ENERGY BAR ASSOCIATION | 2019 MID-YEAR ENERGY FORUM

Tuesday, October 15, 2019 – Wednesday, October 16, 2019
Renaissance Downtown Hotel • Washington DC

Session B: *Drafting and Negotiating Precedent and Firm Transportation Agreement - A Skills Session*

Pipeline projects get built on the strength and stability of Precedent and Firm Transportation Agreements. These agreements have shifted over time as deals have evolved and FERC policies adjusted. Federal, state and local activities also have created additional risks and extended timelines for certain projects that parties often seek to mitigate contractually. What are the current best practices for these agreements? Join the panel as they explore this questions and more.

Speaker:
Patty Francis, *Vice President and Managing General Counsel*, Kinder Morgan

Legal support for Session B: *Drafting and Negotiating Precedent and Firm Transportation Agreement*
Speaker: Patricia S. Francis, Managing Counsel and Vice President, Kinder Morgan Natural Gas Group

I plan to discuss the drafting of contracts for natural gas pipeline services in the context of FERC case law that has been developed under the anchor of four major FERC Policy Statements. I have attached the pertinent Sections of the FERC Regulations. I did not attach the FERC Policy Statements because each are extensive, but the legal citations are as follows:

Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).
Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services, Statements of Policy and Comments, 74 FERC ¶ 61,076 (1996), *order on clarification*, 74 FERC ¶ 61,194 (1996), *order on reh'g*, 75 FERC ¶ 61,024 (1996).
Policy for Selective Discounting By Natural Gas Pipelines, 111 FERC ¶ 61,309 (2005), *order denying rehearing*, 113 FERC ¶ 61,173 (2005).
Policy Statement on Creditworthiness, 111 FERC ¶ 61,412 (2005).

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FERC Statutes and Regulations, Regulation, NGA, 18 CFR §154.1, Application; Obligation to file.

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(a) **[12,693]** The provisions of this part apply to filings pursuant to section 4 of the Natural Gas Act.

(b) Every natural gas company must file with the Commission and post in conformity with the requirements of this part, schedules showing all rates and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission, and the classifications, practices, rules, and regulations affecting such rates, charges, and services, together with all contracts related thereto.

(c) No natural gas company may file, under this part, any new or changed rate schedule or contract for the performance of any service for which a certificate of public convenience and necessity or certificate amendment must be obtained pursuant to section 7(c) of the Natural Gas Act, until such certificate has been issued.

(d) For the purposes of paragraph (b) of this section, any contract that conforms to the form of service agreement that is part of the pipeline's tariff pursuant to §154.110 does not have to be filed. Any contract or executed service agreement which deviates in any material aspect from the form of service agreement in the tariff is subject to the filing requirements of this part.

FERC Statutes and Regulations, Regulation, NGA, 18 CFR §154.109, General terms and conditions.

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(a) [12,699] This section of the tariff contains terms and conditions of service applicable to all or any of the rate schedules. Subsections and paragraphs must be numbered for convenient reference.

(b) [12,700] The general terms and conditions of the tariff must contain a statement of the company's policy with respect to the financing or construction of laterals including when the pipeline will pay for or contribute to the construction cost. The term "lateral" means any pipeline extension (other than a mainline extension) built from an existing pipeline facility to deliver gas to oneor more customers, including new delivery points and enlargements or replacements of existing laterals.

(c) The general terms and conditions of the tariff must contain a statement of the order in which the company discounts its rates and charges. The statement, specifying the order in which each rate component will be discounted, must be in accordance with Commission policy.

FERC Statutes and Regulations, Regulation, NGA, 18 CFR §154.110, Form of service agreement.

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[12,701]

The tariff must contain an unexecuted pro forma copy of each form of service agreement. The form for each service must refer to the service to be rendered and the applicable rate schedule of the tariff; and, provide spaces for insertion of the name of the customer, effective date, expiration date, and term. Spaces may be provided for the insertion of receipt and delivery points, contract quantity, and other specifics of each transaction as appropriate.

491 - MATERIAL DEVIATIONS

Overview. FERC's regulations require a pipeline to file any contract that deviates in any material aspect from the form of service agreement in the tariff. This section examines these regulations and their application by FERC.

