UNITED STATES OF AMERICA 105 FERC ¶ 61, 371
FEDERAL ENERGY REGULATORY COMMISSION

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

Nicole Gas Production, Ltd. Docket No. RP03-243-002

ORDER ON REHEARING AND CLARIFICATION

(Issued December 24, 2003)

1. On June 11, 2003, the Commission issued an order[1] addressing a Petition for Declaratory Order filed by Nicole Gas Production Ltd. (Nicole). In the June 11, 2003 Order, the Commission interpreted Section 26.9(b) of the General Terms and Conditions of Columbia Gas Transmission Corporation's (Columbia) tariff (GT&C) as requiring Columbia to install and pay for meters and meter stations to measure gas received into its system. On July 11, 2003, Columbia filed a request for clarification and rehearing of the June 11, 2003 Order.

2. For the reasons given below, we will grant clarification and deny rehearing.

I. Background

3. In the June 11, 2003 Order, the Commission addressed a petition for declaratory order regarding, inter alia, the issue of whether Columbia's tariff requires it to install and pay for meters and metering stations. Section 26.9(b) of the GT&C provides:

> Unless otherwise agreed to in writing, or unless gas is being received from an interstate pipeline company, which has an approved FERC Gas Tariff governing measurement of gas it delivers, Transporter will install, operate and maintain measuring stations and equipment by which the volume of natural gas or quantities of energy received by Transporter are determined.

However, Columbia claims that it was not so obligated, citing Section 26.9(m):

[1] Nicole Gas Production Ltd., 103 FERC ¶ 61,328 (2003).

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> (m) Nothing in this Section 26.9 shall be construed to require Transporter to construct any facilities.

In the order, the Commission found that Section 26.9 required Columbia to install meters at all receipt points unless there is an agreement to the contrary. The Commission rejected Columbia's interpretation of the tariff, finding that Section 26.9(m) only concerns the construction of taps, interconnects, or pipe facilities consistent with the tariff's construction policy. The Commission found that this interpretation gives meaning to both sections of the tariff. Accordingly, to have a clear and unambiguous tariff, the Commission directed Columbia to file revised tariff language to clarify that Columbia must install and pay for meters and metering stations if needed to measure gas receipts into its system. However, the Commission also stated that Columbia could file an alternate tariff proposal for Commission review if Columbia deemed the requirement as being too onerous.

4. On July 14, 2003, Columbia filed such an alternate tariff proposal, modifying Section 26 to provide that it is not required to construct, install, or pay for meters or for metering stations. The Commission accepted the revised tariff provision, to become effective August 15, 2003.[2]

5. Columbia requests that the Commission clarify that the June 11, 2003 Order, paragraph 26 in particular, offered no opinion as to whether Columbia and Nicole have an agreement that negates any obligation that Columbia may have to install meters for all of Nicole's unmetered wells. Further, Columbia seeks rehearing of the June 11, 2003 Order to the extent that it obligates Columbia to install meters and metering stations at its expense when a customer so requests.

II. Discussion

A. Clarification

6. Columbia requests clarification that the June 11, 2003 Order does not address the question of whether an agreement exists between Columbia and Nicole with respect to the obligation to install and pay for facilities. Columbia asserts that the Commission properly concluded that this is a question of fact best left to the courts, but nevertheless asks that the Commission clarify the point. Specifically, Columbia expresses concern regarding language in paragraph 26 in which the Commission states that "it does not appear that parties here claim such an agreement exists." Columbia asserts that this position is inconsistent with Columbia's position before the courts. Columbia argues that it has maintained that Nicole declined the opportunity to install meters and instead agreed

[2] Nicole Gas Production, Ltd., 104 FERC ¶ 61,193 (2003).

to the use of the one minute pick-up test and correction factor a the measurement method for its un-metered wells. We will grant Columbia's request for clarification.

B. Rehearing

7. In the June 11, 2003 Order, the Commission rejected Columbia's claim that the Commission lacked jurisdiction over meters located on gathering facilities, finding that alleged fact to be irrelevant as the tariff does not limit the obligation to install meters to transmission facilities and, in any event, Columbia's gathering services are jurisdictional as they are in connection with jurisdictional transmission services. On rehearing, Columbia reiterates its claim that the Commission lacked jurisdiction. Columbia argues that, while the Commission does have authority over Columbia's provision of gathering service, the Commission clearly does not have authority over gathering facilities and, therefore, cannot order a pipeline to construct gathering facilities. Presumably, Columbia characterizes a meter installed on its gathering system as a "gathering facility." The issue in this case is not whether the Commission could order Columbia to include such a meter installation requirement in its tariff; the only issue is whether its then-existing tariff obligated it to do so. Tariffs may contain provisions voluntarily filed by the pipeline, including filings made as part of settlements or other agreements, that the Commission may not have the authority to require the pipeline to agree to, but, once in the tariff, they become binding on the pipeline unless and until changed by a Commission order. Under the filed rate doctrine, the tariff on file with the Commission (including in this case the meter installation requirement) must be complied with by the pipeline and enforced by the Commission, until it is changed pursuant to Sections 4 or 5 of the NGA.[3] Moreover, like any additional costs incurred between rate cases, Columbia may reflect any additional metering capital costs in its next general NGA Section 4 rate case.

