132 FERC ¶ 61,231
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Bison Pipeline LLC — Docket No. CP09-161-001

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

(Issued September 16, 2010)

1. On May 7, 2010, Bison Pipeline LLC (Bison) filed a request for clarification or, in the alternative, rehearing of the Commission order issued April 9, 2010, in this docket.[1] The April 9 Order authorized the construction and operation of a new 302-mile pipeline designed to transport approximately 477 million cubic feet per day (MMcf/day) of natural gas from Gillette, Wyoming to an interconnection with Northern Border Pipeline Company in Morton County, North Dakota. As described below, this order denies rehearing and grants clarification.

I. Background

2. In the open seasons Bison held for this project, it established three classes of shipper based on the amount of transportation quantity requested: Foundation Shipper, Cornerstone Shipper, and Anchor Shipper. To qualify as a Foundation Shipper, Bison required a party's bid to be for a minimum transportation quantity of 250 MMcf per day. To qualify as a Cornerstone Shipper, the party's bid was required to be between 100 and 249.999 MMcf per day, and an Anchor Shipper was one requesting a transportation quantity of less than 100 MMcf per day. Bison required a minimum ten-year term for all classes of shipper. The estimated negotiated reservation rates for Foundation, Cornerstone, and Anchor Shippers are $0.548 per million Btu (MMBtu), $0.57 per MMBtu, and $0.575 per MMBtu, respectively, subject to further adjustments and project cost-sharing provisions. Additionally, a negotiated fuel rate of 0.69 percent for Company Use Gas was applicable to all project shippers electing the negotiated rate option. As a

[1] *Bison Pipeline LLC*, 131 FERC ¶ 61,013 (2010) (April 9 Order).

result of the open seasons, Bison entered into precedent agreements with one Foundation Shipper, one Cornerstone Shipper, and two Anchor Shippers, for a total of 407 MMcf per day.

II. The April 9 Order

3. The precedent agreements filed by Bison contained certain contractual provisions, tailored to address the particular concerns of each shipper, that constituted material deviations from Bison's form of service agreements. The Commission found that the non-conforming provisions relating to rate adjustment, creditworthiness, right of first refusal, termination rights, the Mobile Sierra standard, and the potential rate adjustment resulting from an upstream extension project to be permissible because they do not present a risk of undue discrimination and will not affect the operational conditions of providing service nor result in any customer receiving a different quality of service from that available to Bison's other customers.[2] However, the Commission took issue with a maximum pressure cap at the receipt point, different liability provisions for the Foundation Shipper, and Articles 10.2 through 10.5 of the Cornerstone Shipper's proposed service agreement.[3]

III. Request for Clarification or Rehearing

4. Bison requests clarification of the April 9 Order's determinations regarding the non-conforming provisions as discussed below. If the Commission denies the requested clarifications, Bison requests rehearing of the issues.

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[2] April 9 Order, 131 FERC ¶ 61,013 at P 55.

[3] The April 9 Order questioned another provision regarding pre-approved expansion rights for the Foundation Shipper. The Commission held that, while Bison may give a Foundation Shipper the right to contract for expansion capacity, it cannot provide a Foundation Shipper with the sole right to subscribe to all of the expansion capacity. Therefore, Bison was directed to modify section 26.5 of its tariff such that any capacity awarded to a Foundation Shipper in an expansion be done in a nondiscriminatory manner and in compliance with the Commission's open season policy. April 9 Order, 131 FERC ¶ 61,013 at P 40, 56-57. In an appendix to its request for clarification, Bison provided revised tariff sheets deleting the Foundation Shipper's rights to planned expansion capacity. Bison Pipeline LLC, May 7, 2010 Request for Rehearing, Appendix A at A-7, Revised Original Sheet No. 354. Therefore, the Commission's concern regarding this issue has been satisfied.

The Maximum Pressure Cap for the Foundation Shipper

5. Article 1(b) of the Foundation Shipper's precedent agreement includes a provision establishing a maximum pressure cap at the receipt point. The Commission found that the extent to which this provision would affect the quality of service provided to the Foundation Shipper, or to Bison's other shippers, was not clear. Therefore, the Commission stated that Bison should file additional supporting information when it files its nonconforming agreements before the pipeline goes into service, so that the Commission could determine whether the material deviation is permissible.[4]

6. Bison attached to its request for rehearing an amendment to the Foundation Shipper precedent agreement which eliminates the subject provision. Bison instead proposes to apply an alternative maximum pressure cap to all shippers.[5] Bison also included additional language regarding pressure in Section l (b) of the Foundation Shipper precedent agreement which conforms to the language found in the precedent agreements of its other shippers.[6] As requested by Bison, we clarify that these modifications satisfy the concerns the Commission had regarding this issue. Accordingly, clarification is granted.[7]

Liability Provisions for the Foundation Shipper

7. Article 13 of the Foundation Shipper's precedent agreement contains a provision to be added to the Rate Schedule FT-1 Service Agreement providing the Foundation Shipper with different liability provisions from other shippers. The Commission found that this would not be permissible and Bison must either remove this provision from the service agreement or add them to its tariff to be applicable to all shippers.[8]

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[4] April 9 Order, 131 FERC ¶ 61,013 at P 59.

