

121 FERC ¶ 61,207
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

November 28, 2007

In Reply Refer To:
Texas Eastern Transmission, LP
Docket No. RP99-480-018

Texas Eastern Transmission, LP
P.O. Box 1642
Houston, TX 77251-1642

Attention: David A. McCallum
Director, Rates and Tariffs

Reference: Negotiated Rate Agreement

Dear Mr. McCallum:

1. On October 30, 2007, Texas Eastern Transmission, LP (Texas Eastern) filed tariff sheets¹ and an associated letter agreement to reflect the principal elements of a negotiated rate agreement entered into between Texas Eastern and NJR Energy Services Company (NJR) under Rate Schedule FT-1 for service on the Phase 1 facilities constructed as part of the Time II Project.² The tariff sheets are accepted subject to conditions, as discussed below, effective the later of December 1, 2007, or the date on which the Time II Project Phase 1 facilities are completed and placed into service.

¹ Original Sheet No. 117 and Sheet Nos. 118-125 to FERC Gas Tariff, Seventh Revised Volume No. 1.

² On June 8, 2007, the Commission granted Texas Eastern certificate authorization to construct and operate certain compression and pipeline facilities and to abandon and replace certain pipeline facilities in Ohio and Pennsylvania, comprising the Time II Project. *Texas Eastern Transmission, LP*, 119 FERC ¶ 61,258 (2007) (June 8, 2007 Order). On November 2, 2007, in Docket No. CP06-115-000, Texas Eastern sought permission to place the Time II Project facilities into service on December 1, 2007.

2. The terms of the negotiated rate agreement provide for a reservation rate of \$6.996 per Dekatherm (Dth) per month, for a maximum daily quantity of 150,000 Dth, Rate Schedule FT-1 applicable commodity charges, and a cap on the applicable ASA charge of 2.6 percent payable by NJR. The term of the agreement extends from the effective date until October 31, 2008. The tariff sheet includes the contract number, and the primary receipt and delivery points associated with the service, as well as an affirmation that the negotiated rate agreement does not deviate in any material respect from the form of service agreement. Finally, the tariff sheet includes a footnote (Footnote 2)³ which provides, *inter alia*, that, if the customer is no longer creditworthy as determined by Texas Eastern's tariff, within 14 days of notification in writing, the customer will be required to provide a guaranty, letter of credit or other acceptable form of security from a creditworthy entity, in an amount equal to the months of reservation charges remaining in the primary term of the Service Agreement, for the MDQ at the negotiated rate.

3. Public notice of the filing was issued on November 1, 2007, with comments due by November 13, 2007. On November 13, 2007, NJR Energy Services Company and New Jersey Natural Gas Company each filed a timely motion to intervene. On November 13, 2007, Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., and Philadelphia Gas Works (collectively, ConEd) filed a timely motion to intervene and a request for condition of the Commission's approval of Texas Eastern's negotiated rate agreement with NJR. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2007)), all timely filed motions to intervene and any motion to intervene out-of-time filed before the issuance date of this order are granted. ConEd requests that the Commission's approval of the negotiated rate agreement with NJR be conditioned by

³ Footnote 2 states as follows: "If at any time after the Service Commencement Date Customer is no longer creditworthy as determined by Pipeline in accordance with its FERC Gas Tariff, then Customer agrees, upon fourteen (14) days' prior written notice from the Pipeline, to provide Pipeline with a guaranty, letter of credit or other form of security acceptable to Pipeline ("Security Agreement") from an entity that is creditworthy as determined by Pipeline in accordance with its FERC Gas Tariff. The Security Agreement shall include provisions whereby: (i) the amount of such Security Agreement will be equal to the months of reservation charges remaining in the primary term of the Service Agreement, for the MDQ under the Service Agreement, at the Negotiated Rate for the Project, (ii) the Security Agreement will remain in effect for so long as Customer is not creditworthy, (iii) the party supporting Customer's obligations under the Security Agreement will at all times be creditworthy under Pipeline's FERC Gas Tariff, or Customer will be required to obtain a substantially similar Security Agreement from a creditworthy replacement party, and (iv) other provisions reasonably acceptable to Pipeline which are customary for similar types of security agreements or instruments. The security requirements set forth herein shall survive termination of the Negotiated Rate Agreement."

prohibiting Texas Eastern from including in its system fuel rate any difference between the ASA cap included in the NJR agreement and the ASA charge that otherwise would be applicable to the service to NJR.

