125 FERC ¶ 61,396
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Texas Eastern Transmission, LP   Docket No. RP09-70-000

ORDER ACCEPTING REVISED TARIFF SUBJECT TO CONDITIONS

(Issued December 31, 2008)

1. On November 13, 2008, Texas Eastern Transmission, LP (Texas Eastern) filed tariff sheets[1] proposing numerous modifications and changes, primarily to section 3.14 of its General Terms & Conditions (GT&C) concerning the procedures for shippers to release their capacity. Texas Eastern states that the main purpose of these changes is to comply with the capacity release requirements promulgated by Order No. 712.[2] In addition, Texas Eastern states that it is proposing additional modifications and clarifications as a result of a review of its LINK® system. The tariff sheets are accepted, subject to the conditions discussed below, effective January 1, 2009 as requested.

Summary of the Proposal

2. Texas Eastern proposes to revise its GT&C mainly to comply with Order No. 712. Order No. 712 permits market-based pricing for short-term capacity releases and facilitates asset management arrangements (AMAs) by relaxing the Commission's prohibition on tying and on its bidding requirements for certain capacity releases. Texas Eastern proposes several changes to GT&C section 3.14 in order to provide that releases of one-year or less are not subject to the rate cap. In addition, proposed GT&C section 3.14(H)(3) states that such short-term releases will, therefore, not be subject to refund. Texas Eastern also states that it is complying with the requirement to exempt releases to asset management arrangements from the bidding process. In order to identify these

[1] *See* Appendix.

[2] *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37,058 (June 30, 2008), FERC Stats. & Regs. ¶ 31,271 (2008), *order on reh'g*, Order No. 712-A, 73 Fed. Reg. 72,692 (December 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008).

releases, the proposed tariff requires the releasing customer specify whether the proposed release involves an AMA or a state-mandated retail access program, and if so, certain details about the release.

3. Texas Eastern proposes several other modifications and clarifications that it does not directly attribute to Order No. 712, but rather to its goal of improving flexibility and opportunities for releasing and replacement shippers. For example, Texas Eastern proposed several changes to its tariff provisions concerning capacity release bid evaluation methods. Texas Eastern makes several revisions in order to comply with North American Energy Standards Board (NAESB) Wholesale Gas Quadrant (WGQ) Standards, such as allowing the releasing customer to include in its Customer Notice an election not to reveal any minimum conditions to any party other than Texas Eastern and describing the rights and methods for the reput of capacity by the releasing shipper to the replacement shipper that the releasing shipper can specify in its Customer Notice, as called for in NAESB WGQ Standard No. 5.4.7. Finally, Texas Eastern standardizes several phrases, so that its use of terminology is consistent throughout its tariff.

Notice of Filing

4. Public notice of Texas Eastern's filing was issued on November 17, 2008. Interventions and protests were due November 25, 2008, as provided in section 154.210 of the Commission's regulations.[3] Pursuant to Rule 214,[4] all timely filed motions to intervene and any motions to intervene out-of-time before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. FPL Energy, LLC (FPL) filed comments. Indicated Shippers[5] filed a limited protest. The National Grid Companies (National Grid)[6] filed a request for clarification. Piedmont Natural Gas Company, Inc. (Piedmont) filed comments and a request for technical conference. Atmos Energy

[3] 18 C.F.R. § 154.210 (2008).

[4] 18 C.F.R. § 385.214 (2008).

[5] In this proceeding, the Indicated Shippers are BP America Production Company, BP Energy Company, and Hess Corporation.

[6] The National Grid Companies are The Brooklyn Union Gas Company, KeySpan Gas East Corporation, Boston Gas Company, Colonial Gas Company, Essex Gas Company, EnergyNorth Natural Gas Inc., Niagara Mohawk Power Corporation, and The Narragansett Electric Company.

Corporation (Atmos) filed comments and a request for technical conference one day out-of-time. On December 9, 2008, Texas Eastern filed an answer to all respondents. Pursuant to Rule 213,[7] we grant Texas Eastern's request for leave to answer.

Discussion

5. For the reasons discussed below, the Commission finds that Texas Eastern's proposed revisions to section 3.14 of its GT&C are generally consistent with Order No. 712 and the Commission's capacity releases policies. Accordingly, the Commission accepts Texas Eastern's filing subject to conditions.

