126 FERC ¶ 61,156
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Natural Gas Pipeline Company of America LLC Docket No. RP09-240-000

(Issued February 20, 2009)

ORDER ACCEPTING REVISED TARIFF SHEETS, SUBJECT TO CONDITIONS

1. On January 22, 2009, Natural Gas Pipeline Company of America LLC (Natural) filed revised tariff sheets proposing modifications to its tariff to comply with the capacity release requirements promulgated by Order Nos. 712 and 712-A.[1] In addition, Natural proposed tariff sheets containing minor tariff revisions consistent with Order No. 698[2] and Order No. 717.[3] The tariff sheets listed in the Appendix are accepted effective February 22, 2009, subject to further modifications as discussed below.

Summary of the Proposal

2. 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 its bidding requirements for certain capacity releases. Natural proposes several changes to its General Terms and Conditions to provide that capacity releases of one-year or less are not subject to the maximum rate cap. Natural also

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[1] *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 (Dec. 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008) (Order No. 712).

[2] *Standards for Business Practices for Interstate Natural Gas Pipelines; Standards for Business Practices for Public Utilities*, Order No. 698, 72 Fed. Reg. 38,757 (July 16, 2007), FERC Stats. & Regs. ¶ 31,251 (2007), o*rder on clarification and reh'g,* Order No. 698-A, 121 FERC ¶ 61,264 (2007) (Order No. 698).

[3] *Standards of Conduct for Transmission Providers*, Order No. 717, 73 Fed. Reg. 63,796 (Oct. 27, 2008), FERC Stats. & Regs. ¶ 31,280 (2008) (Order No. 717).

proposes additional modifications to clarify and revise the bidding requirements for capacity release transactions associated with an AMA or a state-approved retail open access program. Natural proposes several other modifications that are not directly attributable to Order No. 712, but rather serve to clarify its capacity release provisions.

3. In addition, Natural proposes minor tariff revisions consistent with Order No. 698 and Order No. 717. Specifically, Natural proposes to incorporate language clarifying the use of price indices by releasing shippers and to remove references to the posting of organizational charts.

Notice and Comments

4. Public notice of Natural's filing was issued on January 27, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[4] Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[5] all notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. Motions to intervene and comments were filed jointly by North Shore Gas (North Shore) and The Peoples Gas Light and Coke Company (Peoples Gas), and individually by Atmos Energy Corporation (Atmos).

5. On February 12, 2009, Natural filed an answer to the comments filed by North Shore, Peoples Gas, and Atmos. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[6] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Natural's answer because it has provided information that assisted us in our decision-making process.

Discussion

6. For the reasons discussed below, the Commission finds that Natural's proposed tariff revisions are generally consistent with the Commission's capacity release policies and Order Nos. 712, 712-A, 698, and 717. Accordingly, the Commission accepts Natural's filing, subject to conditions.

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[4] 18 C.F.R. § 154.210 (2008).

[5] 18 C.F.R. § 385.214 (2008).

[6] 18 C.F.R. § 385.213(a)(2) (2008).

7. As explained above, Order No. 712 facilitates AMAs by relaxing the Commission's prohibition on tying and its bidding requirements for certain capacity releases. North Shore and Peoples Gas state that they generally support Natural's proposed changes. However, North Shore and Peoples Gas recommend modifying section 19.5(a) of Natural's tariff, a provision that Natural has not proposed to change. North Shore and Peoples Gas explain that section 19.5(a) of Natural's existing tariff states, in part:

> All terms and conditions relating to a release which is the subject of a Capacity Release Request: ... (3) must relate solely to the details of acquiring or maintaining the transportation capacity rights on Natural, which are the subject of the release...[7]

8. North Shore and Peoples Gas state that this subsection closely resembles the language from Order No. 636-A that prohibited tying,[8] and which the Commission in Order No. 712 stated "may interfere with the ability of shippers to negotiate and implement [asset management arrangements] AMAs."[9] North Shore and Peoples Gas argue that Natural's retention of this language is inconsistent with exemptions from the tying prohibition that the Commission created in Order No. 712. North Shore and Peoples Gas recommend modifying subsection (3) of 19.5(a) by deleting "solely" and adding wording to reference the policy changes, such that subsection (3) would state: "must relate to the details of acquiring or maintaining the transportation capacity rights on Natural consistent with this Tariff and Order No. 712, which are the subject of the release."

