128 FERC ¶ 61,145
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Texas Eastern Transmission LP — Docket No. RP09-70-002

ORDER ON REHEARING

(Issued August 7, 2009)

1. On December 31, 2008, the Commission issued an order[1] accepting revised tariff sheets filed by Texas Eastern Transmission LP (Texas Eastern) on November 13, 2008 (November 13 filing). The November 13 filing proposed modifications to Texas Eastern's tariff to comply with the capacity release requirements promulgated by Order No. 712.[2] In its November 13 filing Texas Eastern also proposed certain tariff modifications unrelated to its compliance with Order No. 712. The Commission accepted the revised tariff sheets subject to conditions, effective January 1, 2009, as requested. On January 30, 2009, the Indicated Shippers[3] filed a request for rehearing of the December 31 Order. For the reasons discussed below, the Commission denies the request for rehearing.

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[1] *Texas Eastern Transmission LP*, 125 FERC ¶ 61,396 (2008) (December 31 Order).

[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, *order on reh'g*, Order No. 712-A, 73 Fed. Reg. 72,692 (December 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008) *order on reh'g*, Order No. 712-B, 127 FERC ¶ 61,051 (2009). Texas Eastern made its November 13 filing after the issuance of Order No. 712, but before the issuance of Order No. 712-A.

[3] In this case, the Indicated Shippers consist of BP Energy Company, BP America Production Company, and Hess Corporation.

I. Background

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. 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 its November 13 filing, Texas Eastern proposed several changes to the capacity release provisions in section 3.14 of the General Terms and Conditions (GT&C) of its tariff to reflect the various changes in the capacity release regulations made by Order No. 712. Among other things, Texas Eastern proposed in section 3.14(H)(3) that for releases that become effective on or after July 30, 2008, 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. The Indicated Shippers objected to this provision. The Indicated Shippers argued that it would be unduly discriminatory to provide the refund to the releasing shipper rather than to the replacement shipper.

4. In the December 31 Order, the Commission rejected their contentions. The Commission stated that Order No. 712 removed the price ceiling for all short-term capacity releases of one year or less and accordingly, a capacity release transaction of one year or less has a market-based rate instead of the regulated cost-based rate.[4] Thus, because the pipeline's maximum rates do not apply to short-term capacity release transactions, the Commission explained, replacement shippers are not entitled to any refunds when the Commission finds that the maximum rates proposed by a pipeline in a section 4 rate case are too high.[5]

II. Indicated Shippers' Request for Rehearing

5. On rehearing, the Indicated Shippers argue the Commission erred in accepting Texas Eastern's tariff provision and not requiring refunds to replacement shippers taking short-term capacity releases in state retail unbundling programs. The Indicated Shippers request that the Commission direct Texas Eastern to modify its tariff to require that, when the Commission finds rates proposed in a section 4 rate case to be unjust and unreasonable, the pipeline must make refunds to the short-term state retail marketer

[4] December 31 Order, 125 FERC ¶ 61,396 at P 13.

[5] *Id.*

replacement shippers. The Indicated Shippers assert that while Order No. 712 discusses in detail the benefits of state-regulated retail unbundling programs to gas consumers and competition, the December 31 Order ignores the corresponding detrimental consequences on consumers and competition that would result from denying refunds of unjust and unreasonable rates to short-term state retail marketer replacement shippers. The Indicated Shippers contend that the basis for the Commission's finding that short-term capacity releases have a market-based rate does not apply to short-term releases to state retail marketer replacement shippers. The Indicated Shippers further contend that, to the contrary, pre-arranged releases to state retail marketers by an LDC are not subject to bidding and are not designed to reflect short-term variations in the market value of the capacity.

6. The Indicated Shippers argue that the December 31 Order failed to address its concerns that releases under state retail unbundling programs differ substantially from traditional capacity releases in which replacement shippers competitively bid for capacity and pay a market-based rate for short-term capacity. The Indicated Shippers further assert that replacement shippers in a state retail unbundling program effectively step into the shoes of regulated LDCs to provide the gas supply requirements of retail consumers. The Indicated Shippers contend that Texas Eastern's proposal would allow the LDCs to reap the benefit of a windfall from any refunds, even though the marketers are bearing financial responsibility and paying the LDCs' pass-through rate for the capacity. This, the Indicated Shippers contend, would result in a competitive advantage for LDCs over state retail marketers.

