127 FERC ¶ 61,083
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 24, 2009

In Reply Refer To:
Dominion Transmission, Inc.
Docket No. RP09-277-000

Dominion Transmission, Inc.
701 East Cary Street, 5th Floor
Richmond, VA 23219

Attention: Daniel L. Verdun
Manager - Regulation

Dear Mr. Verdun:

1. On January 26, 2009, Dominion Transmission, Inc. (Dominion Transmission) filed tariff sheets[1] proposing modifications to its FERC Gas Tariff, Third Revised Volume No. 1, to comply with the capacity release requirements promulgated by Order No. 712.[2] The tariff sheets listed in the Appendix to this order are accepted, subject to the conditions discussed below, effective March 1, 2009.

2. In Order Nos. 712 and 712-A, the Commission removed the maximum rate ceiling on capacity releases of one year or less that take effect within one year after the pipeline is notified of the release. The Commission also modified its regulations in order to facilitate asset management arrangements (AMAs) by relaxing the Commission's prohibition on tying and on its bidding requirements for certain capacity releases. The Commission further clarified that its prohibition on tying does not apply to conditions associated with gas inventory held in storage for releases of firm storage capacity.

[1] The tariff sheets are listed in the Appendix to this order.

[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).

Finally, the Commission waived its prohibition on tying and bidding requirements for capacity releases made as part of a state-approved retail access program.

3. In its filing, Dominion Transmission proposes to modify Section 23 of its General Terms and Conditions (GT&C) to comply with Order Nos. 712 and 712-A. Specifically, Dominion Transmission proposes to modify its tariff to (1) reflect the permanent removal of the rate ceiling on capacity release transactions having a term of one year or less; (2) facilitate retail open access programs by exempting releases made under state-approved retail access programs from the prohibition on tying and from bidding requirements; and (3) facilitate the use of asset management arrangements (AMAs). Dominion Transmission has also made several minor clarifying edits to its tariff.

4. Notice of Dominion Transmission's filing was issued on January 29, 2009. Interventions and protests were due February 9, 2009, pursuant to § 154.210 of the Commission's regulations.[3] Comments were timely filed by Nisource Distribution Companies (Nisource)[4] and Atmos Energy Corporation (Atmos). Limited Protests were timely filed by Hess Corporation (Hess) and the Dominion LDCs.[5] Out-of-time interventions with comments were filed by the Interstate Natural Gas Association of America (INGAA), Sequent Energy Management, L.P., the American Gas Association (AGA), BP Energy Company and BP America Production Company, and Bay State Gas Company. Dominion Transmission filed a motion for leave to answer, and an answer to the comments and protests.

5. Pursuant to Rule 214,[6] all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[7] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Dominion Transmission's answer because it has provided information that assisted us in our decision-making process.

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[3] 18 C.F.R. § 154.210 (2008).

[4] The exact legal name of each of the Nisource Distribution Companies is Columbia Gas of Pennsylvania, Inc. and Columbia Gas of Virginia, Inc.

[5] The Dominion LDCs consists of The East Ohio Gas Company d/b/a Dominion East Ohio, The Peoples Natural Gas Company d/b/a Dominion Peoples, and Hope Gas Inc. d/b/a Dominion Hope.

[6] 18 C.F.R. § 385.214 (2008).

[7] 18 C.F.R. § 385.213(a)(2) (2008).

6. The Commission finds that Dominion Transmission's proposed revised tariff sheets are generally consistent with the Commission's capacity release policies and Order Nos. 712 and 712-A and are otherwise just and reasonable. Accordingly, the Commission accepts Dominion Transmission's filing, effective March 1, 2009, subject to conditions as discussed below.

7. In its comments, Atmos requests that the Commission require Dominion Transmission to include provisions allowing the "flow-through" of discounts from releasing shippers to their asset managers. Atmos suggests that Dominion Transmission should clarify (or propose) a policy with regard to discounted commodity and fuel rates applicable to a qualified asset management arrangement. Atmos states that refusal to allow "flow-through" of discounted commodity and fuel rates would impede asset management transactions by increasing the cost of asset management arrangements involving discounted capacity, contrary to Order Nos. 712 and 712-A. Similarly, the Dominion LDCs urge the Commission to condition the acceptance of Dominion Transmission's tariff sheets on Dominion Transmission making any required conforming tariff changes that may result from the Commission's ruling on the discount "pass-through" issue as discussed in *Texas Eastern*.[8]

8. In its comments, INGAA argues that the Commission should not decide the issue of an asset manager's right to the same discounted or negotiated usage or fuel charge as the releasing shipper in the individual Order No. 712 compliance proceedings. Rather, INGAA asserts that the Commission should address these issues in a generic proceeding because they are of industry-wide scope and have been raised in numerous Order No. 712 compliance filings.