[5] Bison Pipeline LLC, May 7, 2010 Request for Rehearing, Appendix A at A-2, Revised Sheet No. 220.

[6] Bison Pipeline LLC, May 7, 2010 Request for Rehearing, Appendix B at B-2.

[7] Although Bison has attached Revised Sheet No. 220 to its FERC Gas Tariff to its Request for Clarification or, in the Alternative, Rehearing, Bison is required to file its tariff sheets pursuant to section 4; therefore, Bison should include Revised Sheet No. 220 in its compliance filing required by the April 9 Order.

[8] April 9 Order, 131 FERC ¶ 61,013 at P 61.

8. Bison states that it is complying with this directive by revising its tariff such that the limitation of liability language is now applicable to all shippers.[9] We clarify that this modification satisfies the concern the Commission had regarding this issue.[10]

Articles 10.2 through 10.5 of the Cornerstone Shipper Rate Schedule FT-1 Service Agreement

9. Bison stated in its application that the Cornerstone Shipper's proposed service agreement contains certain provisions in Articles 10.2 through 10.5 that do not materially affect the substantive rights of other shippers, but were important to the Cornerstone Shipper. However, Bison did not describe in any detail these non-conforming provisions and the Commission could not determine whether these provisions constitute a material deviation affecting the terms and conditions of service and whether these provisions would be permissible. Accordingly, the Commission required Bison to file at least 60 days before the in-service date of the proposed facilities, an executed copy of each non-conforming agreement reflecting the non-conforming language and a tariff sheet identifying these agreements as non-conforming agreements, consistent with section 154.112 of the Commission's regulations.[11] In its rehearing request, Bison provides further detail on Articles 10.2 through 10.5.

Articles 10.3 through 10.5

10. Bison states that Article 10.3 contains clauses regarding conditions precedent, including management approval. Bison states these provisions are non-operational, will not affect service on the pipeline, must be satisfied before operations commence, and will become void upon the in-service date of the pipeline.

11. Bison states that Article 10.4(a) effectively provides that Bison's tariff may be revised from time to time. Article 10.4(b) contains language stating that natural gas tendered to Bison shall not exceed the maximum allowable operating pressure of the pipeline. Bison states this provision simply confirms language stated in Bison's tariff defining the maximum allowable operating pressure. Article 10.4(c) contains language

[9] Bison Pipeline LLC, May 7, 2010 Request for Rehearing, Appendix A at A-4, Revised Sheet No. 384.

[10] Although Bison has attached Revised Sheet No. 384 to its FERC Gas Tariff to its Request for Clarification or, in the Alternative, Rehearing, Bison is required to file its tariff sheets pursuant to section 4; therefore, Bison should include Revised Sheet No. 384 in its compliance filing required by the April 9 Order.

[11] April 9 Order, 131 FERC ¶ 61,013 at P 62-3.

providing that the rate will be based on a gross heating value of 967 Btu per cubic foot. Bison states such language confirms language appearing in Bison's tariff. Article 10.4(d) contains language regarding the in-service date and will not survive past the in-service date. Article 10.4(e) provides the Cornerstone Shipper the right, exercisable at least one year prior to the expiration of its initial term of contract, to extend its service agreement with respect to all or a potion of its capacity for a five-year term at the negotiated rate. Bison states the Cornerstone Shipper specifically negotiated with Bison to obtain this right and this provision was specifically included in the August 8, 2008 notice concerning Bison's second open season and made available to all interested parties willing to make the contractual commitment necessary to attain Cornerstone Shipper status. Bison maintains that all the provisions in Article 10.4 are permissible because they will not affect service on the pipeline and are not otherwise unduly discriminatory.

12. Bison states that Article 10.5 contains two clauses pertaining to cooperation and gas quality that will fail to affect service because both clauses will become ineffective as of the in-service date of the pipeline.