7. The Indicated Shippers contend that Order No. 712 does not support denial of refunds to state retail marketers. The Indicated Shippers assert that most capacity releases in state retail unbundling programs are for significantly less than one year and typically only one month. The Indicated Shippers contend that, accordingly, an LDC can release capacity to the actual state retail marketer serving the retail customer for whom the capacity was originally acquired. The Indicated Shippers assert that, in Order No. 712-A, the Commission specifically recognized that a state retail marketer's share of released capacity changes based on the marketer's continuing participation in the state program and its market share.

8. The Indicated Shippers argue that the state retail unbundling program's capacity release process is designed to provide seamless service to the retail customer and, in many cases, to pass-through the LDC's interstate pipeline capacity rates to the state retail marketer. However, the Indicated Shippers assert that the December 31 Order will place a state retail marketer at a potential competitive disadvantage relative to an LDC. The Indicated Shippers further assert that refunds constitute a windfall to the LDC, effectively reducing its cost of holding the capacity it has retained to supply the gas requirements of its own retail gas supply customers. The Indicated Shippers contend that this rate exclusion makes it more difficult for retail marketers to compete with LDCs to attract and

retain customers. The Indicated Shippers contend that the December 31 Order constitutes an unexplained departure from the policies articulated in Order No. 712.

9. The Indicated Shippers argue that elimination of the short-term rate cap does not justify denial of refunds to marketers under a state retail unbundling program. The Indicated Shippers assert that, consistent with the Commission's finding in the Notice of Proposed Rulemaking that culminated in Order No. 712, an LDC's short-term release to a marketer participating in a state retail unbundling program differs from other short-term capacity releases because the capacity releases are not releases of excess capacity to the open market, but releases needed to serve the LDC's retail customers. The Indicated Shippers further assert that while short-term capacity releases have a market-based rate, pre-arranged short-term releases under a state retail unbundling program are not subject to bidding, and consequently do not reflect the short-term variations in the market value of the capacity. The Indicated Shippers contend that the pass-through rate is based either on the pipeline's maximum tariff rate or, where applicable, a discount or negotiated rate provided for in the released contract between the pipeline and the LDC. The Indicated Shippers state that retail marketer replacement shippers in a state retail unbundling program simply step into the shoes of the LDC releasing shipper to serve the LDC's retail customers, resulting in interstate pipeline capacity costs for the retail customer that are the same regardless of whether the retail customer purchased gas supplies from the LDC or from the state retail marketer.

10. The Indicated Shippers further argue that the refund provision has an inequitable impact on state retail marketers depending on whether the capacity release is a short-term or long-term release. The Indicated Shippers argue that where the LDC releases capacity for thirteen months, as opposed to each month over a thirteen-month period, the state retail marketer replacement shipper would receive refunds from the pipeline. Moreover, the Indicated Shippers maintain that state retail marketer replacement shippers do not have any ability to negotiate with the LDC regarding the term of the capacity release.

11. The Indicated Shippers argue that the Commission's holding regarding refunds is not only inconsistent with Order No. 712, but also likely to have a significantly negative impact on the energy market and on gas consumers. The Indicated Shippers claim that state retail marketers will not be able to compete with LDCs to service retail gas customers because the marketers will be required to pay a higher rate than the LDC for the same capacity and consequently, will likely increase costs passed through to the retail gas consumers for whom the capacity was originally acquired. The Indicated Shippers further claim that by requiring each LDC releasing shipper and state retail marketer replacement shipper to negotiate whether the LDC will pass-through any refunds is likely to result in potential delays and conditions, which will cost market participants significant time and resources and does not ensure that the LDC will agree to pass-through the refunds to its competitor (i.e., the retail marketer replacement shipper).

III. Discussion

12. For the reasons set forth below, Indicated Shippers' request for rehearing is denied. The issues raised by Indicated Shippers are generally the same issues raised by several parties, including the Indicated Shippers, on rehearing in Tennessee Gas Pipeline Company's Order No. 712 compliance proceeding. As the Commission explained in its order on rehearing in that proceeding,[6] Order No. 712 revised the Commission's regulations to remove the price cap on short-term capacity releases. As a result, the pipeline's maximum cost-of-service rates no longer apply to such releases. It follows that when the Commission finds in a pipeline section 4 rate case that the pipeline's proposed maximum rates are too high, the short-term replacement shipper is not entitled to refunds. To the extent the releasing shipper was paying a recourse rate in excess of the just and reasonable rate, however, it is entitled to a refund, including during the period the short-term release was in effect.[7]

13. As described above, the Indicated Shippers argue at length that the Commission's reasons for removing the price cap for all short-term releases in Order No. 712 are not applicable to short-term releases by an LDC as part of a state-regulated retail access program. For example, the Indicated Shippers contend that LDCs making such releases have market power, and such releases are not made at rates reflecting short-term variations in the market value of the capacity as intended by Order No. 712. The Indicated Shippers assert that, instead, LDCs typically release capacity to the same retail marketers on a monthly or other regular short-term basis based upon each marketer's share of the retail market often at the same rate the LDC is paying the pipeline.

