

Material Deviations

Frequently Asked Questions

These frequently asked questions (FAQs) were prepared by the Commission staff to assist jurisdictional companies in complying with Commission requirements for the filing of contracts with material deviations. The Commission staff has received questions from representatives from the natural gas industry in response to the Commission's order issued in *Southern Star*.¹

- **What constitutes a material deviation?**

Answer – Basically, a material deviation is contractual language that goes beyond the filling-in of the blank spaces in the pro forma agreement and that affects the substantive rights of the parties.

- **Has the Commission provided guidance on what constitutes a material deviation and how to determine if a contract deviation affects the substantive rights of the parties?**

Answer – The Commission has not defined the word - substantive. However, there are numerous orders in which the Commission addressed the issue of material deviations within contracts. Key orders giving guidance on what constitutes a material deviation include *Southern Star Central*, 125 FERC ¶ 61,082 (2008); *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 (2003), *order on rehearing and clarification*, 114 FERC ¶ 61,042 (2006) (*2003 Policy Statement*); *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,010 (2001). *See also ANR Pipeline Co.*, 98 FERC ¶ 61,247, at 62,002 (2002); *Natural Gas Pipeline Co. of America*, 111 FERC ¶ 61,376 at P 9-12 (2005); *Stingray Pipeline Company LLC*, 121 FERC ¶ 61,216 (2007) (for additional material see Docket No. RP07-120-000); *Texas Eastern Transmission LP*, 119 FERC ¶ 61,337 (2007); *CenterPoint Energy Gas Transmission Co.*, 106 FERC ¶ 61,214 (2004) (for additional information see Docket No. IN03-11-000). There are many additional orders in which the Commission addressed specific contracts containing material deviations. To research recent orders, the following search in eLibrary can be performed:

<http://elibrary.ferc.gov/idmws/search/eSave.asp?dt=PrevYear&yr=3&cat=submittal,%20issuance&lib=%20gas&cls=Order/Opinion&txt=material%3Cnear%2F2%3Edeviations+and+not+%22does+not+contain%22&ft=fulltext&dsc=description>.

¹ *Southern Star Central*, 125 FERC ¶ 61,082 (2008) (*Southern Star*).

What mechanisms are in place to seek guidance on the issue of what is a material deviation and when a filing is necessary and provide some insight into which mechanisms are most appropriate under different circumstances?

Answer - A pipeline has several ways to seek informal or formal guidance from the Commission on whether the service agreement contains a material deviation. In the Commission's "Guidance Order" (*Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157 (2008)), the Commission listed mechanisms for companies seeking guidance from staff and the Commission itself. Mechanisms for obtaining Commission and staff guidance from the most formal to least formal include Commission orders, requests for declaratory orders, no-action letter responses, General Counsel Opinion Letters, Enforcement Hotline, compliance help desk, referred to on the Commission's web site as the virtual help desk, and meetings and discussions with individual members of Commission staff. In addition, if undergoing an audit, a pipeline may ask audit staff for its opinion regarding these matters. The compliance help desk is an on-line tool that allows interested persons to e-mail questions and receive responses from staff experts.

- **What deviations from the form of service agreement would not be considered material deviations?**

Answer - Following is a non-exclusive list of deviations from the *pro forma* contract that the Commission probably would not consider as material deviations provided that these deviations do not affect the substantive rights of the parties:

1. Typos, misspellings, capitalization, abbreviation discrepancies, and punctuation or font differences.
2. Whereas clauses which are solely a recitation of factual or descriptive information, e.g., description of the business of the shipper (for example, "Whereas the shipper is a local distribution company doing business in the state of ...").
3. If contracts containing a material deviation at the time of their execution later come into conformance with the *pro forma* service agreement due to a tariff filing, the pipeline would not have to file it because the deviation would be cured.
4. Word processing errors such as missing text at the bottom of a page are acceptable if the parties agree it is a word processing error.

5. Word substitutions that do not change the substantive rights of a party are not material deviations, for example, changing the word “utilize” to “use.”
 6. Minor reference mistakes related to the tariff or agreement section where the cited reference makes no sense, e.g., refers to a section that does not exist. Such errors do not have to be filed, but staff would expect the company to fix these types of errors.
 7. Where the service agreement contains a blank for a specified commencement date and the contract states the contract becomes effective with the in service date of the facilities.
 8. Formatting deviations like the addition of “This space intentionally left blank”.
- **If a service agreement contains material deviations and is filed for the Commission’s review, must all changes from the form of service agreement be identified?**

Answer – When a service agreement is filed for Commission review, consistent with section 154.201(a) of the Commission’s regulations, all deviations must be identified, not just material changes. Similarly, where a pipeline chooses to file a service agreement containing a negotiated rate agreement instead of filing a tariff sheet describing the agreement, and the agreement contains immaterial changes from the form of service agreement, it should identify all deviations from the *pro forma* service agreement despite the fact they are not material.

- **When is the pipeline required to file with the Commission e-mails, discount agreements, construction agreements, or side agreements that contain material deviations to the form of service agreement?**

Answer – When these documents or communications include terms or conditions that deviate from the *pro forma* service agreement and that affect the substantive rights of the parties under the tariff or the service agreement.

