

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Gulfstream Natural Gas System, L.L.C.

Docket No. RP02-361-016

ORDER ON COMPLIANCE FILING

(Issued June 23, 2004)

1. On November 17, 2003, Gulfstream Natural Gas System, L.L.C. (Gulfstream) filed revised tariff sheets,<sup>1</sup> service agreements, and certain information required by the Commission's order issued on October 31, 2003 in Docket No. RP02-361-014.<sup>2</sup> On April 16, 2004, Gulfstream also provided additional information in response to the Commission's April 2, 2004 Delegated Order in the instant docket. The Commission finds that Gulfstream has generally complied with the directives of the October 31, 2003 Order, and will accept the revised tariff sheets, service agreement, and negotiated rate letter agreement, subject to further conditions. This order benefits the public interest by ensuring compliance with the Commission's policies on negotiated rate service agreements.

**Background**

2. On October 3, 2003, Gulfstream filed tariff sheets summarizing a negotiated rate transaction with Florida Power and Light Company (FPL) for service up to 500,000 Dth per day under Rate Schedule ITS (ITS Service Agreement 9000831). Footnotes to the tariff sheet summary<sup>3</sup> included: (1) footnote 5 summarizing a provision allowing the shipper, under specified conditions, to assign the negotiated rate letter agreement to any wholly-owned affiliate or, in the event of a sale of generating units, to third parties; and, (2) footnote 3 summarizing a throughput commitment provision which guarantees

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<sup>1</sup> Sub Original Sheet Nos. 8L and 8M to FERC Gas Tariff, Original Volume No. 1.

<sup>2</sup> Gulfstream Natural Gas System, L.L.C., 105 FERC ¶ 61,164 (2003) (October 31, 2003 Order).

<sup>3</sup> Original Sheet Nos. 8L and 8M to FERC Gas Tariff, Original Volume No. 1.

Gulfstream a certain level of revenue. Footnote 3 indicates that this latter provision provides, *inter alia*, that if FPL's total revenues under ITS Service Agreement 9000831 and any other service agreements (designated as "Applicable Agreements") between Gulfstream and FPL under Rate Schedules ITS and FTS are less than \$5,000,000 for years 2003 and 2004, and \$34,000,000 ending in year 2005, FPL shall pay the difference under ITS Service Agreement 9000831. Furthermore, footnote 3 states that there might be reductions in the usage rate or the throughput commitment and revenue guarantees due, respectively, to a delay in the commencement of service or to the cancellation of service to FPL's Martin plant under FTS Service Agreement 9000828. However, Gulfstream did not include copies of any of the "Applicable Agreements" with its filing. Additionally, Gulfstream did not identify any receipt points on the tariff sheets, instead stating "NA" on the tariff sheet, without any further explanation.

3. In the October 31, 2003 Order, the Commission accepted Original Sheet Nos. 8L and 8M to become effective on October 1, 2003, subject to refund and conditions and further review. The Commission directed Gulfstream to file with the Commission the subject negotiated rate transaction agreements with FPL and any related agreements, contracts, including redline and strikeout versions, and any related documentation and support as required by the Policy Statement Modifying Negotiated Rate Policy,<sup>4</sup> within 15 days of the date of the order. The Commission also directed Gulfstream to provide an explanation of which receipt points are applicable to the transaction.

4. The Commission required Gulfstream to file the service agreements and any related letter agreements, contracts, and documentation so that the Commission could determine if the agreements are consistent with the Commission's regulations and policies. The Commission stated that Gulfstream must clearly delineate differences between its negotiated contractual terms and its tariff's *pro forma* form of service agreement in redline and strikeout and provide a narrative explanation of such differences and why such differences do not present a risk of undue discrimination.