9. In its comments, AGA urges the Commission to act expeditiously to resolve these issues, regardless of whether it proceeds through a generic rulemaking or case-by-case adjudication, because continued regulatory uncertainty could discourage parties from entering into AMAs. AGA contends that releasing shippers should be permitted to pass through discounted or negotiated usage and fuel charges to asset managers or retail choice marketers, consistent with goal of facilitating AMAs and retail choice programs.

10. In its answer, Dominion Transmission argues that Order No. 712 did not address the flow-through of discounted rates from the releasing shipper to an asset manager and thus, Atmos' proposal is outside the scope of this proceeding.

11. The issue of whether a pipeline must provide an asset manager/replacement shipper the same discounted or negotiated usage and fuel rates as it has given the releasing shipper only arises to the extent that the pipeline has provided such discounts or

[8] *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396 (2008) (*Texas Eastern*).

negotiated rates to the releasing shipper. The Commission does not permit pipelines to offer discounts below their minimum rates, which are based on the variable costs allocated to the service to which the rate applies.[9] Therefore, a pipeline such as Dominion Transmission using a Straight-Fixed Variable (SFV) rate design cannot discount its usage charges, because those usage charges only contain variable costs. The Commission has also held that pipelines may not discount their fuel retention rates, because fuel and lost and unaccounted for (LAUF) gas are variable costs.[10] However, pipelines with negotiated rate authority may enter into negotiated rate agreements which are not bound by their tariff maximum and minimum rates. Dominion Transmission has negotiated rate authority, and thus does have authority to enter into negotiated rate agreements providing for fuel retention rates (and usage charges) that vary from those in its tariff.[11]

12. 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 that it gave the releasing shipper.[12] In *El Paso*, 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.[13]

13. While pipelines are not subject to a blanket requirement that they must give replacement shippers the same usage charge discounts (or negotiated usage and fuel rates) given to the releasing shipper, pipelines are subject to the Commission's general policy that selective discounts must be given on a not unduly discriminatory basis to

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[9] 18 C.F.R. § 284.10(c)(4)(ii) and (5)(ii)(A) (2008).

[10] *Mississippi River Transmission Corp.*, 98 FERC ¶ 61,119 (2002).

[11] Dominion Transmission, Inc., FERC Gas Tariff, Third Revised Volume No. 1, Applicable Rates Sheet Nos. 31-99.

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

[13] *Id.*

similarly situated shippers.[14] These same policies apply to negotiated usage and fuel charges.

14. Order No. 712 did not modify the Commission's existing policy concerning the pipeline's offering usage charge discounts to replacement shippers.[15] Nor did Order No. 712 address any issue concerning the offering of negotiated usage and fuel charges to replacement shippers. However, Order No. 712's modification of the Commission's regulations to facilitate AMAs does raise the following issues in this proceeding:

> (1) whether it would be unduly discriminatory for Dominion Transmission to deny an asset manager/replacement shipper the same negotiated usage and fuel and LAUF charge that was provided to the releasing shipper, at least during 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/ replacement shipper.[16]
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> (2) if a negotiated rate agreement between Dominion Transmission and the releasing shipper provides that the negotiated rate is only applicable at certain specified receipt or delivery points as permitted by Commission policy,[17] whether the asset manager/replacement shipper's use of those points should be considered to be within the usage contemplated by Dominion Transmission when it granted the negotiated rate to the releasing shipper? Similarly, whether Dominion Transmission should be required to offer the same negotiated rate to the asset manager/replacement shipper at those points, but not at any other point;
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> (3) whether Dominion Transmission should be required to include in its tariff a provision concerning the circumstances under which it would provide similar negotiated usage and fuel and LAUF charges to an asset manager/replacement shipper; or
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> (4) whether the circumstances of individual releases to asset managers are sufficiently case-specific that pipelines should be allowed to decide whether to

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

[15] *Texas Eastern* at P 21 (2008).

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

[17] *Williston Basin Interstate Pipeline Co.*, 110 FERC ¶ 61,210 at P 5 and 22, *reh'g denied*, 112 FERC ¶ 61,038 at P 19 (2005).

grant negotiated usage and fuel and LAUF charges to the asset manager/replacement shipper on a case-by-case basis, subject to a general requirement of no undue discrimination.

15. Before deciding these issues, the Commission requires additional information from Dominion Transmission, and will give the parties an opportunity to provide supplemental comments. In this regard, the Commission directs Dominion Transmission to file the following information, within 30 days of the date of this order:

(1) how many of Dominion Transmission's existing shipper contracts include negotiated usage and fuel rates,

(2) how many of any such contracts limit the negotiated rate to specific points,

(3) a general description of how Dominion Transmission intends to determine whether to grant negotiated usage and fuel charges to asset manager/replacement shippers, and

(4) what factors it will consider in determining whether to grant such negotiated rates.

Other parties may file comments within 20 days of the date of Dominion Transmission's filing.

