127 FERC ¶ 61,072
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 22, 2009

In Reply Refer To:
National Fuel Gas Supply Corporation
Docket No. RP09-269-000

National Fuel Gas Supply Corporation
6363 Main Street
Williamsville, New York 14221

Attention: Antoinetta D. Mucilli
Senior Attorney

Reference: Order Nos. 712 and 712-A Compliance Filing

Dear Ms. Mucilli:

1. On January 26, 2009, National Fuel Gas Supply Corporation (National Fuel) filed revised tariff sheets[1] proposing modifications to its tariff to comply with the capacity release requirements promulgated by Order Nos. 712 and 712-A.[2] The revised tariff sheets are accepted to become effective February 25, 2009, subject to further modifications 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 that 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] *See* Appendix.

[2] *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).

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-regulated retail access program.

3. In this docket, National Fuel proposes revisions to section 10 of the General Terms and Conditions (GT&C) of its tariff to comply with Order Nos. 712 and 712-A. Specifically, the revised tariff sheets incorporate the Commission's revised regulations by: (1) requiring the releasing shipper to specify whether the release is to a prearranged shipper of 31 days or less, to an asset manager in an asset management arrangement, or a marketer in a state-mandated retail access program; (2) clarifying that capacity releases to asset managers and marketers participating in state-regulated retail access programs are exempted from the bidding process; (3) removing the rate ceiling on capacity release transactions having a term of one year or less; and (4) modifying language otherwise non-compliant with the revised regulations.

4. Notice of National Fuel's filing in Docket No. RP09-269-000 was issued on January 29, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[3] Pursuant to Rule 214,[4] all timely filed motions to intervene and any motions to intervene out-of-time 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. On February 9, 2009, Atmos Energy Marketing LLC (Atmos) and Columbia Gas of Pennsylvania, Inc. (CPA) independently filed motions to intervene and comments. On February 9, 2009, the Peoples Natural Gas Company (Dominion Peoples) filed a motion to intervene and limited protest. On February 9, 2009, the National Grid Gas Delivery Companies (National Grid)[5] filed a motion to intervene, limited protest, and request for modifications.

[3] 18 C.F.R. § 154.210 (2008).

[4] 18 C.F.R. § 385.214 (2008).

[5] National Grid is comprised of the following: 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.

5. On February 19, 2009, National Fuel filed an answer to the comments and protests.[6] On February 27, 2009, the Interstate Natural Gas Association of America (INGAA) submitted comments. On March 11, 2009, the American Gas Association (AGA) filed a response to INGAA's comments. The comments, limited protests, and answer are discussed in detail below.

6. The Commission finds that National Fuel's proposed tariff revisions are generally consistent with Order Nos. 712 and 712-A and the Commission's capacity release policies. Accordingly, the Commission accepts National Fuel's filing, subject to conditions and further review, as discussed below.

7. Atmos asks the Commission to require National Fuel to include provisions allowing the "flow-through" of discounts from releasing shippers to their asset managers. Atmos states that it is unclear whether and to what extent National Fuel 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 National Fuel 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.

8. Dominion Peoples requests that the Commission condition acceptance of National Fuel's proposed tariff sheets on the outcome of the Commission's ruling in *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396 (2008) (*Texas Eastern*) on the issue for which the Commission sought comments, i.e., whether the Commission should require pipelines to allow releasing shippers to pass through discounted or negotiated usage or fuel charges.

9. In its answer, National Fuel argues that the Commission should not require pipelines to give the same discounted usage and fuel charges to asset manager replacement shippers as to the releasing shipper because such a requirement is beyond the scope of this proceeding. National Fuel also asserts that the discount flow-through issue is a policy issue that should be dealt with on a generic basis as part of a new rulemaking. National Fuel further argues that if the Commission determines that it will address this issue in the current tariff filing, then Atmos' request should be denied because discounting decisions by pipelines must be evaluated on a case-by-case basis in the context of market conditions. National Fuel suggests that, at a minimum, (i) asset managers should not automatically receive the usage charge discount that a releasing

[6] The Commission's Rules of Practice and Procedure do not permit answers to protests (18 C.F.R. § 385.213(a)(2) (2008)). However, the Commission finds good cause to accept National Fuel's answer since it will not delay the proceeding, may assist the Commission in understanding the issues raised, and will ensure a complete record. Therefore, National Fuel's answer is accepted.

shipper has with respect to volumes used for the account of any entity other than the releasing shipper, and (ii) pipelines should not be required to provide asset managers with the same usage charge discount as the releasing shipper unless the gas is being shipped to meet the asset manager's obligations to the releasing shipper.