### **Details of Filing**

5. On November 17, 2003, in compliance with the October 31, 2003 Order's directive to file the negotiated ITS service agreement summarized on the tariff sheets, Gulfstream filed the ITS Service Agreement 9000831 and a related negotiated rate letter agreement dated April 21, 2003 (ITS Letter Agreement 9000831). To comply with the directive to file all other related service agreements, Gulfstream also filed a number of what it terms "Applicable Agreements" as that term is used in footnote 3 of the tariff sheet: (1) two Rate Schedule ITS service agreements between Gulfstream and FPL for

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<sup>4</sup> Natural Gas Pipeline Negotiated Rate Policies and Practices, 104 FERC ¶ 61,134 (2003) (Policy Statement Modifying Negotiated Rate Policy).

maximum recourse rates (currently effective ITS Service Agreement 9006626 dated July 18, 2003, and superseded ITS Service Agreement 9000016 dated January 31, 2002), (2) a Rate Schedule PALS park service agreement between Gulfstream and FPL dated July 15, 2002 (PALS Service Agreement 9000306), and associated negotiated rate letter agreement dated June 25, 2003 (PALS Letter Agreement 9000306), and (3) two Rate Schedule PALS service agreements for maximum recourse rates (PALS Service Agreement 9000305 dated July 15, 2002 for lend service, and PALS Service Agreement 9007448 for park service). Gulfstream asserts that all of the revenue generated by the foregoing agreements (“Applicable Agreements”) will be credited against the FPL revenue commitment of the ITS Service Agreement 9000831, as described in the footnote 3 to Sub Original Sheet No. 8L, but will not affect the actual rate that FPL pays under ITS Service Agreement 9000831.

6. In addition, Gulfstream states that the precedent agreement, service agreement and letter agreement<sup>5</sup> for firm service to FPL’s Martin Plant to be effective when Gulfstream places its Phase II facilities in service are related to the ITS Letter Agreement 9000831 and ITS Service Agreement 9000831, but are not “Applicable Agreements” for purposes of the foregoing revenue commitment. Gulfstream states that it is incorporating these agreements by reference, and that it will refile the agreements 30 to 60 days before the effective date of placing into service the Phase II facilities described in the Order Amending Certificate.

7. Finally, Gulfstream submitted revised tariff sheets, Sub Original Sheet Nos. 8L and 8M, adding a footnote 6 to clarify that all receipt points on the system are available on an interruptible basis under ITS Service Agreement 9000831.

8. On April 2, 2004, by delegated order, Gulfstream was directed to provide additional information pertaining to ITS Letter Agreement 9000831. Gulfstream responded to the Commission’s delegated order on April 16, 2004.

### **Notice, Interventions and Protests**

9. Public notice of the filing was issued on November 20, 2003. In addition, public notice of Gulfstream’s April 16, 2004 response to the Commission’s April 2, 2004 Delegated Letter Order issued on May 21, 2004. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §385.214 (2003), all timely motions to intervene are granted and any motions to intervene out of time filed before the

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<sup>5</sup> Gulfstream states that it previously filed these agreements with its Phase II application, but it states that the Commission declined to rule on these agreements. Citing Gulfstream Natural Gas System, L.L.C., 105 FERC ¶ 61,052 at P 37 (2003) (Order Amending Certificate).

issuance of this order are granted. No interventions or protests were filed. Any opposed or untimely filed motion to intervene is governed by the provisions of Rule 214.

## **Discussion**

### **ITS Service Agreement 9000831**

#### **Notice of Termination and Evergreen Provisions**

10. Gulfstream acknowledges that ITS Service Agreement 9000831 deviates from the Form of Service Agreement, which is used for both Rate Schedules FTS and ITS service. Gulfstream states that it has modified the evergreen and termination notice provisions in section 4 of ITS Service Agreement 9000831 beyond merely filling in the blanks. It states that the evergreen provision is modified to month to month (instead of year to year) and the notice of termination is modified to specify sixty day's notice of termination (in lieu of not less than 2 years for agreements with a primary term of 2 years or more and not less than 1 year for agreements with a primary term of at least 1 year but less than 2 years).

11. Gulfstream claims that the changes have no effect on the existing rights of Gulfstream and FPL because the transaction is for interruptible Rate Schedule ITS service, and not firm Rate Schedule FTS service. Gulfstream avers that any creditworthy shipper may execute a Rate Schedule ITS service agreement at any time and obtain a priority of service equal to all other Rate Schedule ITS shippers, because the priority is based on the rate paid by the ITS shipper, not on the date of the agreement or related request for service (citing section 6.1 of the General Terms and Conditions). Gulfstream further contends that the Form of Service Agreement's evergreen and termination notice provisions are necessary for Rate Schedule FTS service with primary terms of at least one year, but asserts that the provisions were never intended to apply in the context of an interruptible service agreement. Therefore, Gulfstream asserts, the change does not constitute a material deviation to the Form of Service Agreement, which is used for both Rate Schedules FTS and ITS service.