8. Columbia next argues that the Commission is incorrectly reading Section 26.9(b) and Section 26.9(m) of its tariff. Columbia argues that its tariff does not, by its terms or by Columbia's past conduct, require Columbia to install and pay for meters and measuring stations. In the June 11, 2003 Order, after concluding that the Commission's interpretation gave meaning to both Section 26.9(b) and (m), the Commission added that Columbia would not "construct" a meter (the term used in Section 26.9(m)), but, rather, would "install" a meter (the term used in Section 26.9(b)). Columbia asserts that it would be more logical to interpret Columbia's tariff in light of what it claims is its long-standing practice of interpreting "install," as used in Section 26.9(b), to be the same as "construct," as used in Section 26.9(m), and that meters are "facilities" as that term is used in Section 26.9(m). Accordingly, Columbia argues that is has consistently required its customers to pay for the construction or installation of any such meter "facilities," and that prior to the instant dispute with Nicole, Columbia's long-standing practices have not been the subject of serious or substantial disputes with its customers.

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[3] Arkansas Louisiana Gas Co., 453 U.S. 576 (1981).

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9. Columbia has failed to explain how its interpretation of the tariff does not effectively read Section 26.9(b) out of the tariff. Like a contract, a tariff must be interpreted to give meaning to all provisions of the tariff. The June 11, 2003 Order does exactly that and is based on giving meaning to the clear and unambiguous language of Section 26.9(b) which expressly obligates Columbia to install meters and metering stations unless otherwise agreed. Inserting the word "construct" for "install" in that section does not eliminate Columbia's obligation. The only ambiguity of the tariff is one created wholly by Columbia in claiming that Section 26.9(m) trumps Section 26.9(b) and negates it because Section 26.9(m) does not clearly exempt the meters and metering stations covered by Section 26.9(b) from its purview and only refers generally to "facilities." The Commission, relying on its experience and expertise, reasonably found that Section 26.9(m) simply provides that Columbia is not obligated to construct taps, interconnects or pipe facilities necessary to connect gas supply to its system consistent with its tariff's construction policy in Section 27 of the GT&C of Columbia's tariff.[4] Thus, for example, Columbia would have no obligation to construct a new line to connect a well to its existing system. With this interpretation of Section 26.9(m), coupled with the plain language of Section 26.9(b), the Commission gave meaning to both sections of the tariff. Columbia presents no argument that would compel the Commission to alter its reading of Columbia's tariff provisions.

10. Furthermore, Columbia's past practices are irrelevant to the interpretation of Section 26.9(b). When presented with a dispute concerning the interpretation of a tariff or contract, the Commission looks first to the tariff or contract itself, and only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence. Extrinsic evidence (which may include the parties' course of performance) is admissible to ascertain the intent of the parties when the intent has been imperfectly expressed in ambiguous contract language, but is not admissible either to contradict or alter express terms.[5] As noted earlier, Section 26.9(b) is clear and unambiguous in its requirement for Columbia to install meters and metering equipment and it is only Columbia that would inject ambiguity by its contradictory reading of Section 26.9(m). Therefore, it was appropriate for the Commission to interpret Section 26.9(b) of the tariff without resorting to any extrinsic evidence. In any event, Columbia's practices must follow its own tariff, which on its face in Section 26.9(b) requires it to install meters and metering stations. If Columbia wishes to enforce its claimed practices, they must be memorialized in tariff provisions filed with and approved by the Commission.

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[4] Section 27 of the GT&C of Columbia's tariff concerns the construction of lateral lines and other facilities to deliver gas to a shipper.

[5] Mid-Continent Area Power Pool, 92 FERC ¶ 61,229 at 61,755 (2000).

11. Columbia argues that the Commission's interpretation renders meaningless Section 26.13 of the tariff, which, it asserts, addresses "the measurement of gas deliveries in the absence of meters" because there would be no need for such a provision if Columbia were obligated to install meters. However, Columbia misreads Section 6.13. That section only establishes the right to use alternative procedures to estimate gas quality, pressure, or volumes when "the measuring equipment is out of service, or is found registering inaccurately." It does not, as Columbia claims, deal with a situation where there is no meter.[6]

12. Columbia argues that Section 26.9(b) does not state who must pay for the installation of facilities. It claims that, unless otherwise agreed, it is not obligated under that section to install meters at its expense. Like its claimed interpretation of Section 26.9(m), this interpretation effectively reads Section 26.9(b) out of the tariff because it would not be obligated to install a meter if the shipper did not agree to pay for it. An obligation to install equipment necessarily implies the obligation to pay for it in the absence of express language to the contrary.