Net Present Value Bid Evaluation Method

6. Texas Eastern proposes several changes to the provisions of section 3.14 concerning the evaluation of bids for released capacity. Revised section 3.14(D)(1)(i) requires the releasing shipper to specify one of three bid evaluation methods in its notice of a release subject to bidding. These include (1) highest rate, (2) net revenue or present value, and (3) an alternative, not unduly discriminatory method chosen by the releasing shipper. Revised section 3.14(E)(3) provides that, if the releasing shipper specifies present value as the bid evaluation method, the pipeline shall use a discount rate of 10 percent in calculating the present value of each bid.[8]

7. FPL opposes Texas Eastern's proposal to use a 10 percent discount rate under the present value bid evaluation method.[9] FPL urges the Commission to instead require that the discount rate track the interest rate described by section 154.501(d) of the Commission's regulations. FPL states that Texas Eastern has made no case in support of its proposal, and further notes that Texas Eastern would retain the Commission interest rate as the discount factor in evaluating primary requests for transportation service.[10] FPL asserts that replacement shippers bidding on packages of released capacity incorporate the actual, current time value of money in establishing their bids by netting the current value of future rates to be paid against the current value of future streams of benefits obtained through the use of the capacity. FPL states that a bid evaluation methodology that ignores the market's perception of the time value of money can result

---

[7] *See* 18 C.F.R. §§ 385.213(a)(2), (a)(3) (2008).

[8] *See* proposed GT&C section 3.14(E)(3), Texas Eastern Tariff, Seventh Revised Sheet No. 534D; cited in Texas Eastern November 13, 2008 Transmittal at 7.

[9] FPL November 25, 2008 Comments at 3.

[10] *Id.* at 5 (citing Texas Eastern Tariff, GT&C section 3.11(a)(1)).

in inefficient capacity awards. FPL asserts that Texas Eastern's proposal would "limit the possibility of arbitrage between capacity release and new pipeline capacity additions."[11]

8. In response to FPL, "Texas Eastern rejects any notion that use of the FERC Interest Rate results in a more fair or appropriate outcome in a [net present value] process."[12] Texas Eastern further contends that the Commission has approved fixed discount rates in the evaluation of net present value bids as just and reasonable.[13]

9. The Commission accepts Texas Eastern's revised tariff provisions concerning the evaluation methods for choosing the best bid for a biddable capacity release. Consistent with Commission policy, the revised tariff language permits releasing shippers to choose among several specified bid evaluation methods, including a net present value method using 10 percent discount rate. In addition, revised section 3.14(D)(1)(i) permits the releasing shipper to choose "an alternative Customer defined bid evaluation method." That section permits the releasing shipper to specify in its notice of the release that bids will be evaluated based on net present value using a discount rate other than 10 percent, for example the Commission interest rate FPL supports. In short, the ten percent discount rate in the proposed tariff is merely a default that any releasing shipper can override. Because the tariff discount rate is a readily overridden default, it is just and reasonable for Texas Eastern to choose a fixed number rather than constructing a more complex or nuanced default scheme.[14]

---

[11] *Id*. at 6.

[12] Texas Eastern December 9, 2008 Answer at 10.

[13] *Id*.

[14] *See Algonquin Gas Transmission, LLC*, 120 FERC ¶ 61,072, at P 61 (2007), where the Commission accepted a pipeline's proposal to modify the net present value method it used in connection with the sale of its own capacity, without making a similar change in the default net present value method provided in its tariff for capacity release. The Commission pointed out that the pipeline's tariff permitted releasing shippers to specify their own bid evaluation methods, which could include the same net present method used by the pipeline. *See* also 18 C.F.R. §284.8(b) (2008) (Requiring pipelines to let shippers release their capacity "without restriction on the terms or conditions of the release.").

No-Refund Provision

10. Texas Eastern proposes various tariff revisions to implement Order No. 712's removal of the price cap for short term releases of one year or less. These changes include adding a GT&C section 3.14(H)(3), which would deem the rate paid by a replacement shipper for a short-term release to be a final rate and not subject to refund.[15]

11. Indicated Shippers protest, asserting that a replacement shipper paying a rate equal to or less than the applicable maximum rate for a short-term release should be eligible for refunds, where the pipeline's maximum rate is in effect subject to refund and the Commission requires refunds. Indicated Shippers assert that Order No. 712, unlike Order No. 637,[16] did not address whether rates paid by replacement shippers for short-term releases would be treated as final rates not subject to refund. Indicated Shippers state that it would be unduly discriminatory to provide the refund to the releasing shipper rather than to the replacement shipper. Indicated Shippers state that if the Commission allows this part of Texas Eastern's proposal, it should consider this policy issue as part of a generic proceeding. Alternatively, Texas Eastern should clarify that releasing shippers will receive any refunds related to the Commission finding the applicable maximum rate to be unjust and unreasonable even if the shipper releases capacity for a short term.