12. Nonetheless, Gulfstream states that it recognizes that, in light of the Commission's Policy Statement Modifying Negotiated Rate Policy, as well as the October 31, 2003 Order in this proceeding, Gulfstream needs to revise its Form of Service Agreement and the manner in which it documents its negotiated rate transactions to eliminate the need to have additional language to document a negotiated rate or to make a minor wording change where the Form of Service Agreement fails to make sense in a particular situation. Gulfstream claims it is in the process of determining the precise changes it must implement in this regard and will make the necessary filings with the Commission to reflect these changes in the future. In this regard, Gulfstream states that it notes that Exhibit A of the ITS Service Agreement 9000831 does not specify a Primary Receipt

Point or Primary Delivery Point MDQ. It states that this again reflects the fact that this is an interruptible transaction and only firm agreements have a Primary Receipt Point and Primary Delivery Point MDQ. It states that modifications it intends to make will eliminate the need to specify such information in the context of ITS transactions.

13. Gulfstream alleges that the foregoing provisions were never intended to apply to interruptible service, and that the modified provisions do not constitute material deviations from the Form of Service Agreement. We find that they do, in fact, constitute material deviations as they materially change the rights and obligations of the parties under the instant agreement, but do not create a risk of undue discrimination. Moreover, the Commission agrees with Gulfstream that it needs to revise the Form of Service Agreement currently included in its tariff. Gulfstream is directed to file its modified provisions to its Form of Service Agreements within 30 days of the date this order issues.

### **ITS Letter Agreement 9000831**

14. In its filing, Gulfstream identifies the differences between ITS Letter Agreement 9000831 and the Form of Service Agreement, and claims that they directly involve the negotiated rate itself, or are either not material or do not present a risk of undue discrimination. We disagree as discussed below.

### **Revenue Commitment**

15. Paragraph 4 of ITS Letter Agreement 9000831 states:

Throughput commitment: In the event that Shipper does not transport under the Service Agreement, or any other Rate Schedule ITS or FTS service agreement between Shipper and Transporter (herein the “Applicable Agreements”), aggregate quantities after this Agreement becomes effective and the end of calendar year 2003 and calendar year 2004 which generate at least five million dollars (\$5,000,000) in revenue to Transporter in each of the years 2003 and 2004, then Shipper shall pay to Transporter the positive difference between five million dollars (\$5,000,000) and the amount owed to Transporter for the actual quantities transported under the Applicable Agreements during each of 2003 and 2004, which shall be due with Shipper’s remittance of payment for Transporter’s service provided in December of 2003 and 2004, respectively (any excess of five million dollars (\$5,000,000) will be applied against Shipper’s throughput commitment for calendar year 2004). In the event that Shipper does not transport under the Applicable Agreements total quantities during the period commencing on the date this Agreement becomes effective and ending April 30, 2005, which generate at least thirty-four million dollars (\$34,000,000) in revenue to Transporter, then Shipper shall pay to Transporter the positive difference between (i) thirty-four million dollars (\$34,000,000) and (ii) the amount owed to Transporter for actual

quantities transported under the Applicable Agreements during the period commencing on the date this Agreement becomes effective and ending April 30, 2005 plus any amounts paid by Shipper to Transporter pursuant to this Paragraph 4 of this Agreement for quantities not transported during 2003 and 2004. Notwithstanding the foregoing, in the event that the FTS Agreement between Shipper and Transporter is terminated as to service to the Martin Plant or Transporter terminates the Service Agreement for any reason other than pursuant to its stated terms or Transporter's Tariff, then after the date of such termination Shipper shall have no further throughput commitment or commitment to make further payments to Transporter pursuant to this Paragraph 4. In no event shall Transporter be obligated to refund monies to Shipper.