4. ConEd's requested condition is unnecessary and, therefore, will not be directed. The Commission has already placed Texas Eastern at risk for the under recovery of any costs associated with the Time II project. In P 15 of the June 8 Order, the Commission stated, "[t]he Commission's cost-of-service analysis shows that the proposed rates for service provided over the Time II Project facilities are reasonable, provided that the customers benefiting from the service using the Time II Project facilities bear all the costs attributable to the use of such facilities, including fuel, electric, and all surcharges." Additionally, in P 18 of the June 8 Order, the Commission stated, "Texas Eastern's negotiated rate must conform with the guidelines for negotiated rates as articulated in the Commission's Alternative Rate Policy Statement".⁴ Under that policy, as affirmed by the Commission in *NorAm Gas Transmission Company*,⁵ any revenue shortfall due to a negotiated rate lower than the incremental recourse rate cannot be recovered from existing shippers.⁶

5. Further the Commission found in P 19 of the June 8 Order, "Texas Eastern must match the cost of service to the customers benefiting from the service. In order to track accurately the charges and surcharges resulting from the incremental service using the Time II Project facilities, Texas Eastern is directed to make adjustments in its tracking mechanisms as necessary to ensure that existing customers do not subsidize the costs resulting from this new incremental service."

6. The Commission finds that the negotiated rate agreement contains a material deviation from Texas Eastern's Rate Schedule FT-1 form of service agreement. Therefore, the Commission accepts Texas Eastern's filing, subject to the conditions discussed below.

⁴ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *reh'g and clarification denied*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066 (1996); *petition for review denied, Burlington Resources Oil & Gas Co. v. FERC*, Nos. 96-1160, *et al.*, U.S. App. Lexis 20697 (D.C. Cir. July 20, 1998).

⁵ *NorAm Gas Transmission Company*, 77 FERC ¶ 61,011 (1996) (*NorAm*).

⁶ Commission policy regarding no discount adjustments for negotiated rates requires Texas Eastern to use the maximum rate for these negotiated rate services in its next general section 4 rate case. See *NorAm Gas Transmission Company*, 83 FERC ¶ 61,047 (1998), *order on rehearing*, 86 FERC ¶ 61,109 (1999).

7. The Commission's regulations require that pipelines include in their tariff a form of service agreement and file any contract that deviates materially from the *pro forma* service agreement.⁷ In addition, a pipeline must include in Volume 1 of its tariff a listing of all contracts containing material deviations.⁸ In *Columbia*, the Commission found that a material deviation is "any provision of a service agreement which 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."⁹ However, not all material deviations are impermissible. If the Commission finds that a deviation does not constitute a substantial risk of undue discrimination, the Commission may permit the deviation.¹⁰

8. Consistent with *Columbia*, the Commission finds that the provision in Footnote 2 of the negotiated rate agreement at issue here concerning creditworthiness deviates materially from Texas Eastern's Rate Schedule FT-1 form of service agreement. Footnote 2 goes beyond merely filling in a blank space in the *pro forma* service agreement and may affect the substantive rights of the parties. Therefore, Texas Eastern must file, within 15 days of the date of this order, a revised tariff sheet adding this negotiated rate agreement to its list of nonconforming contracts. Further, Texas Eastern must explain how Footnote 2 is a just and reasonable deviation from its tariff provisions on creditworthiness.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

⁷ 18 C.F.R. §§ 154.1(d) and 154.110 (2007).

⁸ 18 C.F.R. § 154.112(b) (2007).

⁹ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 at 62,002 (2001) (*Columbia*). *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134 at P 27 (2003) (2003 Policy Statement).

¹⁰ *Columbia*, 97 FERC at 62,003–04.