

127 FERC ¶ 61,019
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 3, 2009

In Reply Refer To:
Wyoming Interstate Company, Ltd.
Docket No. RP09-299-000

Wyoming Interstate Company, Ltd.
PO Box 1087
Colorado Springs, CO 80944

Attention: Catherine E. Palazzari,
Vice President

Reference: Revised Tariff Sheets to Comply with Order Nos. 712 and 712-A

Ladies and Gentlemen:

1. On January 26, 2009, Wyoming Interstate Company, Ltd. (WIC) 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 The revised tariff sheets listed in the attached Appendix are accepted effective February 25, 2009, subject to conditions discussed below.

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

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 No. 712), *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-A).

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 releases made as part of a state-approved retail access program.

3. To comply with Order Nos. 712 and 712-A, WIC 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. In addition, WIC proposes modifications to clarify and revise the bidding requirements for capacity release transactions associated with an AMA or a state-approved retail open access program. WIC also notes the Commission's clarification in Order No. 712-A, which specifically states that the lifting of the price cap for short-term releases only applied to releases that take effect within one year of the date the pipeline is notified of the release.² In light of this clarification, WIC proposes to grandfather releases that took place between the issuance of Order No. 712 and Order No. 712-A, noting that such releases were entered into per the guidance provided in Order No. 712 and then-effective regulations. Finally, WIC proposes to include a provision stating that for releases becoming effective after July 30, 2008, any rate paid by a replacement shipper that is not subject to the rate cap because the term of the release is for a period of one year or less is deemed to be a final rate and is not subject to refund.³

4. Notice of WIC's filing was issued on January 29, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2008), 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 this proceeding or place additional burdens on existing parties. BP American Production Company and BP Energy Company (collectively, BP) and Atmos Energy Corporation (Atmos) filed comments. On February 27, 2009, Interstate Natural Gas Association of America (INGAA) submitted comments out of time. On March 11, 2009, the American Gas Association (AGA) filed a response to INGAA's comments.

5. On February 17, 2009, WIC filed an answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept WIC's answer because it has provided information that assisted us in our decision-making process.

² Citing Order No. 712-A, FERC Stats. & Regs. ¶ 31,284 at P 62.

³ WIC notes that its proposed language is identical to language accepted by the Commission in *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396 (2008) (*Texas Eastern*).

6. In its comments, BP asserts that WIC's proposed tariff language does not comply with Order No. 712's requirement that notice of a release to an asset manager disclose "the asset manager's obligation to deliver gas to, or purchase gas from, the releasing shipper."⁴ WIC's proposed tariff language would require the parties to disclose "whether or not the prearranged Shipper is an asset manager or a marketer participating in a state-regulated retail access program, as defined by FERC regulations at 284.8."⁵ BP asserts that such language is insufficient, arguing that disclosure of an asset manager's obligations is necessary to ensure that the Commission and the parties can determine whether a release complies with the Commission's regulations applicable to releases involving an asset manager. BP also argues that WIC's compliance filing does not comport with the requirement to post an exempt release "as soon as possible, but not later than the first nomination, after the release transaction occurs."⁶ BP requests that WIC clarify that its tariff complies with this timing requirement.

7. In its answer, WIC contends that its tariff requires a releasing shipper to certify whether the release involves an asset manager, and the Commission's regulations at 18 C.F.R. § 284.8(h) adequately delineated an asset manager's delivery and purchase obligations as the obligation to deliver gas to, or purchase gas from, the releasing shipper. WIC notes, however, that it is not opposed to providing additional tariff language clarifying the volumetric delivery and purchase obligation of the AMA and the time period the obligation is in effect. With respect to the time within which exempt releases must be posted, WIC states that its tariff complies with the timeline specifications required by Order Nos. 712 and 712-A.

8. We find that WIC's tariff provisions regarding the disclosure of asset manager obligations are insufficient and should be clarified. Order No. 712 requires pipelines to post (1) the fact that a 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.⁷ The Commission further explained that "[t]he required posting concerning the delivery or purchase obligation that qualifies the release as an AMA . . . should specify the volumetric level of the replacement shipper's delivery or purchase obligation and the time periods during which that obligation is in effect."⁸ Therefore, we

⁴ *Citing* 18 C.F.R. § 284.13(b)(1)(x).

⁵ Proposed General Terms and Conditions § 2.8(g), Eighth Revised Sheet No. 247.

⁶ *Citing* 18 C.F.R. § 284.8(h)(1)(v).

⁷ Order No. 712, FERC Stats. & Regs. ¶ 31,271 at P 175.

⁸ *Id.*

direct WIC to file revised tariff sheets, within 15 days of the date of this order, that are consistent with Order No. 712 and that include the volumetric delivery and purchase obligation of the AMA and the time period the obligation is in effect.

9. Next, as to the posting of exempt releases, we find BP's concerns to be without merit. The requirement cited by BP in 18 C.F.R. § 284.8(h)(1)(v)—that pipelines post an exempt release “as soon as possible, but not later than the first nomination, after the release transaction occurs”—does not impose any new or additional requirement on a pipeline. Rather, it mirrors the reporting requirement that already exists in 18 C.F.R. § 284.13(b)(1). Moreover, the tariff provision⁹ that BP points to as inconsistent with the above-quoted posting requirement pertains to a *releasing shipper's obligation* to report a release to the pipeline, whereas the § 284.8(h)(1)(v) and 284.13(b)(1) both pertain to a *pipeline's obligation* to report a release on its electronic bulletin board. Therefore, we find that no change is necessary with respect to this issue.

10. In its comments, Atmos asks the Commission to require WIC 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 WIC 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 WIC 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.

11. In its answer, WIC 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's proposal is outside the scope of this proceeding. WIC further asserts that Atmos's request is contrary to Commission policy insofar as the usage charge paid by a replacement shipper is a matter between the replacement shipper and the pipeline, and is therefore not something that can be passed through from a releasing shipper to a replacement shipper.

12. 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 *Citing* WIC FERC Gas Tariff, General Terms and Conditions § 4.8(g), Fifth Revised Sheet No. 57A.

13. 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 the goal of facilitating AMAs and retail choice programs.

14. 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 WIC 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 WIC’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. WIC 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.

15. 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

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).

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

releasing shipper under that contract and is not relevant to other contracts and services to other shippers, including replacement shippers.¹³

16. 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.

17. 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 WIC 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;¹⁶

(2) if a negotiated rate agreement between WIC 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 WIC when it granted the negotiated rate to the releasing shipper? For

¹³ *Id.*

¹⁴ *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.

¹⁵ *Texas Eastern*, 125 FERC ¶ 61,396 at P 21.

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).

this reason, should WIC 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 WIC 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.

18. Before deciding these issues, the Commission requires additional information from WIC, and will give the parties an opportunity to provide supplemental comments. In this regard, the Commission directs WIC to file the following information within 30 days of the date of this order: (1) how many of WIC's existing firm 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 WIC 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 WIC's filing.

19. With respect to the request by INGAA 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 WIC's system.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

Wyoming Interstate Company, Ltd.
FERC Gas Tariff, Second Revised Volume No. 2

Tariff Sheets to be Effective February 25, 2009, Subject to Conditions:

Seventh Revised Sheet No. 54A
Sixth Revised Sheet No. 54B
Thirteenth Revised Sheet No. 55
Sixth Revised Sheet No. 57A
Seventh Revised Sheet No. 57B
Seventh Revised Sheet No. 57C
Ninth Revised Sheet No. 57G
Sixth Revised Sheet No. 57J
Third Revised Sheet No. 57L