16. In conjunction with Paragraph 4, Paragraph 5(B) of ITS Letter Agreement 9000831, Reduction in Negotiated Rates, states:

(B) In the event that (i) Transporter has not completed the facilities necessary to provide service under the FTS Agreement to the Martin Plant on or before March 1, 2005, and (ii) the conditions precedent set forth in Paragraphs 7(B) (i), 7(B)(ii) and 7(B)(iii) have been satisfied or waived by the dates set forth in such paragraphs, then commencing on March 1, 2005, Shipper's Throughput Commitment obligations set forth in Paragraph 4 above for any quantities not actually transported shall be reduced by \$190,000 per day for each day Transporter is not capable of delivering gas to the Martin Plant under the Service Agreement, but in no event shall Shipper's Throughput Commitment be less than ten million dollars (\$10,000,000). In no event shall Transporter be obligated to refund monies to Shipper.

17. According to Gulfstream's response to the Commission's inquiry regarding these provisions, ITS Letter Agreement 9000831 provides for a negotiated ITS rate of \$0.55 per Dth through October 1, 2005, and includes an FPL revenue commitment (also variously identified by Gulfstream as a "throughput commitment" and a "minimum bill") of \$34,000,000 associated with ITS Service Agreement 9000831. Any shortfall in revenue below the \$34,000,000 is owed by FPL to Gulfstream. Moreover, Gulfstream asserts that the revenue commitment will not affect the actual rate that FPL pays, nor does it require FPL to flow any gas or maintain any throughput at any time. It states that the throughput commitment will be discontinued if the FTS Agreement with FPL for service to FPL's Martin Plant is terminated, if Gulfstream terminates the ITS Service Agreement 9000831 for any reason other than pursuant to its stated terms or Gulfstream's tariff, or it may be reduced in certain circumstances if Gulfstream has not completed the facilities to provide service to FPL's Martin Plant by October 1, 2005.

18. Gulfstream responded to the Commission's inquiry about the role of the "Applicable Agreements" in determining the revenue commitment by claiming that the

revenue commitment does not involve multiple rate schedules and service agreements, because it only applies to ITS Service Agreement 9000831, and does not require FPL to utilize any other service or enter into any agreement for service of any kind. Gulfstream asserts that the purpose of the revenue commitment formula was to avoid limiting FPL to service under Rate Schedule ITS if, for example, FPL desired firm service during the summer months. It asserts that Gulfstream and FPL intended to ensure that the revenue commitment did not discourage FPL from using any other tariff-approved service that would serve its needs, by agreeing that if FPL used any other service during the term of ITS Service Agreement 9000831, the revenue commitment would be reduced by the amount FPL paid for the service under the “Applicable Agreements.” Gulfstream also maintains that the revenue commitment is merely a minimum bill.<sup>6</sup>

19. The Commission has approved negotiated rate contracts that provide for minimum revenue commitments where the shipper is not obligated to actually take service at a minimum level, but simply must pay a minimum amount irrespective of its service levels.<sup>7</sup> The provision at issue here is similar to provisions approved in the other proceedings, because it only guarantees a certain revenue commitment. However, the revenue commitment is unlike those other provisions in that it not only relates to a particular service agreement with FPL, but instead encompasses all other service agreements with FPL, some under different rate schedules. In our view, the negotiated rate or revenue commitment incorporates all the “Applicable Agreements,” not only ITS Service Agreement 9000831, thereby converting all “Applicable Agreements” to negotiated rate agreements. Because actions under the “Applicable Agreements” determine whether FPL will owe additional monies, and in what amounts, to Gulfstream under the revenue commitment provision, such payments under the revenue commitment are as attributable to the “Applicable Agreements” as they are to ITS Service Agreement 9000831. In essence, Gulfstream has a single, combined set of service commitments subject to a single negotiated rate mechanism. Thus, we will approve this provision, subject to the condition that Gulfstream treat all “Applicable Agreements” as negotiated rate contracts, including those it describes as maximum recourse rate contracts. Pursuant to section 31, Negotiated Rates, of the General Terms and Conditions of its tariff, Gulfstream must file tariff sheets for each of the “Applicable Agreements” as negotiated rate agreements which reflect the essential elements of the transaction. This information will provide transparency and enable other shippers and the Commission to evaluate whether the transactions are unduly discriminatory.