- **Where a tariff specifically permits the pipeline and a shipper to enter into an agreement, other than a transportation service agreement, to address a specific situation, for example, allocation agreements covering deliveries at a delivery point between shippers and the point operator, is that agreement considered conforming or non-conforming and must it be filed/redlined?**

Answer – Contracts, such as contribution in add of construction (CIAC) agreements, interconnection agreements, allocation agreements, etc., as a general rule, do not have to be filed. However, section 4 of the Natural Gas Act requires natural gas companies to file all rates and charges for any transportation or sales and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. If the rates, charges, classifications, practices, regulations and/or services relating to sales or transportation are included in these types of agreements and deviate materially from the form of service agreement and tariff provisions, they should be filed with the Commission.

- **What should the pipeline do if it decides to include provisions that are unique to new facilities in precedent agreements and in service agreements?**

Answer – If the pipeline includes unique provisions related to new facilities in precedent and service agreements, then the provision in the service agreement becomes a material deviation that must be filed with the Commission.

- **Where should pipelines reflect collateral requirements and other conditions relating to construction of new facilities?**

Answer – Collateral requirements and other conditions relating to construction of new facilities should be reflected in precedent agreements.

- **Do pipelines need to re-file service agreements filed in a certificate proceeding as non-conforming agreements when they go into effect if they have material deviations?**

Answer – If a pipeline files non-conforming service agreements in a certificate proceeding which are intended to remain in effect after the in-service date of the new facilities, the pipeline must bring to the Commission’s attention that the certificate filing includes non-conforming service agreements. The Commission may then take whatever action it deems appropriate. Generally, in the certificate order, the Commission has directed the pipeline to file contracts containing material deviations prior to the in-service date of the certificated facilities. (*See Algonquin Gas Transmission, LLC*, 126 FERC ¶ 61,110 (2009) and *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089 (2008)). Filing the non-conforming agreements in a certificate proceeding does not relieve the pipeline from the requirements of section 154.112(b) of the Commission’s regulations which requires the pipeline to list its non-conforming agreements in FERC Volume No. 1.

- **Must a company review contracts that it executed in past periods in determining whether a material deviation exists, and if so, how far must the company go back?**

Answer – A company should examine all previously executed contracts that are currently in effect to determine whether a material deviation exists. If the material deviation changes the substantive rights or responsibilities of a party(s), the contracts must be filed.

- **What tariff should be used to evaluate whether previously executed contracts that are currently in effect contain material deviations – the current tariff, the tariff that was in effect when the contract was signed, or the tariff that was in effect when the contract became effective?**

Answer – 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)).

- **Does audit staff typically examine expired contracts in the context of an audit?**

Answer - In the context of an audit, audit staff typically will not examine expired or terminated contracts during the contract review phase of the audit.

- **Where there is a provision in the tariff permitting the pipeline and the shipper to agree to some action different from the general rule in the tariff, and such agreement is reflected in the parties' service agreement, is that provision (which is permitted by the tariff) considered a material deviation?**

Answer – Generally, no. Note that when Northern Natural filed several years ago to revise its form of service agreement to include a blank that could be filled in with any agreement authorized by its tariff, the Commission required it to include in the form of service agreement citations to the specific provisions in its tariff that authorized it to negotiate various terms of the service agreement (See *Northern Natural Gas Co.* 102 FERC ¶ 61,171 at P 14-19 (2003)). Further, when the

pipeline's tariff authorizes it to negotiate something like an evergreen provision that differs from the default provision in the tariff, then the agreed upon evergreen provision is a "special detail" that the pipeline must post on its website under section 284.13(b)(1)(viii) of the Commission's regulations (*See Natural Gas Pipeline Company of America*, 93 FERC ¶ 61,286 (2000)).

- **What course of action should a pipeline take if it identifies a service agreement with a material deviation and the service agreement was not filed with the Commission?**

Answer – Listed below are some appropriate avenues open to pipelines to address a contract/service agreement that may include a material deviation.

1. The pipeline could renegotiate the contract with the customer and remove the material deviation.
 2. The pipeline can amend the *pro forma* service agreement to incorporate the material deviation.
 3. The pipeline can file the service agreement with the Commission to determine whether the Commission views the language as a "material deviation" (and if so, whether the material deviation is acceptable or not).
 4. The pipeline may seek informal or formal guidance from the Commission on whether the service agreement contains a material deviation. While there is no requirement to submit a self-report, a pipeline may also consider self-reporting the material deviations to OE. *See Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 (2008) (Revised Policy Statement on Enforcement).
- **If a company has an on-line system for contracting for transportation services and the service agreement that results from this system, when printed out, does not look exactly like the pro forma service agreement in the tariff, is that a material deviation?**

Answer – No, so long as the information provided on the on-line service agreement is the same as the information on the pro forma service agreement. However, if practical, the pipeline may want to revise its on-line system so that the resulting agreement looks like the pro forma agreement.