14. These contentions concerning the applicability of the reasons for removing the price cap to consecutive short-term releases to retail marketers under a state-regulated retail access program are an impermissible collateral attack on the regulations adopted by Order No. 712.[8] In Order No. 712-A, the Commission expressly held that such consecutive short-term releases in a state-regulated retail access program are appropriately treated as separate short-term releases for purposes of Order No. 712's removal of the maximum rate ceiling.[9] If the Indicated Shippers, who participated in the Order No. 712 rulemaking proceeding, desired to contest Order No. 712-A's holding on

[6] *Tennessee Gas Pipeline Co.*, 127 FERC ¶ 61,150, at P15 (2009) (Tennessee).

[7] *See id. (*citing *Columbia Gas Transmission LLC*, 126 FERC ¶ 61,084, at P 16 (2009)).

[8] *See Tennessee,* 127 FERC ¶ 61,150 at P 16.

[9] Order No. 712-A, FERC Stats. & Regs. ¶ 31,284 at P 117.

this issue, they should have sought rehearing of that order. Having failed to do so, it is too late now for it to contest the removal of the price cap on such releases.

15. The Indicated Shippers' remaining contentions about adverse effects on retail access programs and the retail consumers served by such programs all fail to take into account the fact that such programs are regulated by state public service commissions.[10] The Indicated Shippers suggest that, if the pipeline makes the refunds to the LDC, the marketers' lack of negotiating leverage with the LDC will enable it to keep the refunds. As a result, the marketers' transportation costs will be higher than the LDC's costs, leading to unfair competition between the LDC and the marketers and higher costs for retail consumers served by the marketers. These contentions are all based upon the false premise that the LDC's disposition of the refunds is entirely within its discretion. In fact, as a regulated public utility, the LDC must dispose of the refunds as directed by the state public service commission.

16. Our capacity release regulations and policies contain nothing that would prevent a state commission from requiring the LDC to dispose of those refunds in whatever manner the state public service commission finds will best achieve the goals of its retail access program.[11] For example, section 284.8(b) of the Commission's regulations permits the releasing shipper to include terms and conditions in its releases. Therefore, if a state commission and the participants in a state-regulated retail access program wish to require the LDC to pass through any refunds it receives from the pipeline to the marketers in the program, they can do so by requiring the LDC to include such a condition in its releases to the marketers.[12] Alternatively, the state public service commission could require the

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[10] *See Tennessee*, 127 FERC ¶ 61,150 at P 17 (citing 18 C.F.R. § 284.8(h)(4), as adopted by Order No. 712-A, which defines the releases in retail access programs that are eligible for the exemption from bidding as "any prearranged capacity release that will be utilized by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program *approved by the state agency with jurisdiction over the local distribution company that provides delivery service to such retail consumers*.") (emphasis added).

[11] *See Tennessee*, 127 FERC ¶ 61,150 at P 17.

[12] Similarly, the parties can structure the release to provide that the rate to be paid by the retail marketer will be equal to the maximum rate in the pipeline's tariff rate, including a provision for any refunds to go to the retail marketer. While Order No. 712 removed the price cap for short-term capacity releases to permit such releases at a rate in excess of the pipeline's maximum rate, there is nothing in Order No. 712 to prevent a releasing shipper from nevertheless agreeing with a replacement shipper that the rate for

(continued…)

LDC to flow the refunds through directly to the retail consumers served by the retail access program or dispose of the refunds in some other manner.

17. Therefore, as in *Tennessee*, we conclude the issue as to the appropriate distribution of any refunds received by an LDC in a state unbundling program is appropriately left to the state public service commissions with jurisdiction over such programs.[13]

The Commission orders:

The request for rehearing of the Indicated Shippers is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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a short-term release will be equal to the pipeline's maximum rate or some percentage of that rate.

[13] In the December 31 Order (at P 21), the Commission requested further information related to the flow through of usage charge discounts from releasing shippers. Texas Eastern has responded and parties have commented on that response. Those issues are pending and will be considered in a future Commission order.