

128 FERC ¶ 61,124
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

August 3, 2009

In Reply Refer To:
Florida Gas Transmission Company, LLC
Docket No. RP09-175-000

Florida Gas Transmission Company, LLC
P.O. Box 4967
Houston, TX 77210-4967

Attention: Michael T. Langston
Senior Vice President, Government & Regulatory Affairs

Reference: Order Rejecting Tariff Sheets

Dear Mr. Langston:

1. On February 17, 2009, Florida Gas Transmission Company, LLC (FGT) filed to comply with the Commission's January 16, 2009 Order in this proceeding.¹ The January 16, 2009 Order accepted and suspended tariff sheets to revise FGT's form of service agreements and the associated Rate Schedules to provide that multiple affiliated shippers associated with a single affiliated agent, may act under a single contract option, to be effective January 19, 2009, subject to condition.² As discussed below, the Commission finds that FGT has not complied with the conditions set forth in the January 16, 2009 Order, and rejects the tariff sheets.

2. On December 19, 2008, FGT filed revised Form of Service Agreements, revised Rate Schedules and the corresponding tariff sheets to provide a single contract option for multiple affiliated shippers associated with a single affiliated agent to be defined

¹ *Florida Gas Transmission Co., LLC*, 126 FERC ¶ 61,055 (2009) (January 16, 2009 Order).

² See Appendix to the January 16, 2009 Order.

individually and collectively as a “Shipper.” FGT proposed that multiple affiliated shippers associated with a single affiliated agent, may act under a single contract option, if such shipper meet three criteria. FGT proposed that, to qualify for single contract treatment, the affiliated shippers must show that they: (1) have collectively met the “shipper must have title” test; (2) are jointly and severally liable for all obligations under the contract, and; (3) are willing to be treated collectively as one shipper for nomination, allocation and billing purposes under the contract. FGT maintained that it has several contracts with Southern Company Services, Inc. (SCS) as agent for multiple SCS affiliated companies that were comparable to those discussed by the Commission in *Southern Natural Gas Company*.³

3. Florida Cities,⁴ protested FGT’s filing and argued that, in *Southern*, the Commission permitted the company to allow multiple shippers associated with a single agent to use one master firm transportation agreement, regardless of whether the shippers were affiliated with one another. It maintained that FGT’s proposal differed in that FGT would only allow this option to be utilized by companies that are affiliated with one another. Florida Cities argued that the Commission should require that FGT permit this single service agreement option to be available to any discrete set of shippers that otherwise meet the applicable criteria for use of an agent as a condition of the Commission’s acceptance of FGT’s proposal.

4. In its January 16, 2009 Order, the Commission pointed out that in *Southern*,⁵ the pipeline filed a master service agreement between itself and SCS acting as agent for six affiliates. The Commission determined that this constituted a material deviation from Southern’s *pro forma* service agreement. Therefore, the Commission directed Southern either to remove this feature from the contract or file a revised *pro forma* service agreement so the service would be available to all eligible shippers in a manner that is not unduly discriminatory as a part of Southern’s generally applicable tariff. The Commission stated that Southern chose the latter option and provided revisions to its *pro*

³ January 16, 2009 Order at P 3, *citing, Southern Natural Gas Co.*, 123 FERC ¶ 61,263 (2008); *order on compliance*, 124 FERC ¶ 61,145 (2008) (*Southern*).

⁴ “Florida Cities” includes JEA, the Orlando Utilities Commission, City of Lakeland Electric Department, the City of Tallahassee, Florida, the City of Gainesville d/b/a Gainesville Regional Utilities and Florida Gas Utility, a Florida inter-local agency whose membership presently consists of more than twenty municipally-owned electric and/or gas utilities.

⁵ January 16, 2009 Order at P 7, *citing, Southern*, 123 FERC ¶ 61,263, at P 9 (2008).

forma service agreement and criteria for eligible shippers to meet.⁶ The Commission noted, however, that Southern did not propose to require that the shippers availing themselves of this service be affiliated with each other.

