126 FERC ¶ 61,177
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

February 26, 2009

In Reply Refer To:
Texas Gas Transmission, LLC
Docket No. RP09-304-000

Texas Gas Transmission, LLC
9 Greenway Plaza, Suite 2800
Houston, TX 77046

Attention: J. Kyle Stephens
Vice President, Regulatory Affairs and Rates

Reference: Order No. 712 Compliance Filing

Dear Mr. Stephens:

1. On January 26, 2009, Texas Gas Transmission LLC (Texas Gas) 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 Texas Gas proposes, pursuant to section 4 of the Natural Gas Act (NGA) to clarify several aspects of its capacity release regulations. The tariff sheets listed in the Appendix are accepted effective March 1, 2009, subject to Texas Gas Making a compliance filing within 30 days of the date of this order including revisions to 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 Texas Gas's compliance filing.

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

2. In Order Nos. 712 and 712-A, the Commission removed the maximum rate ceiling on capacity releases of one year or less, which 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. Finally, the Commission waived its prohibition on tying and bidding requirements for capacity release made as part of state-approved retail access program. Texas Gas proposes several changes to the capacity release provisions in Section 16 of the General Terms & Conditions (GT&C) of its tariff to reflect the various changes in the capacity release regulations made by Order Nos. 712 and 712-A.

3. In addition, Texas Gas also states that it proposes to clarify its capacity release provisions by requiring that release notices include any other information not already listed that is necessary to describe the capacity release transaction in accordance with the North American Energy Standards Board (NAESB) Capacity Release Dataset. Texas Gas states that it also deleted language made redundant or obsolete in light of the new language that has been incorporated to effectuate Order No. 712. Finally, Texas Gas states that it removed certain provisions from Section 16.7(c) that may limit a releasing customer's ability to complete a capacity release.

4. Public notice of Texas Gas's filing was issued on January 29, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[2] Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[3] 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. Proliance Energy LLC (ProLiance), Atmos Energy Corporation (Atmos), Western Tennessee Municipal Group,[4] The Jackson Energy Authority, City of Jackson,

[2] 18 C.F.R. § 154.210 (2008).

[3] 18 C.F.R. § 385.214 (2008).

[4] The Western Tennessee Municipal Group consists of the following municipal distributor-customers of Texas Gas: City of Bells, Gas & Water, Bells, Tennessee; Brownsville Utility Department, City of Brownsville, Brownsville Tennessee; City of Covington Natural Gas Department, Covington, Tennessee; Crockett Public Utility District, Alamo, Tennessee; City of Dyersburg, Dyersburg, Tennessee; First Utility District of Tipton County, Covington, Tennessee; City of Friendship, Friendship, Tennessee; Gibson County Utility District, Trenton, Tennessee; Town of Halls Gas System, Halls, Tennessee; Humboldt Gas Utility, Humboldt, Tennessee; Martin Gas

(continued)

Tennessee, and the Kentucky Cities[5] (jointly "Cities"), the Peoples Natural Gas Company and Hope Gas, Inc. (jointly "Peoples") and National Grid Gas Delivery Companies[6] (National Grid) protested the instant filing.

5. On February 16, 2009, Texas Gas filed an answer. 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 Texas Gas's answer because it has provided information to assist us in our decision-making process.

6. The Commission finds that Texas Gas'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 Texas Gas's filing, effective March 1, 2009, subject to conditions as discussed below.

7. Atmos and ProLiance request that the Commission require Texas Gas 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 Texas Gas 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. Similarly, ProLiance argues that the same usage charge discounts should be available to asset manager/replacement shippers. Peoples argues that the Commission should condition acceptance of Texas Gas's tariff filing on Texas Gas making any required conforming tariff changes that result from the Commission's ruling on the discount issue. Atmos suggests that Texas Gas 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.

Department, Martin, Tennessee; Town of Maury City, Maury City, Tennessee; City of Munford, Munford Tennessee; City of Ripley Natural Gas Department, Ripley, Tennessee.

[5] The Kentucky Cities are the Cities of Carrollton and Henderson, Kentucky. They are municipal distributor-customers of Texas Gas.

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

[7] 18 C.F.R. § 385.213(a)(2) (2008).

8. In its answer, Texas Gas argues that Order No. 712 did not require pipelines to pass through discounts on commodity and usage charges to asset managers, and a pass-through of such charges is contrary to long-standing Commission policy.

9. 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.[8] Therefore, a pipeline such as Texas Gas 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.[9] Thus, the issue of the "flow-through" of discounted usage and fuel charges to an asset manager/replacement shipper does not arise on Texas Gas'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. Texas Gas 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.