10. 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.

11. 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.

12. 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.[7] Therefore, a pipeline such as National Fuel 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.[8] Thus, the issue of the "flow-through" of discounted usage and fuel charges to an asset manager/replacement shipper does not arise on National Fuel'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. National Fuel 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.

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[7] 18 C.F.R. § 284.10(c)(4)(ii) and (5)(ii)(A) (2008).

[8] *Mississippi River Transmission Corp.*, 98 FERC ¶ 61,119, at 61,352 (2002).

13. 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.[9] 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.[10]

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.[11]

14. Order No. 712 did not modify the Commission's existing policy concerning the pipeline's offering usage charge discounts to replacement shippers.[12] 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 National Fuel 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

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

[10] *Id.*

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

[12] *Texas Eastern,* 125 FERC ¶ 61,396 at P 21.

is using the released capacity to satisfy the delivery or purchase obligation contained in the release to the asset manager/replacement shipper; [13]

(2) if a negotiated rate agreement with the releasing shipper provides that the negotiated rate is only applicable at certain specified receipt or delivery points as permitted by Commission policy,[14] should the asset manager/replacement shipper's use of those points be considered to be within the usage contemplated by the pipeline when it granted the negotiated rate to the releasing shipper? This then raises the question of whether the pipeline should 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 National Fuel 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 National Fuel, and will give the parties an opportunity to provide supplemental comments. In this regard, the Commission directs National Fuel to file the following information within 30 days of the date of this order: (1) how many of National Fuel'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 it 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 National Fuel's filing.

16. With respect to the request by INGAA and National Fuel 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 National Fuel's system.

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[13] *See* 18 CFR § 284.8(h)(3) (2008), as revised by Order No. 712-A (defining a release to an asset manager).

[14] *Williston Basin Interstate Pipeline Co.*, 110 FERC ¶ 61,210, at P 5, 22, *reh'g denied*, 112 FERC ¶ 61,038, at P 19 (2005).

17. CPA seeks clarification related to the proposed tariff language in section 10.9. This section provides that any rate paid by a replacement shipper in any capacity release transaction with a term of one year or less which is not subject to the maximum rate cap is deemed to be a final rate and is not subject to refund. Dominion Peoples seeks a clarification similar to that provided in *Texas Eastern*, where the Commission clarified that "a releasing shipper paying a recourse rate higher than the maximum just and reasonable rate determined in a 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."

18. 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.[15] The Commission explained that, as a result of Order No. 712, the pipeline's maximum rates no longer apply to such short-term releases. Therefore, replacement shippers are not entitled to any refunds when the Commission finds that the maximum rates proposed by the pipeline in a section 4 rate case are too high. However, the Commission also stated that a releasing shipper paying a recourse rate higher than the maximum just and reasonable rate determined in a 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.[16] Therefore, the refunds must be paid by the pipeline to the releasing shipper. The Commission finds that the discussion in *Texas Eastern* provides sufficient guidance on this issue and that the suggested tariff revisions to expressly require that National Fuel make such refunds to the releasing shipper are unnecessary.

19. Dominion Peoples argues that National Fuel's refund provision should be revised to clarify that, where the release was made to a marketer participating in a state-regulated retail access program, National Fuel must make the refund to the replacement shipper/marketer. Dominion Peoples states that, in that circumstance, the marketer steps into the shoes of the releasing shipper, and therefore should be entitled to any refunds that would otherwise be made to the releasing shipper. The Commission rejects these contentions. Order No. 712 removed the price ceiling on all capacity releases of one year or less, without regard to the purpose of the release, such as whether it was to a marketer in a retail access program. Therefore, the holding in *Texas Eastern* that the pipeline need

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[15] *Texas Eastern*, 125 FERC ¶ 61,396 at P 13. The discussion in *Texas Eastern* only applies to the reservation charge component of the rate paid by the replacement shipper. As the Commission stated in *Tennessee Gas Pipeline Co*., 126 FERC ¶ 61,171, at P 24-25 (2009), Order No. 712 did not remove the price cap with respect to the usage charge component of a replacement shipper's rate, and therefore that portion of the replacement shipper's rate remains subject to refund.

[16] *Id.*

not make refunds to replacement shippers in short-term releases applies to marketers in retail access programs in the same manner as it applies to any other short-term replacement shipper. 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.