13. Columbia also argues that requiring pipelines to pay for the installation will cause significant economic harm to Columbia and will result in economic waste. However, this argument has, since August 11, 2003, for the most part been rendered moot, since the Commission accepted revised tariff provisions prospectively eliminating Columbia's obligation to install meters and metering stations at its own cost, effective that date. Further, this argument is irrelevant to the issue of the case: what did Columbia's tariff require?

14. Columbia also argues that the June 11, 2003 Order is inconsistent with Commission orders that required Columbia to transition out of the gathering business. Specifically, Columbia states that the Commission directed Columbia to fully unbundle in Columbia Gas Transmission Corp.,[7] and that in Docket No. RP95-408, which was Columbia's next rate case, a settlement was approved by the Commission that provided for the full unbundling of Columbia's gathering costs from its transportation rates by January 31, 1999, and for the spin-down and spin-off of its gathering facilities.[8] Columbia argues that if it follows the June 11, 2003 Order's requirement that it characterizes as the obligation to construct gathering facilities, the cost of the new meters will be an investment in facilities functionalized as gathering.

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[6] It is for that reason that the Commission directed Columbia to revise Section 26.13 to also apply to situations where there is no meter. See 103 FERC ¶ 61,328 at P36.

[7] 64 FERC ¶ 61,060 (1993).

[8] Citing Docket No. RP95-408 Settlement, Stipulation II, Article III.

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15. Columbia's arguments in this regard are without merit. As stated above, the Commission is not requiring Columbia to invest in gathering facilities. The Commission required Columbia to comply with its own tariff, and to install meters or meter stations if requested by its customers to perform the jurisdictional function of measuring gas transported by Columbia to ensure proper billing for services actually performed. Moreover, even if one accepts its characterization, the June 11, 2003 Order does not preclude Columbia from spinning off or down any facilities. It simply provides that its then-existing tariff required it to install meters and meter stations on whatever facilities it still owns if needed to measure gas receipts or deliveries on its transmission system, unless agreed otherwise. Therefore, the order is not inconsistent with any previous Commission orders regarding Columbia's transition out of the gathering business.

16. Columbia also argues that the Commission's reliance on representations made in Columbia's fuel tracker proceedings is misplaced. In the June 11, 2003 Order, following its direction to Columbia regarding the installation of meters and meter stations, the Commission stated that this requirement is consistent with representations Columbia made and promised in its fuel tracker proceedings regarding its claimed program for installing meters to eliminate problems with lost and unaccounted for fuel.[9] Columbia concedes that the requirement to install meters is consistent with representations Columbia made in those proceedings. Nevertheless, Columbia argues that the factual situation in that fuel tracker case was different: the installation of custody transfer measurement facilities at points of interconnect with third parties, usually in connection with agreements for the sale of its former gathering facilities, as opposed to the instant case, where the meters at issue are "individual production" meters.

17. Although the Commission noted Columbia's promise to install meters in its June 11, 2003 Order, the Commission did not rely on these representations as a means of interpreting Columbia's tariff provisions. Regardless of any reference to the fuel tracker proceedings in the June 11, 2003 Order, the Commission found that Columbia was required to install meters and meter stations under Section 26.9(b) of its then-existing tariff. Moreover, it is, in fact, consistent with Columbia's representation in the report addressed in the cited order, that it would be installing "hundreds" of meters[10] as part of its efforts to lower its exceptionally high amounts of lost and unaccounted for gas, for it to install additional meters pursuant to Section 26.9(b). The Commission will reserve for its review of Columbia's fuel tracker rate filings what effect it should give to Columbia's newly-stated limitation on its promised actions.

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[9] Citing Columbia Gas Transmission Corp., 97 FERC ¶ 61,354 (2001).

[10] See Columbia Report filed October 31, 2001, in Docket No. RP01-262-002, at p. 5.

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18. Lastly, Columbia argues that the Commission erred in granting a petition for declaratory order filed by what it claims is a non-existent entity that does not have an effective service agreement with Columbia. Columbia asserts that the Commission noted in the June 11, 2003 Order that Nicole Energy Services, Inc., was dissolved in September, 2002, and states that Columbia had no service agreements with Nicole Energy Services, Inc., at the time of the filing of its petition, and does not currently have any such agreements.

19. This case arose from the filing of a petition for declaratory order which alerted the Commission to disputes over and possible infirmities of a jurisdictional tariff which applies to all customers of the pipeline. The Commission has an obligation under the NGA to ensure that all tariff provisions are just and reasonable and that they are complied with. It also has an obligation ensure that tariffs clearly state the rights and obligations of the pipeline and its customers. Consistent with those mandates, the Commission interpreted the subject generally-applicable tariff provisions. Accordingly, it is not important at this juncture for purposes of the Commission's regulation under the NGA whether the entity filing the original petition still exists or, indeed, ever existed. In any event, Columbia's representations regarding the monetary cost of installing meters for Nicole pursuant to the directives of the June 11, 2003 Order belies its claim that the petitioner did not exist and/or had no interest in the proceeding. Rehearing is denied.

The Commission orders:

(A) The request clarification of the June 11, 2003 Order is granted.

(B) The request for rehearing of the June 11, 2003 Order is denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.