13. We find that the proposed non-conforming provisions of Articles 10.3, 10.4, and 10.5 are permissible in that they do not present a risk of undue discrimination and will neither affect the operational conditions of providing service nor result in any customer receiving a different quality of service from that available to Bison's other customers.[12]

<u>Article 10.2</u>

14. Article 10.2 provides the Cornerstone Shipper a sixty-day window to have any bankruptcy claim filed against it dismissed before Bison may terminate the Service Agreement, while section 41.1.8 of Bison's General Terms and Conditions (GT&C) provides Bison the right to suspend and terminate service if a shipper has filed for bankruptcy protection and does not provide shippers with any window to have the bankruptcy claim dismissed. Article 10.2 provides the Cornerstone Shipper a ten-day window to cure following notice of a failure to pay or failure to otherwise comply with an obligation, while section 6.5 of Bison's GT&C provides that Bison will provide a customer with a thirty-day notice of suspension if the customer fails to pay in full the amount of any invoice by the payment due date.[13]

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[12] *See, e.g.*, *Gulf South Pipeline Co., L.P.*, 115 FERC ¶ 61,123 (2006); *Gulf South Pipeline Co., L.P.*, 98 FERC ¶ 61,318, at 62,345 (2002).

[13] With the exception of invoices in dispute pursuant to section 6.4.2 of Bison's GT&C.

15. The Commission finds that Article 10.2 provides the Cornerstone Shipper with rights that are not available to all shippers and presents a significant potential for undue discrimination among shippers. Although we have clarified that pipelines may provide incentives to induce sponsoring shippers to commit to a project, we did not extend this policy to include non-rate considerations.[14] Providing certain shippers with additional creditworthiness and payment rights, such as described by Bison, is contrary to Commission policy.

16. While Bison is correct that the Commission has previously found certain non-conforming provisions necessary to "reflect the unique circumstances involved with the construction of new infrastructure and to provide the needed security to ensure the viability of the project,"[15] none of the orders cited by Bison approve non-conforming provisions such as it proposes in Article 10.2. Providing certain shippers with additional creditworthiness and payment rights is contrary to Commission policy. Accordingly, the request for rehearing as to Article 10.2 is denied.

17. In the event that the Commission finds any of the provisions impermissible, as it has done for Article 10.2, Bison requests that the Commission apply the provisions to only those entities qualifying as Cornerstone Shippers or to all shippers who have signed Rate Schedule FT-1 Service Agreements prior to the in-service date of the project, irrespective of class. The Commission declines to do so. The provisions in Article 10.2 relate to creditworthiness and payment provisions. These provisions do not deviate by class of shipper but are applicable to all shippers who use Bison's services.[16] Therefore, Bison's tariff provisions with regards to these provisions should apply to all shippers and should be stated in its General Terms and Conditions.

18. As stated in the April 9 Order, the Commission emphasizes that the determinations it made in this order and the April 9 Order on the nonconforming provisions are based on

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[14] *See Gulf Crossing Pipeline Co. LLC*, 123 FERC ¶ 61,100 (2008).

[15] Bison cites *Fayetteville Express Pipeline LLC,* 129 FERC ¶ 61,235 (2009) (finding that a most favored nation provision was non-conforming and constituted a material deviation from the pro forma service agreement but was necessary to secure financial commitments); *Rockies Express Pipeline LLC,* 116 FERC ¶ 61,272 (2006) (approving provisions granting one shipper most favored nations rate treatment, annual contract rollover rights, and a one-time right of first refusal (ROFR)); *Kern River Gas Transmission Co.*, 127 FERC ¶ 61,203 (2009) (approving non-conforming provisions pertaining to termination and ROFR).

[16] The Commission has allowed different levels of collateral for expansion shippers, but that provision is not at issue here.

Bison's descriptions of those items in its application and its rehearing request. Bison must file at least 60 days before the in-service date of its proposed facilities an executed copy of each non-conforming agreement reflecting the non-conforming language and a tariff sheet identifying these agreements as non-conforming agreements consistent with section 154.112 of the Commission's regulations.[17]

19. At a hearing held on September 16, 2010, the Commission on its own motion, received and made a part of the record in this proceeding all evidence, including the application, submitted in this proceeding and upon consideration of the record,

The Commission orders:

(A) The requests for clarification of the April 9 Order regarding Articles 1(b) of the Foundation Shipper Precedent Agreement, Article 13 of the Foundation Shipper Precedent Agreement, and Articles 10.3, 10.4, and 10.5 of the Cornerstone Shipper Proposed Service Agreement, are granted.

(B) The request for rehearing as to Article 10.2 of the Cornerstone Shipper Proposed Service Agreement, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[17] 18 C.F.R. § 154.112 (2010).