12. Texas Eastern characterizes the protest of Indicated Shippers as a collateral attack on Order No. 712. In removing the rate cap on short-term capacity release, Texas Eastern contends, Order No. 712 also removed the replacement shipper's entitlement to refunds, because replacement shippers "could not have been paying a rate ultimately determined to be above a just and reasonable cost-based maximum rate."[17]

13. Indicated Shippers misunderstand Order No. 712. In Order No. 712, the Commission eliminated the price ceiling for short-term capacity release transactions of one year or less in order to allow the prices of short-term capacity release transactions to

---

[15] Proposed GT&C section 3.14(H)(3), Texas Eastern Tariff, Fifth Revised Sheet No. 538.

[16] *See Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services,* Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

[17] Texas Eastern December 9, 2008 Answer at 6.

reflect short-term variations in the market value of that capacity. Accordingly, a capacity release transaction of one year or less has a market-based rate, instead of the regulated cost-based rate. Because the pipeline's maximum rates do not apply to short-term capacity release transactions, replacement shippers are not entitled to any refunds when the Commission finds that the maximum rates proposed by a pipeline in a section 4 rate case are too high.[18] As Order No. 712 stated, short-term capacity release rates will be presumed just and reasonable, and treated similarly to how the Commission treats market-based or negotiated rates.[19] Therefore, Texas Eastern's proposal to deem rates paid by replacement shippers for terms of one year or less to be final and not subject to refund is consistent with Order No. 712. However, a releasing shipper paying a recourse rate higher than the maximum just and reasonable rate determined in a rate case would be eligible for refunds, because Order No. 712 did not remove any maximum rates for the pipeline's sale of its own capacity.

Storage Releases

14. GT&C section 3.14(G)(4)(a) permits a releasing shipper to transfer its storage inventory to the replacement shipper after the award of capacity to the replacement shipper. GT&C section 3.14(G)(4)(c) requires a replacement shipper to withdraw its storage inventory by the end of a release. That section also permits the replacement shipper to transfer its storage inventory to another storage service customer in lieu of withdrawing that inventory. In the instant filing, Texas Eastern proposes to modify those sections to specify the information which the releasing and replacement shippers must submit to the pipeline in order to effectuate these transfers of storage inventory. In addition, Texas Eastern proposes to revise section 3.14(G)(4)(c) to permit a replacement shipper to transfer storage inventory balances among its own open-access storage service agreements upon termination of the release transaction, provided that the terms of the agreements involved in the transfer do not overlap.[20] Finally, Texas Eastern proposes to add a new section 3.14(G)(4)(d) to provide a replacement shipper the same options for the transfer of storage capacity when the releasing shipper recalls its capacity as upon the termination of the release.

15. National Grid filed a request for clarification, proposing changes to Texas Eastern's proposed language in GT&C section 3.14(G)(4). National Grid notes that Order No. 712 clarified that the prohibition on tying storage capacity to extraneous

---

[18] *See Wyoming Interstate Company, Ltd.*, 92 FERC ¶ 61,198 (2000).

[19] Order No. 712 at P 30-31.

[20] *See* proposed GT&C section 3.14(G)(4), Texas Eastern Tariff, Third Revised Sheet No. 537A; cited in Texas Eastern November 13, 2008 Transmittal at 9.

conditions does not prohibit a releasing customer from including conditions in a release concerning the sale and/or repurchase of gas in storage inventory, even outside the AMA context. National Grid expresses concern that, as currently worded, GT&C section 3.14(G)(4) fails to recognize that the terms of the releasing customer's offer could limit the replacement customer's options to dispose of gas in inventory at the conclusion of a capacity release or at the time a recall right is exercised. National Grid requests that Texas Eastern's proposed GT&C sections 3.14(G)(4)(c) and (d) be clarified to expressly limit the replacement customer's option of transferring the gas balances to another storage customer or contract of its own, where the replacement customer has undertaken an obligation set forth in the release offer to return such capacity to the releasing customer with a specified amount of gas in storage. Specifically, National Grid seeks to insert the phrase "except as otherwise specified in the Releasing Customer's offer to release storage capacity" into each paragraph.[21]

16. In its answer, Texas Eastern accepts National Grid's request for clarification regarding the ability of a releasing shipper to tie obligations concerning storage inventory with the release of storage capacity. It agrees to revise GT&C sections 3.14(G)(4)(c) and (d) in the manner National Grid requests.[22]