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[7] Natural Gas FERC Gas Tariff § 19.5(a).

[8] North Shore and Peoples Gas' Feb. 3, 2009 Motion to Intervene and Comments at 3 (citing *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 Fed. Reg. 13,267 (Apr. 16, 1992), FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 30,939 (1992), *order on reh'g*, Order No. 636-A., 57 Fed. Reg. 36,128 (Aug. 12, 1992), FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 30,950, at 30,599 (1992), *order on reh'g*, Order No. 636-B, 7 Fed. Reg. 57,911 (Dec. 8, 1992), 61 FERC ¶ 61,272 (1992), *notice of denial of reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and vacated and remanded in part, United Dist. Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997)).

[9] *Id*. at 4 (citing Order No. 712 at P 113).

9. In its answer, Natural agrees to make the tariff revision suggested by North Shore and Peoples Gas. The Commission orders Natural to revise section 19.5(a)(3) of its tariff accordingly in a compliance filing within 30 days of the date of this order.

10. Atmos asks the Commission to require Natural to include provisions allowing the "flow-through" of discounts from releasing shippers to their asset managers. For example, Atmos states that it is unclear whether and to what extent Natural will permit a releasing shipper's asset manager to pay the same discounted usage and fuel rates that the pipeline provided to the releasing shipper. Atmos suggests that Natural 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, contrary to Order Nos. 712 and 712-A. In its answer, Natural 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 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.[10] Therefore, a pipeline such as Natural 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.[11] Thus, the issue of the "flow-through" of discounted usage and fuel charges to an asset manager/replacement shipper does not arise on Natural's system. However, pipelines with negotiated rate authority may enter into negotiated rate agreements which are not bounded by their tariff maximum and minimum rates. Natural 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.

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

[10] 18 C.F.R. § 284.10(c)(4)(ii) and (5)(ii)(A) (2008).

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

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

14. Natural is correct that 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 Natural 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

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

[13] *Id.*

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

[15] *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396, at P 21 (2008).

using the released capacity to satisfy the delivery or purchase obligation contained in the release to the asset manager.[16]

(2) if a negotiated rate agreement between Natural and the releasing shipper provides that the discount or negotiated rate is only applicable at certain specified receipt or delivery points as permitted by Commission policy,[17] should the asset manager/ replacement shipper's use of those points be considered to be within the usage contemplated by Natural when it granted the negotiated rate to the releasing shipper? For this reason, should Natural be required to offer the same negotiated rate to the asset manager/replacement shipper at those points, but not at any other point?

(3) whether Natural should be required to include in its tariff a provision concerning the circumstances under which it would provide similar negotiated usage and fuel charges to an asset manager/replacement shipper; or

(4) whether the circumstances of individual releases to asset managers are sufficiently case-specific that pipelines should be allowed to decide whether to 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 Natural, and will give the parties an opportunity to provide supplemental comments. In this regard, the Commission directs Natural to file the following information in a compliance filing within 30 days of the date of this order: (1) how many of Natural'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 Natural 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.

<u>The Commission orders</u>:

(A) The Commission accepts the tariff sheets listed in the Appendix to this order to be effective on February 22, 2009, subject to conditions and a further order by the Commission.

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[16] *See* 18 C.F.R. § 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).

(B) Natural is directed to make a compliance filing within 30 days of the date of this order including revisions to section 19.5(a)(3) of its tariff, as well as the additional information discussed in the body of this order. Parties may file additional comments within 20 days of the date of Natural's compliance filing.

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

Natural Gas Pipeline Company of America LLC

FERC Gas Tariff, Seventh Revised Volume No. 1
Tariff Sheets to be Effective February 22, 2009, Subject to Conditions

First Revised Sheet No. 406
First Revised Sheet No. 417
Original Sheet No. 417A
First Revised Sheet No. 418
First Revised Sheet No. 419
First Revised Sheet No. 420
First Revised Sheet No. 422
Original Sheet No. 422A
First Revised Sheet No. 423
First Revised Sheet No. 425
Original Sheet No. 425A
First Revised Sheet No. 426
First Revised Sheet No. 428
First Revised Sheet No. 434
First Revised Sheet No. 435
First Revised Sheet No. 436
Original Sheet No. 436A