10. 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.[10] 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.[11]

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[8] 18 C.F.R. § 284.10(c)(4)(ii) and (5)(ii)(A) (2008).

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

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

[11] *Id.*

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.[12] These same policies apply to negotiated usage and fuel charges.

11. Order No. 712 did not modify the Commission's existing policy concerning the pipeline's offering usage charge discounts to replacement shippers.[13] 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 Texas Gas 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; [14]

(2) if a negotiated rate agreement between Texas Gas 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,[15] should the asset manager/ replacement shipper's use of those points be considered to be within the usage contemplated by Texas Gas when it granted the negotiated rate to the releasing shipper? For this reason, should Texas Gas 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 Texas Gas 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

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

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

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

[15] *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).

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.

12. Before deciding these issues, the Commission requires additional information from Texas Gas, and will give the parties an opportunity to provide supplemental comments. In this regard, the Commission directs Texas Gas to file the following information in a compliance filing within 30 days of the date of this order: (1) how many of Texas Gas'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 Texas Gas 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.

13. National Grid asserts that Section 16.6 of the GT&C of the Texas Gas' tariff[16] must be modified to comply with Order No. 712. Section 16.6(e) of the tariff currently states:

> "In the event the Commission orders refunds of any rates charged by Pipeline and previously approved, Pipeline and/or Releasing Customer, as the case may be, must make corresponding refunds to such Releasing Customer or Replacement Customer to the extent that Releasing Customer has paid a rate in excess of Pipeline's just and reasonable applicable maximum rates."

Specifically, National Grid asserts that Texas Gas should clarify that the pipeline will deem rates paid by replacement shippers for releases with terms of one year or less to be final and therefore not subject to refund and cites *Texas Eastern Transmission, LP,*[17] as support for its request.

14. In *Texas Eastern* 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.[18] However, the Commission also stated that a releasing shipper paying a recourse rate higher than the maximum just and reasonable rate determined in a

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[16] *See* Original Sheet 2916 to Texas Gas FERC Gas Tariff, Third Revised Volume No. 1.

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

[18] *Texas Eastern,* 125 FERC ¶ 61,396 at P 13.

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.[19] Therefore, the refunds must be paid by the pipeline to the releasing shipper. With respect to refunds to state retail marketer replacement shippers, as determined in *Texas Eastern*, replacement shippers are not entitled to any such refunds. However, section 284.8(b) of the Commission's regulations permits the releasing shipper to include terms and conditions in its releases. 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 a local distribution company (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.

15. The Commission finds that the discussion in *Texas Eastern* provides sufficient guidance on this issue and therefore, there is no reason to modify the tariff. However, section 16.6(e) may be inconsistent with Order No. 712. Thus, Texas Gas should explain the reason for section 16.6(e) and why it is not inconsistent with Order No. 712 or remove such provision from its tariff.

16. Peoples asserts that Texas Gas's tariff revisions do not allow for an exception found under Section 284.8(h)(2) of the new regulations that the 28-day hiatus does not apply to re-releases to the same replacement shipper for a release that is posted for bidding or that qualifies for the exemptions from bidding. Peoples state that, as currently written, it would appear that all re-releases to the same replacement shipper are subject to the 28-day hiatus.[20] Peoples state that the Commission should require Texas Gas to add tariff language spelling out the situations where the 28-day hiatus is inapplicable to re-releases.

17. The Commission denies Peoples request. Pursuant to proposed Section 16.3(e)(vi) of the revised tariff which describes the 31-day Price/Bidding exemption, a "Releasing Customer may not roll over, extend or in any way continue the release to the same Replacement Customer *using this bidding exemption* until 28 days after the first release period has ended" (emphasis added). This clause applies to transactions of 31 days or less, and the Commission does not believe it necessary for Texas Gas to include provisions stating the inapplicability of the 28-day hiatus where that restriction does not apply.

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[19] *Id.*

[20] See First Revised Sheet No. 2805.

18. Cities assert that Order No. 712 limits the information about asset management arrangements (AMA) that must be disclosed[21] for certain releases exempt from bidding requirements.[22] Cities goes on to say that, read literally, nothing in the revised version of Section 16.4(a) would prevent the pipeline from requesting restricted information, and that Texas Gas should be required to clearly specify the items that do not apply to capacity releases that are exempt from certain requirements under Order No. 712.