17. In Order No. 712, the Commission said it would "allow a shipper that releases storage capacity to require the replacement shipper to (1) take title to any gas in the released storage capacity at the time the release takes effect and/or (2) return the storage capacity to the releasing shipper at the end of the release with a specified amount of gas in storage."[23] GT&C section 3.14(D)(1)(m) of Texas Eastern's tariff permits a releasing shipper to include in its notice of a release "any additional terms and conditions of releases that are objective and non-discriminatory." Consistent with Order No. 712, this section permits a releasing shipper to include conditions in its release requiring the replacement shipper to take title to any gas in the released storage capacity at the time the release takes effect and/or return the storage capacity with gas in storage. Texas Eastern's agreement in its answer to revise proposed sections 3.14(G)(4)(c) and (d) will ensure that those sections do not improperly limit the releasing shippers' right to impose such conditions. Accordingly, subject to the condition that Texas Eastern files updated tariff sheets as it has agreed within 20 days of this order, we find the proposed GT&C section 3.14(G)(4) to be consistent with Order No. 712.

---

[21] National Grid November 25, 2008 Comments at 5.

[22] Texas Eastern December 9, 2008 Answer at 11.

[23] Order No. 712 at P 190.

Requests for Technical Conference

18. Piedmont and Atmos separately file similar requests for a technical conference. Piedmont and Atmos state that the breadth of the proposed changes, and lack of detailed explanation in Texas Eastern's transmittal letter, make it unclear how customer rights are being affected by the proposal, and may place customers at risk for the pipeline's subsequent interpretation. Piedmont and Atmos request that a technical conference be convened to resolve any such confusion. For example, Atmos states that it is unclear whether and to what extent Texas Eastern will permit a releasing shipper's asset manager to pay the same discounted usage and fuel rates as the pipeline has provided to the releasing shipper. Atmos suggests that Texas Eastern should clarify (or propose) a policy allowing the asset manager/replacement shipper to receive the same discounted usage and fuel rates applicable to the releasing shipper, particularly since a general refusal to allow "pass-through" of such discounts would impede asset management transactions, contradicting Order Nos. 712 and 712-A.

19. Texas Eastern asks the Commission to reject the request for a technical conference by Atmos and Piedmont. The Commission is not obligated to hold a technical conference, Texas Eastern argues, unless "material issues of fact are in dispute that cannot be resolved on the basis of the written record."[24] Atmos and Piedmont fail to raise any factual dispute. Further, the request fails to specify any issues at all, except for how the tariff addresses pass-through of discounted commodity and fuel rates. Texas Eastern replies that its proposed tariff does not affect this issue, nor does it believe that Order No. 712 mandated any changes. Texas Eastern will therefore continue to "deal with the issue of passing-through of discounted or negotiated commodity and fuel rates to replacement customers on a case-by-case basis," which, it states, conforms to "[t]he Commission's long-standing policy."[25]

20. The Commission has held that the usage charge to be paid by the replacement shipper is a matter between the replacement shipper and the pipeline, and the releasing shipper cannot bind the pipeline to accept any particular usage charge from the replacement shipper. Therefore, the pipeline "generally should not be required to give the replacement shipper the same discount" of the usage charge as it gave the releasing

---

[24] Texas Eastern December 9, 2008 Answer at 12 (quoting *El Paso Natural Gas Co.*, 98 FERC ¶ 61,096 (2002)).

[25] *Id*. at 14 (citing *Gulf South Pipeline Company, LP*, unpublished letter order, Docket No. RP96-320-095 (Sept. 24, 2008)).

shipper.[26] In *El Paso*,[27] the Commission explained that "the discount in the usage charge negotiated between the releasing shipper and El Paso is related only to the contract between the releasing shipper and the pipeline and to the transportation services actually performed by El Paso for the releasing shipper under that contract and is not relevant to other contracts and services to other shippers, including replacement shippers." While pipelines are not subject to a blanket requirement always to give replacement shippers the same usage charge discounts as to the releasing shipper, in determining whether to grant a discount to a replacement shipper pipelines are subject to the Commission's general policy that selective discounts must be given on a not unduly discriminatory basis to similarly situated shippers.[28]