5. Accordingly, the Commission accepted and suspended FGT's proposed tariff sheets to be effective January 19, 2009. However, while the Commission recognized that FGT had set forth criteria to determine shippers eligible for its proposal, it found that FGT did not explain why its proposal would apply only to shippers that are affiliated with one another. Therefore, the Commission conditioned its acceptance of FGT's tariff sheets by directing FGT to explain why shippers that meet its criteria, in particular shippers that have agreed to be jointly and severally liable for all obligations under the contract, are not unduly discriminated against when they are denied access to this service because they are not otherwise affiliated with each other. The Commission also stated that FGT may, in the alternative, revise its proposed tariff sheets to remove the language that appears to require that the shippers availing themselves of this program be affiliated.

6. FGT states that it is able to support the proposed "agent option" only for affiliated shippers. FGT states that its experience is that there are only certain situations where shippers can fulfill the requirement that the shippers be jointly and severally liable for each other. FGT states that its business experience shows that only affiliated shippers qualify as being responsible for the full contract quantity of all shippers under the single contract. FGT continues that it is not aware of other situations where this requirement could be met and, therefore, it could not support a broader application of the option.

7. FGT states that it does not believe that any of the entities which comprise the Florida Cities could meet the above described test. FGT states that it is not aware that any of the Florida Cities entities have the authority in their charters which would allow the entity to either indemnify FGT for the debt of another political body or legal entity or to guarantee the debt of another political body or legal entity. On the other hand, FGT continued, the Florida Cities already have two mechanisms which allow them to combine their contracts to be administered by a single agent. First, pursuant to the terms of Section 11 of FGT's Market Area firm rate schedules (Rate Schedules FTS-1 and FTS-2) public agencies are allowed to aggregate all or part of their firm capacity under a single service agreement into a Joint Action Agency.⁷ These agencies may enter into a single contract at any time and also may disaggregate their capacity at any time. FGT states that

⁶ *Id.*, citing, *Southern*, 124 FERC ¶ 61,145 (2008).

⁷ FGT Compliance filing at p.4, citing FGT's FERC Gas Tariff, Original Sheet Nos. 42-45 and 115-118.

the Florida Gas Utility acts as Joint Action Agency for 20 different shippers on FGT's system and has been the agent for multiple shippers since 1993.

8. Second, FGT states that in its Order Nos. 712 and 712-A⁸ compliance filing, cities and city agencies have the ability to release capacity to an entity operating under an asset management arrangement (AMA).⁹ Any number of parties could release capacity to the same AMA, which could administer the contracts of all of the releasing parties.

9. FGT argues that it is within its rights under section 4 of the Natural Gas Act (NGA), to propose rates, terms and conditions for service it provides and the Commission must accept the proposal if it is just and reasonable regardless of whether another proposal might also be just and reasonable.¹⁰ FGT argues that Florida Cities has in no way shown that the FGT proposal is unjust and unreasonable or that it is unduly discriminatory.

10. FGT concludes that there is no undue discrimination with its proposal and that to open the doors wider to allow unqualified parties to apply for the option, would invite conflict and result in inefficient administration not only of the business of the pipeline but also of the Commission.

11. The Commission finds that FGT has failed to comply with the directives of the January 16, 2009 Order. The January 16, 2009 Order directed FGT to explain why shippers that meet its criteria for its proposal, in particular why shippers that have agreed to be jointly and severally liable for all obligations under the contract, are not unduly discriminated against when they are denied access to this service because they are not otherwise affiliated with each other. In the alternative, FGT was directed to remove the offending language from its tariff proposal.

12. FGT first states that it is able to support its proposal only for affiliated shippers because there are only certain situations where shippers can fulfill the requirement that the shippers be jointly and severally liable for each other. It argues that in its experience

⁸ *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37,058 (June 30, 2008), *FERC Statutes and Regulations* ¶ 31,271 (2008), *order on reh'g*, Order No. 712-A, 73 Fed. Reg. 72,692 (December 1, 2008), *FERC Statutes and Regulations* ¶ 31,284 (2008).