16. With respect to the request by INGAA and Dominion Transmission that the Commission pursue these issues in a generic proceeding, the Commission will consider the need for such a proceeding after analyzing the parties' responses to the above request for information and comments concerning the specific circumstances on Dominion Transmission's system.

17. In its compliance filing, Dominion Transmission proposes to revise section 23.4.B.4 of its GT&C to provide that the rate paid by the replacement shipper in a capacity release not subject to price cap will be deemed a final rate and will not be subject to refunds.

18. In its comments, Nisource, joined by Bay State, urges the Commission to clarify Dominion Transmission's proposed tariff language to avoid any suggestion that releasing shippers are not entitled to refunds in situations where the capacity has been released to a replacement shipper for more than the maximum rate.

19. In its answer, Dominion Transmission states that its proposed tariff language at issue addresses only replacement customers. Dominion Transmission further states that it has not altered its refund obligations to releasing customers in any way and therefore no change in the filed tariff language would be appropriate.

20. In *Texas Eastern Transmission, LP*,[18] the Commission found that it was consistent with Order No. 712 to deem rates paid by replacement shippers for terms of one year or less to be final and not subject to refund.[19] However, the Commission also stated that 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.[20] Therefore, the refunds must be paid by the pipeline to the releasing shipper.

21. The Commission finds that the discussion in *Texas Eastern* provides sufficient guidance on this issue, without the need for Dominion Transmission to revise its tariff in the manner requested by Nisource and Bay State.

22. The Dominion LDCs and Hess both urge the Commission require Dominion Transmission to modify its filing to provide that state retail marketer replacement shippers obtaining capacity on a short-term basis as part of a state-mandated retail unbundling would be entitled to any refunds that would be otherwise ordered to the releasing shipper. Hess states that not requiring pipelines to provide refunds to short-term state retail marketer replacement shippers will have negative consequences on the energy market and on gas consumers by disadvantaging the state retail marketer replacement shipper against the releasing local distribution company (LDC).

23. Dominion Transmission answers that Hess is advocating a change in Commission policy. Dominion Transmission states that the rates paid by short-term replacement customers, including those participating in retail unbundling programs, will be within a zone of reasonableness as a result of competitive options of purchasing capacity from multiple releasing customers or obtaining interruptible or short-term firm capacity from the pipeline itself.

24. The Commission rejects the modifications advocated by the Dominion LDCs and Hess. Order No. 712 removed the price ceiling on all capacity releases of one year or less, without regard to the purpose of the release, such as whether it was to a marketer in a retail access program. Therefore, the holding in *Texas Eastern* that the pipeline need not make refunds to replacement shippers in short-term releases applies to marketers in retail access programs in the same manner as it applies to any other short-term replacement shipper. However, section 284.8(b) of the Commission's regulations

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[18] *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396, at P 13 (2008) (*Texas Eastern*).

[19] *Id.*

[20] *Id.*

permits the releasing shipper to include terms and conditions in its releases.[21] Such conditions may address the issue of the releasing shipper's disposition of any refunds it receives from the pipeline. Thus, if a state commission and the participants in a state retail access program wish to provide for an LDC to pass through refunds it receives from the pipeline to the marketers in the program, they can do so through conditions in the LDC's releases to the marketers.

25. The Dominion LDCs suggest two wording changes to Dominion Transmission's filed tariff language. First they ask that the heading of Section 23.2.E.3[22] be revised from "State-Mandated Retail Unbundling Programs" to "State-Regulated Retail Unbundling Programs." The Dominion LDCs state that this would ensure that all regulated state unbundling programs, whether they are mandated or encouraged, are covered. The second change the Dominion LDCs request is that Sections 23.2.C.2 and C.3,[23] be revised to change "Commission regulations" to "Commission regulations or policies" in order to reflect that the "policy" of prohibition against tying shall not apply to releases involving the sale or repurchase of gas in storage inventory.

26. Dominion Transmission answers that it does not believe that these editorial suggestions would alter the meaning of the filed tariff language and that Dominion Transmission does not object to the adoption of the suggestion. The Commission finds that the changes proposed by these parties are acceptable and directs Dominion Transmission to file tariff sheets reflecting the above discussion within 15 days of the date of this order.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

cc: All Parties

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[21] 18 C.F.R. § 284.8(b) (2008).

[22] First Revised Sheet No. 1144.

[23] First Revised Sheet No. 1144.

Appendix

Dominion Transmission, Inc.
FERC Gas Tariff, Third Revised Volume No. 1

Tariff Sheets to be effective March 1, 2009:

Fourth Revised Sheet No. 1142
First Revised Sheet No. 1144
Second Revised Sheet No. 1145
Second Revised Sheet No. 1147
Third Revised Sheet No. 1148
Third Revised Sheet No. 1150
First Revised Sheet No. 1152
Third Revised Sheet No. 1153