21. Texas Eastern is correct that Order No. 712 did not modify the Commission's existing policy concerning the pipeline's offering of usage charge discounts to replacement shippers. However, Order No. 712's modification of the Commission's regulations to facilitate AMAs does raise the issues of (1) whether the Commission should find that it would be unduly discriminatory for a pipeline to deny an asset manager replacement shipper the same discount of its usage charge as provided to the releasing shipper, at least during those periods when the asset manager is using the released capacity to satisfy the delivery or purchase obligation contained in the release to the asset manager, [29] and (2) if so, whether Texas Eastern should be required to include in its tariff a provision concerning the circumstances under which it would provide similar usage charge discounts to an asset manager replacement shipper, or (3) whether the circumstances of individual releases to asset managers are sufficiently case-specific that pipelines should be allowed to decide whether to grant a usage charge discount to the asset manager/replacement shipper on a case-by-case basis, subject to a general requirement of no undue discrimination. Before deciding these issues, the Commission will give the parties an opportunity to comment on these issues. In its comments, Texas Eastern should provide a general description of how it intends to determine whether to grant usage charge discounts to asset manager replacement shippers and what factors it will consider. Initial comments from all parties will be due 20 days from the date of this

---

[26] *El Paso Natural Gas Co.*, 61 FERC ¶ 61,333, at 62,309 (1992) (*El Paso*).

[27] *Id.* at 62,309-10.

[28] *See Williston Basin Interstate Pipeline Co.*, 85 FERC ¶ 61, 247, at 62,028-30 (1998), and cases cited, for a discussion of this policy.

[29] *See* § 284.8(h)(3) of the Commission's regulations, as revised by Order No. 712-A, defining a release to an asset manager.

order and reply comments will be due 30 days from the date of this order. The Commission finds that the parties have not shown the need for further procedures to address any other issues in this proceeding.

Drafting Errors

22. Two intervenors flag possible errors in the proposed tariff sheets. National Grid requests that Texas Eastern correct a presumed inadvertent error in GT&C section 3.14(D)(1)(b), where the word "firm" should be replaced with "non-recallable." This correction would make section 3.14(D)(1)(b) consistent with section 3.14(A), where Texas Eastern did make this change in order "to provide a clear description of the options available to the Releasing Customer."[30] Indicated Shippers suggest the word "effective" has been erroneously omitted from GT&C section 3.14(H)(3).

23. Texas Eastern, in its answer, acknowledges these errors and agrees to file substitute tariff sheets to correct them. We so require as a condition of our acceptance of the revised tariff sheets.

Compliance with Order No. 712-A

24. Texas Eastern made the instant filing after the issuance of Order No. 712, but before the issuance of Order No. 712-A. Among other things, Order No. 712-A revised the regulations adopted by Order No. 712 so that the lifting of the price cap for short-term releases only applies to releases that take effect within one year of the date the pipeline is notified of the release. Texas Eastern's proposed tariff revisions in the instant filing to implement Order No. 712 do not reflect the Order No. 712-A limitation on the lifting of the price cap for short-term releases. Accordingly, in its filing to comply with this order, Texas Eastern must revise GT&C section 3.14 as necessary to comply with this aspect of Order No. 712-A. In addition, it may include in that compliance filing any other tariff revisions it finds necessary to comply with Order No. 712-A.

The Commission orders:

(A) The Commission accepts the tariff sheets listed in the Appendix to this order to be effective on January 1, 2009, subject to Texas Eastern filing revised tariff sheets as discussed above within 20 days of the date of this order.

---

[30] Texas Eastern November 13, 2008 Transmittal at 2.

(B) Initial comments on the issue of pass through of a releasing shipper's usage charge discounts to its asset manager replacement shipper are due 20 days from the date of this order. Reply comments are due 30 days from the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

Texas Eastern Transmission, LP
FERC Gas Tariff, Seventh Revised Volume No. 1
Tariff Sheets to be Effective January 1, 2009

Second Revised Sheet No. 380
Second Revised Sheet No. 390
Original Sheet No. 390A
Second Revised Sheet No. 398
Seventh Revised Sheet No. 529
Third Revised Sheet No. 530
Original Sheet No. 530A
Fifth Revised Sheet No. 531
Original Sheet No. 531A
Fifth Revised Sheet No. 532
Original Sheet No. 532A
Sixth Revised Sheet No. 533
Second Revised Sheet No. 534A
First Revised Sheet No. 534C
Original Sheet No. 534D
Fourth Revised Sheet No. 535
Third Revised Sheet No. 536
Fourth Revised Sheet No. 537
Original Sheet No. 537.01
Third Revised Sheet No. 537A
Original Sheet No. 537B
Fifth Revised Sheet No. 538
Third Revised Sheet No. 539
First Revised Sheet No. 539B
Fifth Revised Sheet No. 643
Sixth Revised Sheet No. 645