rehearing. Cities and VNG filed answers to Columbia's response.³

Late Interventions

5. AGA, American Public, and National Fuel filed untimely motions to intervene, which also request rehearing and clarification. The untimely motions were sought after the issuance of the May 7, 2004 Order accepting Columbia's tariff filing, subject to conditions. In those circumstances, the prejudice to other parties and burdens upon the Commission of granting the late interventions may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late interventions. The Commission has determined to grant the late interventions because they are unopposed

² Columbia filed revised tariff language on May 24, 2004. The Commission accepted the filing as in compliance with the May 7, 2004 order in an unpublished delegated letter order issued in Docket No. RP04-255-001 on August 23, 2004.

³ While the Commission's Rules of Practice and Procedure generally prohibit answers to requests for rehearing and answers, the Commission will accept the answers to allow a better understanding of the issues. *See* 18 C.F.R. 385.213(a)(2) (2004).

and raise issues concerning the May 7, 2004 Order's adoption of a policy related to the pipeline's imposition of new conditions on minimum pressure and hourly flow rate obligations during the ROFR process.⁴

Requests for Rehearing/Clarification

6. Generally, the parties seeking rehearing/clarification request that the Commission find that Columbia's obligation to provide service at the minimum pressure and hourly flow rates contained in an existing contract will continue to apply to the service without new conditions, unless mutually agreed to between the shipper and Columbia, when the service is extended through the exercise of the ROFR.⁵ They argue that minimum pressure and hourly flow limits are fundamental to the firm transportation service that Columbia provides. The parties assert that Columbia seems to consider a contract renewed through the exercise of a ROFR to be a new contract which, therefore, would be subject to new pressure or hourly flow conditions. They submit that a shipper exercising its ROFR is not a new shipper contracting for a new service, but is an existing shipper continuing existing service. They ask the Commission to clarify that Columbia's proposed tariff revisions may not abrogate or diminish the rights of its shippers to continue to receive their existing service pursuant to a ROFR.

7. Columbia's proposed tariff provisions provide that a shipper and Columbia may mutually agree to conditions on specific hourly flow rate and/or pressure obligations. However, based on the ROFR, some parties interpret the provisions to provide that if no such agreement is reached, then the existing contract provisions would apply. The parties state that under Columbia's ROFR tariff provisions, the customer is required to agree only to pay the recourse rate for a five year contract term to continue service upon termination of the existing long-term service agreement.⁶ Columbia's April 8, 2004 Filing states that Columbia's "proposal regarding conditions will not apply to previously, negotiated minimum pressure and hourly flow rate commitments."⁷ Therefore, some

⁴ See *Petal Gas Storage, L.L.C.*, 106 FERC ¶ 61,325 at P 3 (2004).

⁵ Columbia's tariff ROFR provision is contained in section 4.1(c) of the GT&C.

⁶ Citing Sections 4.1(c)(1)(a) and 4.1(c)(1)(c)(4) of Columbia's GT&C.

⁷ Citing Columbia's April 8, 2004 filing at 3.

parties submit that Columbia's filing did not attempt to limit a customer's existing minimum pressure or hourly flow rate when it exercises its ROFR. They maintain that the conclusion is buttressed by the fact that Columbia did not propose to modify its ROFR provisions.

8. The parties contend that, unclarified, the May 7, 2004 Order contravenes the Commission's ROFR regulations,⁸ precedents, and policy as well as the Commission's statutory obligations under section 7(b) of the Natural Gas Act (NGA).⁹ They assert that the purpose of the Commission's ROFR regulations is to ensure that a customer has the right to continue its historic service under its expiring contract and protect captive long-term customers from the pipeline's exercise of monopoly power. They claim that the Commission's finding in the May 7, 2004 Order diminishes the protection provided by the ROFR and allows abandonment of service without the proper consumer protection required by the NGA.

9. The parties contend that when the Commission allows a pipeline to impose new minimum pressure conditions on service extended through the exercise of a ROFR, the Commission is permitting the pipeline to fundamentally alter the contracted for service. They assert that service in the ROFR context includes all of the components of the service agreement that enable a customer to receive gas from the interstate pipeline to meet its own service obligations to its customers. They argue that LDC shippers with minimum pressure commitments in their contracts require those same commitments when exercising their ROFR to meet their future service obligations to their customers and without them the contract is substantially altered. They assert that the minimum pressures in current pipeline agreements are necessary to allow many LDCs to distribute gas to their customers, since they have often been relied on in building the LDCs' systems. They also submit that the shippers serve high priority loads whose demands fluctuate significantly during a day and imposition of hourly flow limits could prevent them from serving such loads. Thus, they insist that a change in minimum pressures or imposition of hourly flow limits could degrade the services they now receive and could significantly impair their ability to use the capacity provided under their existing contracts and would allow abandonment of service through contract negotiations. The parties contend that the Commission has found that pressure and hourly flow obligations

⁸ 18 C.F.R. § 284.221(d).