20. National Grid requests that National Fuel be required to modify its tariff to explicitly provide that a releasing shipper may elect to agree to assume responsibility for its replacement shipper's charges from the pipeline, in lieu of any requirement that such replacement shipper satisfy National Fuel's creditworthiness standards. Specifically, National Grid requests that National Fuel be required to include in its tariff, language similar to that set forth in Dominion Transmission Inc.'s tariff, which states:

> Upon mutual agreement between Pipeline and Releasing Customer, Pipeline will not bill Replacement Customer but will bill Releasing Customer for charges under this Section, and Releasing Customer may bill Replacement Customer; provided, however, that: (1) Releasing Customer must post such arrangement in its Release Notice; and (2) Releasing Customer is liable for all charges owed to Pipeline to the extent of its agreement with Replacement Customer, and Replacement Customer has no liability to Pipeline for such charges.[17]

21. National Grid argues that one of the benefits of including such a provision in National Fuel's tariff is that local distribution companies would have more flexibility to release capacity to small marketers in state retail unbundling programs. National Grid contends that in its experience, certain small marketers may find it extremely burdensome to comply with pipeline creditworthiness requirements and enabling releasing shippers to opt to be responsible for replacement shippers' charges would further the Commission's policy of facilitating capacity releases entered into pursuant to state retail access programs.

22. National Grid further contends that while Commission policy requires replacement shippers to satisfy pipeline creditworthiness standards, the Commission has determined that pipelines "could give the releasing shipper the option of . . . assuming liability for the

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[17] *Citing* Dominion Transmission, Inc., FERC Gas Tariff, Third Revised Volume No. 1, Substitute Second Revised Sheet No. 1153.

usage charge in the event of the replacement shipper's default."[18] National Grid further asserts that given the Commission's support for retail unbundling as evidenced by Order No. 712 and elsewhere, there is no reason why the Commission should not require National Fuel and other pipelines to permit releasing shippers to agree to assume responsibility for pipeline charges where such a provision will afford LDC shippers greater flexibility to arrange capacity releases for the benefit of small marketers operating on their systems.

23. National Fuel, in its answer, responds that National Grid's requests are unrelated to the regulatory changes promulgated in Order Nos. 712 and 712-A and, therefore, should be denied.

24. National Grid's request that National Fuel be required to afford releasing shippers the right to assume responsibility for a replacement shipper's charges is outside the scope of Order No. 712 and unsupported by National Grid. While such an option may provide local distribution companies with more flexibility in releases to marketers in state unbundling programs, the Commission has already provided support for such programs in Order No. 712 by exempting releases to marketers participating in state regulated unbundling programs from the prohibition against tying and bidding requirements. The fact that such a requirement may provide more flexibility for local distribution companies is not compelling as a reason to impose the requirement on pipelines. As National Grid notes, the Commission has previously allowed pipelines to provide releasing shippers the option to assume liability for a replacement shipper's usage charge in the event of a replacement shipper's default.[19] National Grid provides no compelling reason, however, why the Commission should require the pipeline to provide such an option. Therefore, National Grid's requests are denied.

25. Section 10.2(a)(viii) of the GT&C of National Fuel's tariff requires a releasing shipper to identify any pre-arranged replacement shipper and, if the release is "less than one month," state whether the releasing shipper wants National Fuel to solicit bids. National Fuel proposes to replace the phrase "less than one month" with the phrase "31 days or less." It also proposes to add a requirement that the releasing shipper state whether the release is exempt from bidding because the prearranged shipper is an asset manager or a marketer participating in a state-regulated retail access program.

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[18] *Citing Dominion Cove Point LNG, LP*, 104 FERC ¶ 61,184, at P 7 (2003) (*Dominion Cove Point*).

[19] National Grid protest, at 6, citing *Dominion Cove Point*, 104 FERC ¶ 61,184 at P 7.

26. In Order No. 712-A, the Commission revised section 284.8(h)(1)(i-iv) of its regulations to clarify that releases of capacity to an asset manager, releases of capacity to a marketer participating in a state-regulated retail access program, releases for more than one year at the maximum tariff rate, and releases for any period of 31 days or less, need not comply with the bidding requirements of 18 C.F.R. § 284.8(c)-(e) (2008). As noted, National Fuel's proposed modifications to section 10.2(a)(viii) require the releasing shipper to indicate whether a release is non-biddable because it is for 31-days or less or is to an asset manager or a marketer participating in a state approved retail access program. It does not propose, however, to require a releasing shipper to indicate whether a release to a pre-arranged shipper is non-biddable because it is for more than a year at the maximum applicable rate. Moreover, as proposed, National Fuel's GT&C section 10.2(a)(viii) is inconsistent with proposed GT&C section 10.3(b), which correctly states that the pipeline will post the releasing shipper's release notice for informational purposes only, and not to solicit bids, if the release is for a term of more than a year at the maximum tariff rate, as well as in the three other situations where releases are exempt from bidding. Thus, the Commission directs National Fuel to revise section 10.2(a)(viii), within 15 days of the date of this order, to require that the releasing shipper's release notice state whether the prearranged release is at the maximum rate for more than one year and thus exempt from bidding.