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<sup>6</sup> Gulfstream cites High Island Offshore System, L.L.C., 100 FERC ¶ 61,031 at P11 (2002) (HIOS), Dominion Transmission, Inc., 93 FERC ¶ 61,228 at 61,754 (2000) (Dominion), and a delegated letter order issued on April 29, 2003 in Gulfstream Natural Gas System, L.L.C., Docket No. RP03-336-000 (“Commission approving minimum bills for negotiated rate transactions”).

<sup>7</sup> HIOS at P 11, and Dominion at 61,754.

### **Applicability of Revenue Commitment to Other Service Agreements**

20. In the October 31, 2003 Order, the Commission required Gulfstream to file not only the subject ITS Service Agreement 9000831, it also required Gulfstream to file any related letter agreements, contracts, and documentation so that the Commission could determine if the agreements are consistent with the Commission's regulations and policies.

21. Gulfstream states that it is incorporating the precedent agreement, service agreement and letter agreement for firm service to FPL's Martin Plant by reference and will refile the agreements 30 to 60 days before they become effective. Gulfstream states, without explanation, that these agreements are "related to" the ITS Letter Agreement 9000831 and ITS Service Agreement 9000831, even though it asserts that they are not "Applicable Agreements" (for purposes of the revenue commitment of ITS Letter Agreement 9000831). However, Paragraph 4 of ITS Letter Agreement 9000831 and footnote 3 of Sub Original Sheet No. 8L state that the revenue commitment applies to service under the instant negotiated rate agreement for service under any other Rate Schedule ITS or FTS service agreement ("Applicable Agreements") between Gulfstream and FPL. We find its statements to be contradictory to Paragraph 4 of ITS Letter Agreement 9000831. We, therefore, direct Gulfstream to identify the specific firm service agreements for service to FPL's Martin Plant which it is referring to, and to clarify whether or not those firm service agreements are "Applicable Agreements" as the term is used in Paragraph 4 of ITS Letter Agreement 9000831. In the event they are not, Gulfstream must revise this provision accordingly.

22. In the November 17, 2003 filing, Gulfstream filed a number of service agreements with FPL under Rate Schedules FTS, ITS and PALS<sup>8</sup> in compliance with the October 31, 2003 Order. However, PALS service was not identified on either the tariff sheet summary or Paragraph 4 of ITS Letter Agreement 9000831 as "Applicable Agreements." In response to the Commission's inquiry, Gulfstream states that services under Rate Schedule PALS do apply to the revenue commitment, even though Rate Schedule PALS was not specifically identified as an "Applicable Agreement" on the tariff sheet summary or in ITS Letter Agreement 9000831. Gulfstream affirms the parties' intent is that the revenue commitment for ITS Service Agreement 9000831 be based on a formula which considered revenues from all service agreements between Gulfstream and FPL, including agreements under Rate Schedules FTS, ITS and PALS. Gulfstream states that FPL has authorized it to state that FPL agrees with this statement of the parties' intent. We find that Gulfstream must file a revised ITS Letter Agreement 9000831, and tariff sheets reflecting that the PALS service agreements are "Applicable Agreements."

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<sup>8</sup> Gulfstream included the following PALS agreements in its November 17, 2003 compliance filing: Service Agreement 9000306, Letter Agreement 9000306, Service Agreement 9000305 and Service Agreement 9000748.

### Rate Assignment Provision

23. Paragraph 10 of ITS Letter Agreement 9000831 states:

Assignment: Shipper may not assign this Agreement to any other person (including affiliates) without the prior express written consent of Transporter. Subject to any necessary regulatory authorization for the direct generation of electricity, Shipper shall have the assignment rights with respect to this Agreement as follows:

- (a) Shipper may, upon notice to Transporter but without the need for Transporter's consent, assign all or part of its right, interest, and obligations under this Agreement to any wholly-owned affiliate(s) of Shipper that has an investment grade credit rating from a nationally recognized credit rating agency (or that has been provided a guarantee in Transporter's favor from an affiliated entity with such a rating).
- (b) In the event of a sale of a generating unit or units at any of Shipper's generating facilities which are supplied gas through the Transporter's gas transmission system, Shipper may, upon notice to Transporter but without the need for Transporter's consent, assign all or part of its right, interest and obligations under this Agreement (except for the assignment rights under this subparagraph (b)) to any third party (or parties) that:
  - (i) has a credit rating from a nationally recognized credit rating agency equal to or better than Shipper's but in no event less than investment grade, and
  - (ii) purchases said generating unit or units.