⁹ 15 U.S.C. § 717f(b).

are an important part of a shipper's firm transportation service.¹⁰ They state that the Commission has sought to protect the pressure entitlements of existing customer when considering applications for system expansions.¹¹

10. The parties claim that the Commission has recognized that "the character of the service being provided under the expiring contract cannot be changed through use of the right of first refusal."¹² They cite two other orders: *Columbia*, where the Commission stated the purpose of the ROFR is the protection of the historical service of the long-term captive customers;¹³ *Tennessee*, where the Commission rejected a proposal by the pipeline to require pro rata reductions across all receipt and delivery points if a shipper exercised its right to a volumetric reduction in mainline capacity;¹⁴ and *Williams*, where the Commission found that a shipper with one character of service cannot be forced to bid against shippers seeking a different character of service at the time the ROFR is exercised.¹⁵

11. The parties insist that the ROFR is to protect customers from pipelines' exercise of monopoly power and the May 7, 2004 Order exposes captive customers to the pipelines' monopoly power.¹⁶ They argue that the order will allow Columbia to exercise market power during the ROFR process, and such ability invalidates the pre-granted abandonment of firm transportation services. They state that in *United Distribution Companies v. FERC*,¹⁷ the court upheld the generic pre-granted abandonment of firm service after concluding that the ROFR mechanism, with the matching conditions of rate

¹⁰ Citing *Columbia*, 97 FERC ¶ 61,221 (2001).

¹¹ Citing *Iroquois Gas Transmission System, L.P.*, 100 FERC ¶ 61,275 (2002); *Maritimes & Northeast Pipeline, L.L.C.*, 95 FERC ¶ 61,077 (2001).

¹² Citing *Williams Natural Gas Co.*, 65 FERC ¶ 61,221 at 62,013 (1993) (*Williams*), and Order No. 637 at 31,339-40.

¹³ *Columbia Gas Transmission Corp.*, 94 FERC ¶ 61,301 at 62,111 (2001).

¹⁴ *Tennessee Gas Pipeline Co.*, 95 FERC ¶ 61,272 (2001).

¹⁵ *Williams Natural Gas Co.*, 66 FERC ¶ 61,315 (1994).

¹⁶ Citing Order No. 636-A, at 30,631-32 and Order No. 637 at 31,336.

¹⁷ 88 F. 3d 1105, 1139-40 (D.C. Cir. 1966).

and contract term, provides the protections from pipeline market power required for pre-granted abandonment under section 7 of the NGA. They assert that the May 7, 2004 Order potentially adds new matching conditions (hourly flow and minimum pressure) to the ROFR matching conditions considered and conditionally accepted by the court. They submit that the pipelines' exercise of market power would be more direct with the new matching conditions, since Columbia will establish the matching conditions (not competing bidders as with contract term conditions).

12. They explain that the Commission first implemented the ROFR in Order No. 636¹⁸ in response to a court remand of the Commission's adoption of pre-granted abandonment authority for pipeline service agreements.¹⁹ They assert that the ROFR the Commission requires as a condition of pre-granted abandonment authority under section 7(b) of the NGA is designed to fulfill the Commission's consumer protection mandate.²⁰ They submit that ROFR policies that undermine consumer protections are contrary to the NGA, and that the standard of protection required at contract expiration is a broader standard than just the prevention of the exercise of pipeline market power.²¹ They claim that the ROFR is the exercise of the Commission's statutory obligation under section 7(b) of the NGA to approve only those abandonments of service in the public convenience and necessity.²² They state that courts and the Commission have consistently rejected the notion that a certificated service whose contract has expired is any less subject to the protections afforded under section (7)(b) or a customer's ROFR than a service provided

¹⁸ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines after Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs., Regulations Preambles 1991 – 1996, ¶ 30,939 (1992); Order No. 636-A, FERC Stats. & Regs., Regulations Preambles 1991-1996, ¶ 30,950 (1992), Order No. 636-B, 61 FERC ¶ 61,272 (1992), Order No. 636-C, 78 FERC ¶ 61,186 (1997), Order No. 636-D, 83 FERC ¶ 61,210 (1998).

¹⁹ *American Gas Association v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990).

²⁰ Order No. 637 at 31,336-40.

²¹ *Tennessee Gas Pipeline Co. (Tennessee)*, 94 FERC ¶ 61,097 at 61,400 (2001) and *Tennessee*, 91 FERC ¶ 61,053 at 61,191-92 (2000).