27. National Grid requests that National Fuel revise section 10.2(a) of its tariff to explicitly permit the exercise of all storage inventory transfer rights and to impose conditions on the release of storage capacity, as permitted by Order Nos. 712 and 712-A. Specifically, National Grid requests that National Fuel add a new subsection, 10.2(a)(xix), that states that for releases of storage capacity, a releasing shipper may include in its capacity release notice conditions concerning the transfer and/or return of storage inventory both inside and outside the context of an AMA. National Grid further requests that National Fuel refer to such storage capacity release condition rights in any sections of its tariff that cross-reference the information to be included in a capacity release notice, with specific reference to the introduction of GT&C section 10 of National Fuel's tariff.[20]

28. National Fuel, in its answer, responds that its current tariff language permits shippers to identify terms and conditions, including but not limited to storage related provisions. Further, National Fuel states that the introductory paragraph defines the instances when the capacity release timeline is applicable and National Grid's suggested cross-reference would make the timelines set forth in the tariff applicable to releases that

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[20] *See* proposed Third Revised Sheet No. 356, National Fuel's FERC Gas Tariff, Fourth Revised Volume No. 1 (section 10).

include special terms and conditions related to storage inventory, regardless of their complexity or the time required for their satisfaction.

29. National Grid's request is denied. As National Grid acknowledges, National Fuel's existing tariff language requires shippers to identify the terms and conditions of each release. As noted by National Fuel in its answer, this section includes but is not limited to terms and conditions of storage related releases. While the Commission in Order No. 712 permitted parties to negotiate further terms and conditions related to the commodity portion of storage release transactions, we find no reason to require National Fuel to specify that option in section 10.2 of its tariff or in any sections that cross reference section 10.2.

30. Dominion Peoples asserts that section 10.3(b) of National Fuel's tariff should be revised to refer to "state-regulated retail access programs" instead of "state-mandated retail access programs." Dominion Peoples argues that this change is consistent with the language of the Commission's new capacity release regulations and ensures that all regulated state unbundling programs, whether mandated or encouraged and sanctioned, are covered.

31. Throughout Order Nos. 712 and 712-A, the Commission refers to "state-regulated retail access programs" and not "state-mandated retail access programs." National Fuel has agreed to revise section 10.3(b) in accordance to Dominion Peoples' suggested changes. Therefore, the Commission directs National Fuel to file revised tariff sheets containing these revisions within 15 days of the date of this order.

32. Dominion Peoples also requests that National Fuel be required to add tariff language explaining 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. Dominion Peoples claims that, according to section 10.3(b) of National Fuel's tariff, all re-releases to the same replacement shipper are subject to the 28-day hiatus.

33. In its answer, National Fuel clarifies that section 10.3(b) of the tariff is consistent with section 284.8(h)(2) of the Commission's regulations. The revised tariff sheets specify that the 28-day hiatus is only applicable to releases posted for informational purposes pursuant to clause (i) of that section (i.e., releases of 31 days or less) or a renewal of such a previously posted transaction. Accordingly, National Fuel believes that it is not necessary to add tariff language explaining when the 28-day hiatus is not applicable.

34. National Fuel has included affirmative language implementing the 28-day restriction on re-releases to the same shipper, in the section of its tariff pertaining to the posting of shipper's notices. This language is entirely consistent with Order Nos. 712 and 712-A, and the resulting revisions to section 284.8(h)(2) of our regulations. The

Commission does not believe it necessary for National Fuel to include provisions stating the inapplicability of the 28-day hiatus where that restriction does not apply. The Commission denies the Dominion Peoples request.

35. The Commission accepts the tariff sheets listed in the Appendix to this order to be effective on February 25, 2009, subject to conditions and further review, as discussed above in the body of this order.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

cc: All Parties

<u>Appendix</u>

National Fuel Gas Supply Corporation
FERC Gas Tariff, Fourth Revised Volume No. 1
<u>Tariff Sheets Accepted, Effective February 25, 2009, Subject to Conditions</u>

Third Revised Sheet No. 356
Fourth Revised Sheet No. 358
Fourth Revised Sheet No. 359
First Revised Sheet No. 359A
Fourth Revised Sheet No. 360
Second Revised Sheet No. 360A
Second Revised Sheet No. 360B
Fifth Revised Sheet No. 362
First Revised Sheet No. 366.03