⁹ *Florida Gas Transmission Company, LLC*, in Docket Nos. RP09-253-000 and RP09-253-001, 126 FERC ¶ 61,267 (2009).

¹⁰ FGT Compliance filing at p.6, *citing, Eastern Shore Natural Gas Co.*, 114 FERC ¶ 61,011, at P 8 (2006).

only affiliated shippers qualify as being responsible for the full contract quantity of all shippers under the single contract and that it is not aware of other situations where this requirement could be met. Therefore, FGT states that it cannot support a broader application of the option.

13. This argument does not provide a basis for finding that FGT's proposal to limit the single contract option to affiliated shippers is not unduly discriminatory. It merely sets forth FGT's belief that only affiliated shippers will agree to be responsible for each others' contract demands. It does not explain why non-affiliated shippers that have agreed to become jointly and severally liable for each others' contract demands must be excluded by FGT. FGT's assertion that only affiliated shippers may be responsible for the contract quantities of other shippers does not explain why it cannot support a proposal of unaffiliated shippers that have agreed to be responsible for the contract demand of other shippers. Simply because FGT cannot imagine a group of unaffiliated shippers agreeing to be jointly and severally liable under a single transportation contract does not lead to a requirement that such a group, if they so agree, should be disqualified from requesting such a contract option. Moreover, if FGT is convinced that no shippers other than affiliated shippers will agree to become responsible for the contract demand of other shippers, revising its tariff to permit single contract treatment for such non-affiliated shippers will not cause it any problems as no shipper would qualify for such treatment.

14. Secondly, FGT argues that for various reasons the Florida Cities are unable to either indemnify FGT for the debt of another political body or legal entity or to guarantee the debt of another political body or legal entity. FGT also argues that the Florida Cities may avail themselves of Rate Schedules FTS-1 and FTS-2 of its tariff which permits public agencies to aggregate all or part of their firm capacity under a single service agreement into a Joint Action Agency. FGT also argues that pursuant to Order No. 712 cities and city agencies have the ability to release capacity to an entity operating under an AMA and therefore, the Florida Cities have a second single-contract option.

15. These arguments also fail to support a finding that FGT's proposal is not unduly discriminatory. FGT argues that Florida Cities cannot guarantee the debt of other political bodies or legal entities but that they have been provided with other mechanisms to reach the effect of the single contract option. While the Commission takes no position on FGT's assertions concerning legal restrictions on the Florida Cities, the argument posited by FGT fails to explain why unaffiliated shippers that can and do agree to be jointly and severally liable for each other's contract demand cannot be granted the single contract option as FGT has proposed for shippers that are affiliated with each other. FGT's argument, if taken at face value, would merely show that the Florida Cities could not agree to be jointly and severally liable for each other's contract demand, and thus could not qualify for the single contract option. It would not show why shippers that could make such agreements must be denied service under the one contract proposal. Further, while FGT argues that the Florida Cities may avail themselves of an AMA to

accomplish their goals, it does not state why unaffiliated shippers that have agreed to be jointly and severally liable for each other's contract demand should have to incur the costs of an AMA to accomplish similar results as FGT permits affiliated shippers under its single contract proposal.

16. FGT argues that it tailored its option for affiliated shippers so that they might have a single agent administer the contract for the affiliates. It argues that because the affiliates fall under the same corporate umbrella and under that umbrella there is only a single exposure for the full contract volume, this option can be efficiently utilized for affiliates. It posits, however, "that unaffiliated companies are not subject to the same corporate umbrella and, therefore, are in different circumstances than affiliated companies."¹¹ FGT argues that the Commission's approval of this affiliation requirement in *Transco* confirms this business reality, and that to allow unqualified parties to apply for the option will invite conflict.¹²

