127 FERC ¶ 61,021
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 3, 2009

In Reply Refer To:
Cheyenne Plains Pipeline
Company, L.L.C.
Docket No. RP09-300-000

Cheyenne Plains Pipeline Company, L.L.C.
Two North Nevada Avenue
Colorado Springs, CO 80903

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, Cheyenne Plains Gas Pipeline Company, L.L.C. (CPG) 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 tariff sheets listed in the Appendix are accepted effective February 25, 2009, subject to conditions as 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 Commission further clarified that its prohibition on tying does not apply to conditions

[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).

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, CPG 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, CPG 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. CPG 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, CPG 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.

4. Notice of CPG'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. 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, CPG filed an answer to the comments filed by Atmos. 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 CPG's answer because it has provided information that assisted us in our decision-making process.

6. In its comments, Atmos asks the Commission to require CPG 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 CPG 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 CPG 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

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

since a general refusal to allow “pass-through” of such discounts would impede asset management transactions, contrary to Order Nos. 712 and 712-A.

7. In its answer, CPG 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. CPG 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.

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 the goal of facilitating AMAs and retail choice programs.

10. 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.[3] Therefore, a pipeline such as CPG 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.[4] Thus, the issue of the “flow-through” of discounted usage and fuel charges to an asset manager/replacement shipper does not arise

[3] 18 C.F.R. § 284.10(c)(4)(ii) and (5)(ii)(A) (2008).

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

on CPG'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. CPG 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. 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.[5] 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.[6]

12. 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.[7] These same policies apply to negotiated usage and fuel charges.

13. Order No. 712 did not modify the Commission's existing policy concerning the pipeline's offering usage charge discounts to replacement shippers.[8] 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:

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

[6] *Id.*

[7] *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.

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

(1) whether it would be unduly discriminatory for CPG 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; [9]

(2) if a negotiated rate agreement between CPG 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,[10] should the asset manager/ replacement shipper's use of those points be considered to be within the usage contemplated by CPG when it granted the negotiated rate to the releasing shipper? For this reason, should CPG 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 CPG 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.

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

15. 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

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

[10] *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).

analyzing the parties' responses to the above request for information and comments concerning the specific circumstances on CPG's system.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Cheyenne Plains Gas Pipeline Company, L.L.C.
FERC Gas Tariff, Original Volume No. 1

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

Second Revised Sheet No. 315
First Revised Sheet No. 316
First Revised Sheet No. 318
Second Revised Sheet No. 319
First Revised Sheet No. 323
First Revised Sheet No. 324
First Revised Sheet No. 325
Second Revised Sheet No. 329
First Revised Sheet No. 334