

Commission found that this information was necessary so that the Commission could evaluate whether the transaction was unduly discriminatory.<sup>23</sup>

27. Subsequently, the Commission defined a material deviation as any provision of a service agreement that goes beyond the filling-in of the spaces in the form of service agreement with the appropriate information provided for in the tariff and that affects the substantive rights of the parties.<sup>24</sup> Therefore, if a negotiated rate agreement contains any such deviation from the form of service agreement, the pipeline must file the agreement for the Commission's review. The Commission will only accept negotiated rate agreements with such material deviations from the pipeline's form of service agreement if such deviations do not change the conditions under which service is provided and do not present a risk of undue discrimination.<sup>25</sup>

28. Many commenters assert that the Commission's filing requirements for negotiated rates provide sufficient information for the necessary transparency of negotiated transactions.<sup>26</sup> Duke Trading, WDG and NEG state that the current filing requirements permit the Commission and other interested parties to monitor the contracting activity of the pipelines for undue discrimination, and to allow market participants to undertake a full commercial analysis of each negotiated rate deal. El Paso asserts that there is no evidence to justify a change in the filing requirements, or that additional requirements are necessary for transparency. The KM Pipelines add that additional information may actually obscure the important terms of the agreement.

29. On the other hand, Calpine states that the filing requirements do not provide sufficient transparency of information for negotiated rate transactions and joins BP and EPSA in asserting that the lack of a consistent format complicates any assessment of the options available to a shipper when reviewing multiple pipeline filings and comparing the negotiated rates granted to other shippers. Mirant states that the current filing requirements are insufficient to ensure transparency and

states that the Commission should not permit the pipelines to file a mere contract summary because the summaries may fail to disclose all meaningful and negotiated contract terms. NGSa joins Mirant and requests that the Commission require pipelines to file both the negotiated rate contract and a tariff sheet describing the contract. NGSa states that there is too much risk that the pipeline could omit details of a transaction that shippers see as important, and without full disclosure of the contract, the Commission and shippers have only limited ability to monitor negotiated transactions.

30. NASUCA and BP state that negotiated rate transactions lack transparency because of their bilateral nature, despite the posting and filing requirements. NASUCA states that recourse shippers and regulatory agencies often lack access to essential information. BP states that, even when the contracts are filed, it is sometimes hard to determine what elements are negotiated.

#### *Discussion of Negotiated Rate Filing Requirements*

31. The Commission's experience with negotiated rate filings has shown that the filings on occasion lack the information necessary for the Commission's Staff and the pipelines' shippers to analyze the negotiated agreement. First, even where the agreement contains no deviation from the form of service agreement, the tariff sheet summary may not describe the primary rate formula or the other essential elements of the transaction in sufficient detail. Second, pipelines have sometimes failed to file a service agreement even though it contained a material deviation. Finally, and most importantly, where pipelines have filed service agreements with material deviations, the deviations have often not been clearly identified, requiring the Commission to carefully compare the negotiated rate agreement with the form of service agreement in order to determine how the two may differ. Indeed, on some occasions, parties have drafted the entire service agreement independently of the form of service agreement in the tariff. As a result, provisions may be worded differently from similar provisions in the form of service agreement, but it is not immediately apparent whether the parties intended the provisions to be substantively different. These circumstances hinder the Commission's ability to assess whether the transaction is unduly discriminatory as well as the assessment of the transaction by

shippers attempting to determine if they are similarly situated to the shipper in the negotiated transaction.<sup>27</sup>

32. The Commission will permit a pipeline filing a negotiated rate transaction that does not deviate from its *pro forma* service agreement to file a tariff sheet reflecting the terms of the agreement, together with a statement that the agreement conforms in all material respects with its *pro forma* service agreement.<sup>28</sup> However, pipelines are reminded that the tariff sheet summaries must fully describe the essential elements of the transaction, including the name of the shipper, the negotiated rate, the type of service, the receipt and delivery points applicable to the service and the volume of gas to be transported. Also, where the price term of the negotiated rate agreement is a formula, the formula should be fully set forth in the tariff sheet.<sup>29</sup> Pipelines are also reminded that, in order to file a tariff sheet summary, they must certify that the agreement contains no deviation from the form of service agreement that goes beyond filling in the blank spaces or that affects the substantive rights of the parties in any way. Since there would appear to be no reason for the parties to use language different from that in the form of service agreement other than to affect the substantive right of the parties, this effectively means that all language that is different from the form of service agreement should be filed with the Commission.

33. In addition, in order to provide greater transparency and to assist the Commission and interested parties in analyzing negotiated rate transactions, the Commission has determined that the form of service agreement must be used as a starting point in drafting any negotiated rate contract. Therefore, the Commission will henceforward require that a pipeline filing a contract proposing material changes from its form of service agreement must clearly

<sup>27</sup> See, e.g., Gulfstream Natural Gas System, L.L.C., 103 FERC ¶61,312 (2003); CenterPoint Energy Gas Transmission Co., 102 FERC ¶61,094 (2003) and CenterPoint Energy Gas Transmission Co., 102 FERC ¶61,059, *order on reh'g*, 103 FERC ¶61,228 (2003).

<sup>28</sup> This action merely emphasizes the Commission's current regulations which require that if the pipeline contends that its filing implements a negotiated contract that conforms to its form of service agreement in all material aspects, and therefore, it is not necessary to file the contract, such a filing will contain a statement that the pipeline's filing complies with the requirements of 18 CFR 154.1(d) (2003). Violation of this regulation may result in the rejection of the filing or suspension of the pipeline's negotiated rate authority.

<sup>29</sup> In the case of complicated formula, the pipeline may, as an alternative, simply file the agreement.

points, contract quantity and other specifics of each transaction as appropriate. 18 CFR § 154.110 (2003).

<sup>23</sup> 77 FERC ¶ 61,011 at 61,037 (1996).

<sup>24</sup> Columbia Gas Transmission Corp., 97 FERC ¶ 61,221 at 62,002 (2001).

<sup>25</sup> *Id.* at 62,001–02.

<sup>26</sup> See Comments of Northern Natural, Peoples, MidAmerican, Alliance, The Industrials, ProLiance, El Paso, EnCana, INGAA, Vector, CAPP, Williston Basin, Dominion, Williams, and Duke Transmission.