19. The Commission denies Cities' protest on this issue. Order No. 712 did not change section 284.13 of the regulations concerning posting of information with regard to long term and short term non-biddable releases; it added information required to be posted with regard to releases to implement asset management arrangements (AMAs) and releases to marketers participating in state regulated retail access programs. Texas Gas's revisions appear consistent with Order No. 712. Texas Gas does not propose to change its tariff provisions regarding the posting requirements for short-term and long-term non-biddable releases and those provisions still require that the same information be provided to the pipeline prior to commencement of service. Texas Gas has modified the provision to provide that the "applicable" information must be in the notice.

20. Further, in Order No. 712, the Commission stated that:

> any posting under section 284.13(b) that relates to a release to implement an AMA should include: (1) the fact that the release is to an asset manager, and (2) the delivery or purchase obligation of the AMA, *in addition to the information required to be posted for all capacity releases*. Order No. 712, P 175 (*emphasis added).*

As shown, the Commission did not limit the posting of information for releases to implement AMAs to the items enumerated in the new regulation, we explained in particular what must be included in such a posting. Aside from adding language as directed by Order No. 712 for releases to implement AMAs and retail unbundling, Texas Gas proposed no tariff changes that would indicate the need to disclose confidential information. Thus, we find the proposed changes consistent with Order No. 712.

21. Cities observe that Section 16.3(e)(vi) of the modified tariff refers to "eligible capacity," when the term is neither defined in the tariff nor used in the regulation, and Cities request that the word "eligible" be removed. Similarly, Cities observe that Section 16.3(e)(vi) refers to the release of capacity to a "pre-arranged" customer, and that the

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[21] Order No. 712 at PP 172-175.

[22] Order No. 712 at PP 132-137.

regulation does not require that the replacement customer be "pre-arranged." Cities request that the word "pre-arranged" be removed. Finally, Cities suggest that the bidding exception described in Section 16.3(e)(vi), once revised, should be moved to Section 16.4(c)(i) so that every bidding exception can be found in one location.

22. The Commission agrees with Cities and finds that Texas Gas should remove or define the terms "eligible" and "pre-arranged" in section 16.3(e)(vi). However, the Commission will not require Texas Gas to combine Section 16.3(e)(vi) with Section 16.4(c)(i). The Commission permits the pipeline a certain leeway in the manner it chooses to organize its tariff, and the location of this provision in Texas Gas's tariff does not render it inconsistent with Order No. 712.

23. Cities asserts that the GT&C should be modified to reflect the revised regulations in Section 284.8(b)(2). Specifically, which payments between the releasing and replacement shipper to an asset manager are subject to the maximum rate.

24. The Commission denies Cities' request because the tariff as written does not contradict Order No. 712. In Order No. 712, the Commission said that "the price ceiling does not apply to any consideration provided by an asset manager to the releasing shipper as part of an AMA," save for the cases where the capacity release is for more than one year.[23] Section 16.3(e)(i) of the revised tariff expressly states that maximum rates apply on a release of capacity for a period greater than one year. Accordingly, the Commission will not require Texas Gas to further modify its tariff.

Cities asserts that Section 16.4(c)(i) does not properly reference the requirements for asset managers or marketers to receive the relevant bidding exemption, as described in Section 284.8(h)(3) and (h)(4) respectively. Cities requests that the tariff indicate these provisions must be complied with to be eligible for the exemption. Cities also requests that the phrase "asset Manager" be replaced with "asset manager" in Section 16.4(c)(i).

25. Texas Gas is directed to correct the case used to identify "asset Manager" as described above. The Commission will not require the other changes requested by Cities because the regulations define the conditions under which an asset manager or a marketer in a state retail access program is exempt from bidding.

26. Cities asserts that Texas Gas did not incorporate the requirements of Section 284.8(h)(1)(v) of the regulations into its tariff. This regulation requires the pipeline to post on its website notices of releases exempt from bidding "as soon as possible, but not later than the first nomination, after the release transaction commences."

[23] Order No. 712 at PP. 158

27. Section 284.8(h)(1)(v) is simply an existing regulation that was renumbered as part of Order No. 712-A and there is no reason for the pipeline to duplicate in its tariff regulations that it is already required to follow. Accordingly, Cities' request is denied.

By direction of the Commission. Commissioner Kelliher is not participating.

Kimberly D. Bose,
Secretary.

cc: Public File
All Parties

Appendix

Texas Gas Transmission LLC

FERC Gas Tariff, Third Revised Volume No. 1
Tariff Sheets to be Effective March 1, 2009, Subject to Conditions

First Revised Sheet No. 2800
First Revised Sheet No. 2804
First Revised Sheet No. 2805
First Revised Sheet No. 2807
First Revised Sheet No. 2809
First Revised Sheet No. 2810
First Revised Sheet No. 2811
First Revised Sheet No. 2817