

129 FERC ¶ 61,046
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

October 16, 2009

In Reply Refer To:
Texas Gas Transmission, LLC
Docket No. RP09-1051-000

Texas Gas Transmission, LLC
3800 Frederica Street
Owensboro, KY 42301

Attention: J. Kyle Stephens
Vice President, Regulatory Affairs and Rates

Reference: Non-Conforming Service Agreement

Dear Mr. Stephens:

1. On September 18, 2009, Texas Gas Transmission, LLC (Texas Gas) filed a revised tariff sheet¹ and a non-conforming service agreement between Texas Gas and ProLiance Energy, LLC (ProLiance). We accept and suspend, subject to the conditions discussed in the order, the revised tariff sheet, to be effective September 18, 2009, as proposed, and the filed service agreement.²
2. Following the Commission's order in *Southern Star Central Gas Pipeline, Inc.*,³ Texas Gas states that it initiated a review of its agreements to determine whether they conform to the *pro forma* service agreements contained in Texas Gas' tariff. Texas Gas explains that in the course of its review, it has identified the No-Notice Transportation Service (NNS) Agreement No. 13646 with ProLiance as an agreement that has not

¹ Fifth Revised Sheet No. 99A to FERC Gas Tariff, Third Revised Volume No. 1.

² The Commission grants waiver of the 30-day notice requirement to allow the sheets to become effective as proposed. 18 C.F.R. § 154.207 (2009).

³ 125 FERC ¶ 61,082 (2008) (*Southern Star*).

previously been filed with the Commission that contains non-conforming provisions.⁴ Texas Gas states that the non-conforming provisions in this agreement include a deviation from the *pro forma* service agreement which permits varying contract demands throughout the summer season. Specifically, for the months of May and September, the contract specifies a contract demand of 45,410 MMBtu/day, while for June through August the contract demand is only 22,149 MMBtu/day. Texas Gas states that the provision was included at the request of ProLiance to enable ProLiance to respond to market demand. Texas Gas asserts that this deviation applies only to this agreement and has no impact on the rights of any other Texas Gas customer.⁵

3. Public notice of Texas Gas' filing was issued on September 21, 2009, with comments, interventions and protests due on or before September 30, 2009. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2009)), all timely filed motions to intervene and any motion 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 the proceeding or place additional burdens on existing parties. A joint protest was filed by the Western Tennessee Municipal Group,⁶ Jackson Energy Authority, City of Jackson, Tennessee, and the Kentucky Cities⁷ (collectively, Cities).

4. Cities argue that the Commission has previously found that the ability to vary contract demand is a valuable right because it enables shippers to pay reduced reservation

⁴ *Southern Star*, 125 FERC ¶ 61,082.

⁵ Texas Gas also states that language not included in the *pro forma* service agreement also appears beneath the signature block to identify the signature page. Texas Gas states that it does not consider this language to be a material deviation because the language simply provides formatting information.

⁶ The Western Tennessee Municipal Group consists of the following municipal distributor-customers of Texas Gas: City of Bells, Gas & Water, Bells, Tennessee; Brownsville Utility Department, City of Brownsville, Brownsville, Tennessee; City of Covington Natural Gas Department, Covington, Tennessee; Crockett Public Utility District, Alamo, Tennessee; City of Dyersburg, Dyersburg, Tennessee; Gibson County Utility District, Trenton, Tennessee; Town of Halls Gas System, Halls, Tennessee; Humboldt Gas Utility, Humboldt, Tennessee; Martin Gas Department, Martin, Tennessee; Town of Maury City, Maury City, Tennessee; City of Munford, Munford, Tennessee; City of Ripley Natural Gas Department, Ripley, Tennessee.

⁷ The Kentucky Cities are the Cities of Carrollton and Henderson, Kentucky. They are municipal distributor customers of Texas Gas.

charges during periods of the year when their need for service is less.⁸ Cities contend that the Commission has previously held that the pipeline may not include differing contract demand levels in an agreement unless the pipeline's tariff provides the option on a not unduly discriminatory basis to the pipeline's other customers.⁹ Cities assert that Texas Gas' tariff does not include such a provision and that Texas Gas has not provided any justification for giving ProLiance this option while not offering it to others.

5. Accordingly, Cities assert that if the Commission accepts the ProLiance agreement, the Commission should condition its acceptance with a requirement that Texas Gas revise its tariff to expressly provide to all customers, on a not unduly discriminatory basis, the option of monthly varying contract demand and nominated daily quantity.

6. On October 6, 2009, Texas Gas filed an answer to the Cities' protest. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹⁰ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Texas Gas' answer because it has provided information that assisted us in our decision-making process.

7. In Texas Gas' answer, Texas Gas asserts that Cities are not similarly situated to ProLiance, the shipper subject to the proposed agreement. Texas Gas maintains that Cities and ProLiance utilize service under different rate schedules. ProLiance's agreement is pursuant to Rate Schedule NNS and Texas Gas states that most of the customers represented by the Cities utilize service pursuant to Rate Schedule SGT. As such, Texas Gas argues that a majority of Cities' constituents would not be affected by the outcome of the proceeding and therefore, Cities' protest should be rejected.

