

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Algonquin Gas Transmission, LLC

Docket No. RP05-106-001

ORDER ON COMPLIANCE FILING

(Issued March 7, 2005)

1. On January 12, 2005, Algonquin Gas Transmission, LLC (Algonquin) filed a revised tariff sheet¹ in compliance with the Commission's letter order issued on December 28, 2004.² In this order, the Commission accepts Algonquin's revised tariff sheet, effective January 1, 2005. This order benefits customers by ensuring that service is rendered in a not unduly discriminatory manner.

I. Background

2. On December 1, 2004, Algonquin filed a revised tariff sheet³ to extend a right-of-first-refusal (ROFR) to shippers who might not otherwise qualify under the Commission's regulations. Specifically, Algonquin proposed to revise section 1.40 of the General Terms and Conditions (GT&C) of its tariff to provide that Algonquin may agree, on a not unduly discriminatory basis, that a firm service agreement subject to a negotiated rate may qualify as a ROFR Agreement. Northeast Energy Associates (Northeast) filed a protest arguing that Algonquin's exclusion of discount rate shippers from the offer to negotiate contractual ROFRs was discriminatory.

¹ Substitute First Revised Sheet No. 507 to FERC Gas Tariff, Fifth Revised Volume No. 1.

² *Algonquin Gas Transmission, LLC*, 109 FERC ¶ 61,371 (2004) (December 28 Order).

³ First Revised Sheet No. 507 to Algonquin's FERC Gas Tariff, Fifth Revised Volume No. 1.

3. The December 28 Order accepted and suspended Algonquin's proposed revised tariff sheet to be effective upon the earlier of June 1, 2005, or upon further order of the Commission, subject to Algonquin either (1) filing, within 20 days of the issuance of the order, an explanation for why it is not discriminatory to offer a contractual ROFR only to negotiated rate shippers or (2) modifying its proposal to offer contractual ROFRs to both negotiated rate and discounted rate shippers on a not unduly discriminatory basis.

II. Compliance Filing

4. In compliance with the December 28 Order, Algonquin filed the revised tariff sheet referenced in footnote no. 1 to modify section 1.40 of the GT&C of its tariff to provide that Algonquin may agree on a not unduly discriminatory basis that a firm service agreement subject to a negotiated or discounted rate may qualify as a ROFR Agreement. Algonquin observes that the Commission clarified in the December 28 Order that, "if a pipeline offers contractual ROFRs to one category of firm shippers, it does not necessarily have to give contractual ROFRs to all firm shippers not eligible for the regulatory ROFR."⁴ Algonquin asserts that with this affirmation in the December 28 Order of Algonquin's discretion with respect to the negotiation of contractual ROFRs in a not unduly discriminatory manner, the proposed limitation in the ROFR Agreement definition set out in Algonquin's December 1 Filing is no longer necessary, either for commercial or administrative reasons. Algonquin states that given the December 28 Order and Commission precedent,⁵ Algonquin has determined that the modified section 1.40 proposed herein, providing that Algonquin may agree on a not unduly discriminatory basis that a firm service agreement subject to a negotiated or discounted rate may qualify as a ROFR Agreement, satisfies Algonquin's requirements.

5. Algonquin requests that the Commission grant all waivers necessary to accept its compliance filing and approve the proposed tariff sheet to be effective January 1, 2005, consistent with Algonquin's original submission.

⁴ 109 FERC ¶ 61,371 at P 9 (2004).

⁵ Citing *Cheyenne Plains Pipeline Co.*, 105 FERC ¶ 61,095 at P 55 (2003) (the Commission explicitly held that Cheyenne Plains' ROFR conditions were "consistent with similar Commission-approved proposals that allowed the pipeline to negotiate ROFRs with shippers who would otherwise not qualify.") (citing *ANR Pipeline Co.*, 103 FERC ¶ 61,084 (2003); *Williston Basin Interstate Pipeline Co.*, 103 FERC ¶ 61,087 (2003)).