See ¶504: Negotiated Rate Agreement Clauses for orders reviewing non-conforming provisions in negotiated rate agreements.

Relevant regulations. "Section 4(c) of the Natural Gas Act (NGA) requires that, under such rules as the Commission may prescribe, pipelines must file not only schedules showing all rates for jurisdictional services, but also must file 'all contracts which in any manner affect or relate to such rates, charges, classifications, and services.' ... [18 C.F.R.] Section 154.1(b) sets forth the general requirement that pipelines must file all contracts related to their services. Section 154.1(d) provides that, for purposes of [section] 154.1(b), any contract that conforms to the form of service agreement set forth in the pipeline's tariff pursuant to [section] 154.110 need not be filed. Section 154.110 requires that pipeline tariffs contain an unexecuted *pro forma* copy of each form of service agreement. ... Section 154.1(d) provides that any contract which 'deviates in any material aspect from the form of service agreement in the tariff' must be filed." *Columbia Gas Transmission Corp.*, 97 FERC ¶61,221 (2001).

"Since these regulations implement the filing requirements of NGA section 4, they must be interpreted in a manner that is consistent with the statute. Section 4 requires the filing of all contracts which 'in any manner' affect the services the pipeline provides to its customers. Clearly, this filing requirement applies to all customer service agreements, without exception. Thus, the Commission is only able to exempt the pipeline from filing any customer service agreement based on a finding that the section 4 filing requirement has already been satisfied by the pipeline's previous filing of the *pro forma* service agreement. Where a customer service agreement conforms to the *pro forma* service agreement (and the other provisions of the pipeline's tariff), the Commission's prior review and approval of (javaScript:Void(0)) (javaScript:Void(0)) (javaScript:Void(0))

Tab 500 - Transportation Rates
503 - Negotiated Rates

Alternative ratemaking policy statement. In 1996, the Commission issued a policy statement permitting negotiated rates, incentive rates and market-based rates. *Alternatives to Traditional Cost-of-service Ratemaking for Natural Gas Pipelines (/FERC-issuances/alternatives-to-traditional-cost-of-service-ratemaking-74-ferc-p61076-1996)*, 74 FERC ¶61,076 (1996).

Overview. Negotiated rates are established by mutual agreement between the pipeline and individual shippers. FERC entertains requests for negotiated rates on a case-by-case basis. Negotiated rates may exceed maximum applicable tariff rates and can deviate from the straight-fixed variable (SFV) rate design method. To be acceptable, a negotiated rate proposal must allow the customer to retain its ability to choose a cost-of-service based tariff rate (i.e., a recourse rate). Pipeline tariffs must indicate that the rate for the service will be either the rates stated in its existing rate schedule or a rate mutually agreed upon by the pipeline and the shipper.

Pipelines must negotiate rates in a manner that is not unduly discriminatory and that treats similarly situated shippers similarly. In addition, a pipeline proposing a negotiated rate must demonstrate that capacity is available at the recourse rate. According to the policy statement (/FERC-issuances/alternatives-to-traditional-cost-of-service-ratemaking-74-ferc-p61076-1996), a "shipper willing to pay only the recourse rate cannot lose access to capacity merely because someone else is willing to pay a negotiated rate."

Negotiated terms and conditions of service. Negotiated terms and conditions of service, as opposed to negotiated rates, cannot be pre-approved. However, the pipeline is permitted to file a non-conforming contract with the Commission for review. See ¶491: Material Deviations (/manuals/natural-gas-transportation-information-service/tab-400-general-terms-and-conditions/491-material-deviations). For orders reviewing clauses and provisions contained in negotiated rate agreements, see ¶504: Negotiated Rate Agreement Clauses (/manuals/natural-gas-transportation-information-service/tab-500-transportation-rates/504-negotiated-rate-agreement-clauses).

As it explained in Order No. 637 (/FERC-issuances/order-no-637-90-ferc-p61109-2000), FERC "generally considers negotiated terms and conditions to be related to operational conditions of transportation service. A negotiated rate would not include conditions or activities related to the transportation of gas on the pipeline, such as scheduling, imbalances or operational obligations, such as [operational flow orders]. By contrast, negotiated rate agreements can include the price,