24. In response to the Commission's inquiry, Gulfstream clarified that the assignment provision relates only to the rate itself, and not to the underlying service agreement, and that the provision operates as a present agreement to provide a particular rate for service in the future to whomever FPL assigns ITS Letter Agreement 9000831. Gulfstream indicates that the assignment does not guarantee capacity on Gulfstream's system or any capacity rights associated with the Letter Agreement 9000831. Gulfstream claims the Commission has approved these types of provisions in Gulf South Pipeline Company, LP, 98 FERC ¶ 61,321 (2002), and ANR Pipeline Company, 97 FERC ¶ 61,252 (2001).

25. Gulfstream also states that the Form of Service Agreement does not contain an assignment provision, and any assignment of rights (such as capacity release) under a service agreement must be done under the terms of Gulfstream's tariff. According to Gulfstream, shippers can obtain a service agreement for interruptible service at any time.

26. Gulfstream asserts the assignment provision has no affect on ITS Service Agreement 9000831. If FPL exercised the assignment provision, Gulfstream states that

FPL would still have ITS Service Agreement 9000831 entitling it to ITS service at the maximum recourse rate, and the assignee would have to obtain its own service agreement pursuant to Gulfstream's tariff. Therefore, Gulfstream claims that the assignment would not convey any capacity or priority rights to the assignee. It states that interruptible capacity is scheduled based on the rate the shipper pays for such service (section 6.1 of the General Terms and Conditions of its tariff).

27. Consistent with the Commission's action in ANR, supra, we find this rate assignment provision is reasonable, subject to Gulfstream filing a revised ITS Letter Agreement 9000831 and tariff sheets to add a provision to clarify that the capacity must be obtained through the ordinary procedures in Gulfstream's tariff.

28. Also, Gulfstream responded to the Commission's inquiry regarding the apparent conflict between the first paragraph of Paragraph 10 of ITS Letter Agreement 9000831, which requires the written consent of Gulfstream and Paragraph 10(a) which does not require Gulfstream's written consent. Gulfstream contends that Paragraph 10(a) operates as an exception to the first general paragraph above it in Paragraph 10. We find the language in these paragraphs contradictory and ambiguous. Gulfstream is directed to modify Paragraph 10 consistent with the parties' intent and make appropriate changes to the tariff sheets.

### Miscellaneous

29. Consistent with East Tennessee,<sup>9</sup> Gulfstream is directed to delete Paragraph 7 (Transporter's Tariff), Paragraph 11 (Governing Law), Paragraph 12 (Entire Agreement) and Paragraph 13 (Notices) in ITS Letter Agreement 9000831 since these provisions are non-rate related and cover provisions contained in the ITS Service Agreement 9000831.

30. The Commission notes that Gulfstream redlined the entire Sub Original Sheet Nos. 8L and 8M tariff sheets, instead of only the minor changes it made to Original Sheet Nos. 8L and 8M to comply with the October 31, 2003 Order. We find that redlining these entire tariff sheets is not consistent with section 154.201(a) of the Commission's regulations considering that the changes resulted from the October 31, 2003 Order. Any tariff sheets required as a result of compliance with Commission orders should reflect redline/strikeout of only those changes made to the previously-filed tariff sheets to comply with the Commission's order. Any changes required to be made to service agreements and negotiated rate letter agreements should similarly only reflect

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<sup>9</sup> East Tennessee Natural Gas Co., 107 FERC ¶ 61,197 at P 16 (2004) (East Tennessee) ("the rate document must not contain any provisions that address the same issues as provisions contained in the Form of Service Agreement").

redline/strikeout of the changes made from the earlier versions to comply with the Commission's order.

The Commission orders:

(A) Sub Original Sheet Nos. 8L and 8M to FERC Gas Tariff, Original Volume No. 1, are accepted, subject to refund, and the conditions set forth herein, to be effective on October 1, 2003.

(B) Gulfstream is directed to file, within 30 days of the date this order issues, the supplemental information and revisions discussed in the body of the order.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Acting Secretary.