III. Public Notice, Protests, Comments, and Answers

6. Public notice of the January 12, 2005 Compliance Filing was issued on January 25, 2005. Protests were due as provided in section 154.210⁶ of the Commission's regulations. Northeast filed comments. Algonquin filed a response to Northeast's comments. Although answers generally are not allowed by Rule 213 of the Commission's regulations, 18 C.F.R § 385.213 (2004), here we waive this rule since Algonquin's answer facilitates the decision-making process.

7. Northeast states that, at least at the time of Algonquin's December 1, 2004 Filing, Algonquin's view was that discounted rate agreements and negotiated rate agreements are per se dissimilarly situated. Although Northeast states that the proposed revised tariff language in the compliance filing appears to comport with the Commission's directive, Northeast is concerned that Algonquin may rely on statements in its transmittal letter in implementing and interpreting the newly filed tariff language. Northeast notes that Algonquin states that the December 28 Order states, "if a pipeline offers contractual ROFRs to one category of firm shipper, it does not necessarily have to give contractual ROFRs to all other firm shippers not eligible for the regulatory ROFR," and, therefore, the limitation in the proposed ROFR Agreement definition in the December 1, 2004 Tariff Filing is no longer necessary. Northeast contends that it is concerned with what it states is Algonquin's view that the December 28 Order clarifies that negotiated rate shippers are not similarly situated to discount rate shippers.

8. Northeast requests that the Commission take note of what it characterizes as Algonquin's ambiguous statements and reaffirm that negotiated rate shippers and discounted rate shippers are not per se dissimilarly situated, or at least that Algonquin has presented no case to support that notion. Northeast further requests that the Commission direct Algonquin to post on its website (i) each exercise of its "discretion" with regard to special ROFRs, and (ii) each instance in which a firm discounted rate shipper was denied a request to obtain a ROFR similar to that found in a firm negotiated rate agreement. Northeast asserts that this posting is necessary so that parties may review such events and determine whether Algonquin has acted in an unduly discriminatory manner and whether or not further Commission action is warranted.

9. In its answer, Algonquin asserts that no clarification of the December 28 Order or the related compliance filing is necessary. Algonquin asserts that there is no ambiguity in either Substitute First Revised Sheet No. 507 or the accompanying transmittal letter.

⁶ 18 C.F.R. § 154.210 (2004).

Algonquin states that its compliance filing proposed a revised section 1.40 that included the language regarding discounted rate shippers that the Commission identified in the December 28 Order. Algonquin asserts that the proposed tariff sheet clearly states that discounted rate shippers are within the universe of shippers with whom Algonquin may negotiate a contractual ROFR and no identifiable ambiguity exists regarding the effect of the proposed section 1.40.

10. Algonquin states that, as reflected in the revised section 1.40, shippers with discounted agreements are eligible for contractual ROFRs. However, Algonquin asserts that, since not all eligible shippers are similarly-situated, the revised section 1.40 does not provide a discounted rate shipper with an unequivocal right to a contractual ROFR in the event that Algonquin agrees to a contractual ROFR with a negotiated rate shipper, or vice versa.⁷ Algonquin argues that Northeast, rather than Algonquin, appears to be trying to prejudge the similarly-situated determination. Algonquin states that a determination with respect to discounted rate shippers' right to a contractual ROFR cannot be made on a hypothetical basis,⁸ but it depends on specific facts. Algonquin argues that the Commission has repeatedly held that the determination of whether a pipeline has been unduly discriminatory turns on the facts and circumstances of the particular case.⁹ Algonquin states that the Commission should decline to exempt discounted rate shippers from the similarly-situated analysis.