²² *Citing* Order No. 637-A at 31,630. *See also Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 143 (1960) and *Sunray Mid-Continent Oil Co. v. FPC*, 239 F.2d 97, 101 (10th Cir. 1956).

under an existing contract.²³ They state that the courts have ruled that an alteration in overall jurisdictional service constitutes an abandonment of that service that must be authorized beforehand.²⁴ They argue that there is no difference in the ability of a pipeline to protect certificated service during or after the term of an existing contract.

13. The parties claim that physical changes to a pipeline system over time or the addition of new customers should not be an excuse to fundamentally alter historical service when a shipper exercises its ROFR. The parties argue that neither Columbia nor the Commission has cited authority or reasons for a pipeline imposing new conditions on minimum pressure or hourly flow rates obligations when a shipper executes a service contract pursuant to a ROFR. They assert there is not sufficient information on the record to support the Commission's decision. They submit that, if changes in operations or the design of Columbia's system prevent the continuation of an unconditioned pressure and/or flow rate obligation during the ROFR process, Columbia's ability to provide existing service is already impaired in violation of Columbia's existing service obligation, and it would be unlawful for the Commission to permit such abandonment of service. They claim that the Commission's rationale that a pipeline may need the flexibility to change such basic terms to protect the service of other existing firm services is flawed, since the Commission has no statutory basis to provide different protection to customers with certificated services whose current contracts are ongoing than to those customers who are exercising their ROFR. Some parties claim that the May 7, 2004 Order sets precedent that may allow a pipeline to insist on other changes (like MDQ) in service during the ROFR process. National Fuel argues that the Commission should consider other tools, such as OFOs, force majeure, and ratable flow tariff provisions if operational circumstances dictate the need to deviate from historical pressure and/or hourly flow commitments on a temporary basis.

Columbia's Answer and Parties' Responses

14. On June 30, 2004, Columbia filed a response to the rehearing requests. Columbia states that the Commission should maintain its approval of its proposed tariff language and reiterates several points made in its tariff filing. Columbia explains that it is presumed under its tariff that, at the end of the ROFR shipper's existing service

²³ Citing *Sunray Mid-Continent Oil Co. v. FPC.*, 364 U.S. 137, 143-44 (1960); *Farmlands Industries Inc. v. Kansas-Nebraska*, 486 F.2d 315, 317; and Order No. 637-A at 31,630.

²⁴ Citing *Tennessee Gas Pipeline Co. v. FERC*, 972 F.2d 376, 384 (D.C. Cir. 1992) and *UDC v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

agreement, pressure and/or hourly flow commitments will continue in the ROFR shipper's new service agreement. Columbia states that, under GT&C sections 9.3 and 13(a) and (b), if Columbia is unable to agree on a pressure or hourly flow obligation in a new service agreement, Columbia is required to provide "a written explanation concerning the operational reasons for the denial." Columbia contends that the May 7, 2004 Order states that it is only if something has significantly changed operationally on Columbia's system that Columbia needs to evaluate whether and under what conditions it can offer pressure and/or hourly flow obligations in a new service agreement. It asserts that the order does not allow Columbia to automatically terminate, without cause or explanation, existing pressure or hourly flow commitments at the end of the term of a ROFR contract.

15. On July 7, 2004, Cities filed a response to Columbia's answer. Cities argue that Columbia's response is misguided. Cities assert that changes to hourly flow limits and delivery pressure terms constitute an abandonment of service. They contend that Columbia's offer to provide a written explanation for an abandonment of service with a customer's undefined right to challenge the explanation cannot satisfy the Commission's statutory obligation under section 7(b) of the NGA to determine beforehand that the abandonment is in the public convenience and necessity. Cities assert that Columbia incorrectly assumes that a contract that is extended by a ROFR may be subject to different treatment than a contract whose primary term has not expired. Cities claim that the Commission has no statutory basis to provide such different treatment. They argue that the Commission and the courts have consistently rejected the notion that a certificated service whose contract has expired is any less subject to the protections afforded under section 7(b) or a customer's ROFR than a service provided under an existing contract. Therefore, Cities assert that whatever procedure is required for changing fundamental terms and conditions of service applies identically to existing contracts and contracts extended under an ROFR.

16. VNG filed a reply to Columbia's June 30, 2004 Answer. VNG states that Columbia ignores the rehearing parties' core argument that the Commission erred in finding that Columbia may impose previously un-required conditions on pressure and/or hourly flow commitments when the shipper exercises its ROFR. VNG states that Columbia argues there is no issue to decide because it is presumed that at the end of the ROFR shippers' existing service agreement, existing pressure and/or hourly flow commitments will continue in the shipper's new service agreement. VNG states that the proposed language itself does not specifically address how the tariff mechanism will apply in the ROFR context. Thus, VNG claims that from reading Columbia's tariff, a shipper unaware of the interpretation of the tariff provision adopted in the May 7, 2004 Order and would have no idea how the tariff language is to apply in the ROFR context.