17. Again, FGT does not inform the Commission why unaffiliated companies not subject to the same corporate umbrella are different from affiliated companies if the unaffiliated companies have agreed to be jointly and severally liable for all obligations under the contract. The argument that the companies are different without a showing of how such a difference matters does not relieve FGT of its burden to show that it is not unduly discriminating against unaffiliated companies. Moreover, FGT's reliance on *Transco* to bolster its reluctance to inform the Commission why it cannot accommodate unaffiliated shippers is particularly ineffective given that the Commission stated in its January 16, 2009 Order that:

While FGT references two filings, the only relevant proceeding where such a contract was discussed by the Commission was *Southern Natural Gas Co.*, 123 FERC ¶ 61,263 (2008); *order on compliance*, 124 FERC ¶ 61,145 (2008) (*Southern*). The Director of the Office of Energy Market Regulation also issued an unpublished Delegated Letter Order in Docket No. RP09-37-000, issued November 24, 2008, accepting uncontested tariff sheets in a *Transco* proceeding.¹³

¹¹ FGT Compliance filing at p.5.

¹² FGT Compliance filing at p.5, *citing*, Office of Energy Market Regulation unpublished Delegated Letter Order in Docket No. RP09-37-000, issued November 24, 2008, accepting uncontested tariff sheets in a Transcontinental Gas Pipe Line Corporation (*Transco*) proceeding.

¹³ January 16, 2009 Order at fn.2.

While FGT claims to find support in the latter proceeding for not permitting unaffiliated shippers to avail themselves of the single contract option, in the Commission's view such an uncontested and unaddressed proceeding provides no support for FGT's position.¹⁴

18. FGT is not required by statute or Commission regulation to offer multiple shippers a single contract option. FGT correctly argues that it is within its rights to make proposals and that the Commission must accept the proposal if it is just and reasonable regardless of whether another proposal might also be just and reasonable. However, the January 16, 2009 Order found that FGT's proposal had not been shown to be just and reasonable and offered FGT two options to cure its proposal: (a) FGT may explain why shippers that have agreed to be jointly and severally liable for all obligations under the contract are not unduly discriminated against when they are denied access to this service because they are not otherwise affiliated with each other; or (b) revise its proposed tariff sheets to remove the language that appears to require that the shippers availing themselves of this program be affiliated. FGT has failed to support its proposal and has not revised its tariff sheets to remove the language that appears to require that the shippers availing themselves of this program be affiliated. Therefore, the Commission finds that FGT has not complied with the January 16, 2009 Order.

19. Accordingly, the Commission rejects the tariff sheets accepted subject to condition in the January 16, 2009 Order, without prejudice to FGT filing tariff sheets consistent with the condition set forth by that order in a new proceeding.

¹⁴ In *Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318, 1320 (2007) the court stated:

With regard to the unchallenged filings, FERC said: '[I]n the absence of protests, the Commission may simply have accepted these provisions without examining whether they conformed to Commission policy and precedent. Under such circumstances, accepting another pipeline's provisions does not necessarily establish a generic Commission policy or precedent regarding similar tariff provisions.' We think that position is eminently reasonable.

Further, the Court stated, "FERC's acceptance of a pipeline's tariff sheets does not turn every provision of the tariff into "policy" or "precedent." See, e.g., *Alabama Power v. FERC*, 301 U.S. App. D.C. 253, 993 F.2d 1557, 1565 n.4 (D.C. Cir. 1993); *Nevada Power Co.*, 113 FERC ¶ 61,007 at 61,013-14 (2005) (refusing to treat a rate calculation from a prior tariff as precedent because 'the issue was not raised, and the Commission did not discuss it or rule on it')." *Id.* at 1320.

The Commission orders:

(A) The Commission finds that the instant filing fails to comply with the directives of the January 16, 2009 Order.

(B) The tariff sheets accepted by the January 16, 2009 Order set forth in its Appendix are rejected without prejudice to FGT filing tariff sheets consistent with the conditions of that order in a new proceeding.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.