⁷ Citing, *e.g.*, *Tennessee Gas Pipeline Co.*, 99 FERC ¶ 61,285 at 62,200 (2002) (“Amoco contends that if Tennessee offers a contractual ROFR to one firm, long-term, nonrecourse rate shipper, it must offer the same contractual ROFR to any other firm, long-term, nonrecourse rate shipper that requests it. We disagree....Tennessee [Gas Pipeline Co.] is required only to offer a contractual ROFR to similarly-situated shippers.”) Citing *also* *Cheyenne Plains Pipeline Co.*, 105 FERC ¶ 61,095 at P 55 (2003) (holding that Cheyenne Plains' ROFR conditions were “consistent with similar Commission-approved proposals that allowed the pipeline to negotiate ROFRs with shippers who would otherwise not qualify.”) (Citing *ANR Pipeline Co.*, 103 FERC ¶ 61,084 (2003); *Williston Basin Interstate Pipeline Co.*, 103 FERC ¶ 61,087 (2003)).

⁸ Citing *Tennessee Gas Pipeline Co.*, 99 FERC ¶ 61,095 at 62,202 (noting that the hypothetical consideration of discrimination in the implementation of a contractual ROFR, without factual allegations of undue discrimination, is “nothing less than speculation....”).

⁹ Citing *e.g.*, *Southern Natural Gas Company*, 85 FERC ¶ 61,134 at 61,523 (1998) and *Tennessee Gas Pipeline Co.*, 99 FERC ¶ 61,285 at 62,200.

11. Algonquin avers that Northeast's requested posting requirement is not only inappropriate but also unnecessary and unsupported. Further, Algonquin states that the value of such a posting requirement is questionable because any shipper who might potentially allege undue discrimination presumably would base such an allegation on Algonquin's treatment of other shippers who have negotiated contractual ROFRs. Given that the tariff provides that Algonquin shall specify whether the parties to a negotiated rate agreement have agreed to a contractual ROFR and that Algonquin currently posts links on its website to all negotiated rate filings, Algonquin asserts that each shipper will have access to information on Algonquin's website regarding every currently effective contractual ROFR.

12. Therefore, Algonquin states that the Commission should deny Northeast's motion for clarification and accept the instant compliance filing as being in compliance with the December 28 Order.

IV. Discussion

13. The Commission finds that Algonquin's revised tariff sheet fully complies with the directives contained in the December 28 Order. The proposed tariff language in section 1.40 of Algonquin's tariff clearly states that shippers with discounted agreements are eligible for contractual ROFRs. We agree with Algonquin that the determination of whether Algonquin has been unduly discriminatory in granting a ROFR turns on the facts and circumstances of the particular case. Accordingly, we agree with Algonquin that no further revision of the instant tariff language to clarify the similarly-situated analysis is necessary.

14. However, consistent with previous Commission orders,¹⁰ any agreement by Algonquin with a shipper containing a provision for a contractual ROFR, including negotiated rate and discount rate agreements, contains "special details pertaining to a transportation contract" which Algonquin must post on its website pursuant to section 284.13(b)(1)(viii) of the Commission's regulations.¹¹ Providing such notice will enable all of Algonquin's shippers to monitor Algonquin's contracting practices and guard against undue discrimination. This posting requirement lets shippers see who has been

¹⁰ See, *Trunkline Gas Company, LLC*, 108 FERC ¶ 61,224 at P 7 (2004); *Columbia Gas Transmission Corporation*, 107 FERC ¶ 61,130 at P 10 (2004); *ANR Pipeline Company*, 102 FERC ¶ 61,235 at P 11 (2003).

¹¹ 18 C.F.R. § 284.13(b)(1)(viii) (2004).

granted a contractual ROFR and shippers who are denied a contractual ROFR can then use that information to determine whether to file a complaint alleging undue discrimination. Accordingly, for these reasons, we reject Northeast's proposal to modify Algonquin's posting requirements.

The Commission orders:

Waiver of the Commission's regulations is granted and Algonquin's revised tariff sheet filed on January 12, 2005 is accepted effective January 1, 2005.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.