Furthermore, VNG argues that Columbia's presumptions and expectation regarding the tariff language would only apply if Columbia unilaterally decides that its system is still capable of providing service at the contracted-for pressure and/or hourly flow level.

Discussion

17. The Commission grants rehearing of the May 7, 2004 Order and clarifies that Columbia may not impose new contractual minimum pressure or hourly flow conditions on an existing long-term firm shipper's service under a service agreement executed with that shipper pursuant to the shipper's ROFR. Although the language of the tariff provides for "mutual" agreement on minimum pressure and/or hourly flow rates and, therefore, arguably would not obligate the shipper, in its exercise of its ROFR, to agree to new pressure and/or hourly flow conditions, Columbia interprets its proposal as giving Columbia the unilateral right to impose new conditions based on changes in the operations or the design of its system. In its intervention to Columbia's April 8, 2004 Filing, Orange & Rockland sought clarification that the service agreements of existing shippers may not be so conditioned in the future when the agreements are renewed. In denying Orange & Rockland's request for clarification, the Commission adopted Columbia's interpretation and accepted the proposed provisions as so interpreted. On rehearing, we agree with the petitioners that Columbia should not have such a unilateral right and, therefore, find that our denial of Orange and Rockland's requested clarification was in error. We will direct Columbia to modify its tariff language to make clear that Columbia may not unilaterally impose new contractual pressure and/or hourly flow conditions on a shipper exercising its ROFR. Although the shipper and Columbia may mutually agree to such new contractual conditions, Columbia shall not enter into hourly flow or minimum pressure conditions that will adversely affect Columbia's ability to meet its firm service obligations to any existing shipper.²⁵

18. The Commission established the ROFR in Order No. 636 to permit a long-term firm shipper to continue its historic service, subject only to matching conditions on rates and contract term.²⁶ In Order No. 637, citing Order No. 636-C, the Commission stated

²⁵ As noted earlier, on May 24, 2004, in compliance with the May 7, 2004 order, Columbia filed revised tariff language in section 9.3 and a new section 13(c) of the CT&C stating that it will not enter into hourly flow rate or minimum pressure obligations that will adversely affect Columbia's ability to meet its firm service obligations to an existing shipper. Columbia's compliance filing was accepted by the Commission in an unpublished, delegated letter order issued August 23, 2004 in Docket No. RP04-255-001.

²⁶ Order No. 636 at 30,448-50.

that the purpose of the ROFR is to protect captive long-term customers from the pipelines' exercise of monopoly power.²⁷ The regulatory ROFR is contained in the Commission's regulations at 18 C.F.R. § 284.221(d)(2) (2004). In Order No. 637-A, the Commission stated that, under section 7(b) of the NGA, a shipper is entitled to protection from the pipeline's exercise of monopoly power through the refusal of service at the end of the contract term.²⁸ More specific to the issue at hand, in *Williams* the Commission clarified that the character of service being provided under the expiring contract cannot be changed through use of the ROFR.²⁹

19. The Commission agrees with the parties seeking rehearing and/or clarification that minimum pressure and hourly flow rate obligations are important aspects of a shipper's firm, long-term transportation service and are part of the contractual rights protected by the shipper's ROFR. Permitting a pipeline to unilaterally impose new contractual conditions on existing minimum pressure and/or hourly flow rate obligations when an existing shipper exercises its ROFR would allow a change in the character of service that may impair the shipper's ability to use pipeline capacity it is entitled to under the ROFR. The shipper may require a certain pressure to serve its customers and/or the shipper's customers may require a particular level of gas flow at certain hours of the day. Allowing the pipeline to impose conditions that change those agreed to rights may also allow the pipeline to exercise market power, since the pipeline may refuse to continue service to an existing shipper despite the shipper's exercise of its ROFR if the shipper does not agree to the pipeline's proposed conditions to its minimum pressure and/or hourly flow rate obligations. The only way that new minimum pressure and/or hourly flow rate conditions can apply to the service subject to the ROFR is if the pipeline's tariff and/or certificate obligations change pursuant to Commission authorization under section 4 or 7 of the NGA. In that event, the service changes will automatically be incorporated into the service agreement by its terms. Columbia may not impose such changes unilaterally by contract.

20. Accordingly, we direct Columbia to file revised language in sections 9 and 13 of the GT&C of its tariff to clarify that Columbia may not unilaterally impose new contractual minimum pressure and/or hourly flow rate conditions when the existing shipper exercises its ROFR.

²⁷ Order No. 637 at 31,336.

²⁸ Order No. 637-A at 31,632. .

²⁹ *Williams*, 65 FERC ¶ 61,221 at 62,013 (1993).

The Commission orders:

(A) The Commission grants the requests for clarification and/or rehearing as discussed above.

(B) Columbia must file revised tariff provisions, as directed above, within 15 days of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.