8. Texas Gas also argues that it is the Commission's policy to allow the continuance of existing contracts that have been ongoing and relied upon by the parties for many years, and that were entered into before the Commission clarified the standards governing materially non-conforming provisions in 2001.¹¹ Texas Gas asserts that its agreement with ProLiance is similarly a longstanding contractual commitment between the parties.

⁸ *Citing Texas Eastern Transmission, LP*, 102 FERC ¶ 61,028, at P 5 (2003), *reh'g denied*, 106 FERC ¶ 61,066 (2004).

⁹ *Citing Id.* P 1, 24.

¹⁰ 18 C.F.R. § 385.213(a)(2) (2009).

¹¹ *Citing Texas Eastern Transmission, LP*, 119 FERC ¶ 61,337, at P 11 (2007).

Texas Gas explains that the provision at issue was executed in 1998. Texas Gas states that in 2008, the parties extended this agreement and executed a new service agreement, to be effective November 1, 2009, that carried forward the non-conforming provision. Texas Gas asserts that the provision is permissible under the Commission precedent allowing the parties to maintain long-standing contractual commitments.

9. Texas Gas further urges that if the Commission determines that the non-conforming provision is impermissible, the Commission should order Texas Gas to strike the provision from the agreement. Texas Gas states that it is committed to re-negotiating the agreement in a manner which provides ProLiance an opportunity to meet its specific market needs, preserves the benefit of each party's bargain, and endeavors to prevent adverse impacts to ProLiance as a result of this proceeding.

10. Texas Gas further asserts that it should not be required to include in its tariff the option for customers to obtain monthly varying contract demand and nominated daily quantity, asserting that no showing has been made to satisfy the burden of proof under Section 5 of the Natural Gas Act to support such a change.

11. The Commission finds that the agreement filed by Texas Gas appears to conform with Texas Gas' currently effective *pro forma* service agreement. Texas Gas states that the contract that it has filed here deviates from its *pro forma* service agreement because it allows varying contract demand during the summer season. However, Texas Gas' currently effective NNS *pro forma* service agreement provides blanks to insert different daily contract demand quantities to be effective during certain date ranges as specified by the parties in the agreement.¹² In addition, the *pro forma* service agreement contains a notation that additional blanks may be added for additional time periods. These blanks appear to permit the monthly variations contained within the agreement filed by Texas Gas in this proceeding. Thus, it is not clear to the Commission how the parties view this provision as non-conforming. If a service agreement conforms with a pipeline's *pro forma* service agreement, the pipeline does not need to file the agreement with the Commission; agreements must only be filed if they contain material deviations.¹³ Moreover, if the *pro forma* service agreement allows for incorporation of varying contract demand, other parties with NNS service appear to be similarly entitled to

¹² Texas Gas, FERC Gas Tariff, Third Revised Volume No. 1, Second Revised Sheet No. 4200, First Revised Sheet No. 4201, and Original Sheet No. 4202. The Commission recognizes that Texas Gas has filed to modify its *pro forma* service agreements in Docket No. RP09-548-000, et al., but the proposed *pro forma* service agreements have been suspended to be effective until December 1, 2009, or some earlier date specified in a subsequent Commission order.

¹³ *Id.*

contract for daily contract demand that varies on a monthly basis or over some other date range.¹⁴ Therefore, the Commission directs Texas Gas, within 30 days of this order, to provide additional explanation for its position that the contract filed in this proceeding is a non-conforming contract.

12. Based upon a review of the filing, the Commission finds that the proposed tariff sheet and filed agreement have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission shall accept the tariff sheet and filed service agreement for filing and suspend their effectiveness for the period set forth below, subject to the conditions set forth in this order.

13. The Commission's policy regarding suspensions is that tariff filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards.¹⁵ It is recognized, however, that shorter suspensions may be warranted in circumstances where suspensions for the maximum period may lead to harsh and inequitable results.¹⁶ Such circumstances exist here where the contract permits a continuance of ProLiance's service. Accordingly, the Commission will exercise its discretion to accept and suspend the tariff sheet and the filed service agreement for the shorter period, permitting the tariff sheet to be effective September 18, 2009, as requested.

The Commission orders:

(A) Texas Gas' Fifth Revised Sheet No. 99A to FERC Gas Tariff, Third Revised Volume No. 1, is accepted and suspended, subject to the conditions set forth herein, to be effective September 18, 2009.

(B) The service agreement filed by Texas Gas, is accepted, subject to the conditions discussed herein.

¹⁴ The proposed language indentifying the signature page is accepted as an immaterial deviation.

¹⁵ See *Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension).

¹⁶ See *Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension).

(C) Texas Gas is directed within 30 days of this order to provide additional explanation for its position that the contract filed in this proceeding is a non-conforming contract.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.