

129 FERC ¶ 61,176
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Gas Transmission, LLC

Docket No. RP09-505-001

ORDER ON REHEARING

(Issued November 24, 2009)

1. On June 8, 2009, Texas Gas Transmission, LLC (Texas Gas) filed a request for clarification or, in the alternative, rehearing of the Commission's May 8, 2009 order in this proceeding.¹ Also on that date, the Western Tennessee Municipal Group,² the Jackson Energy Authority, City of Jackson, Tennessee, and the Kentucky Cities³ (collectively, Cities) filed a request for clarification of the May 8 Order. In this order, the Commission grants rehearing of the May 8 Order and rejects the tariff sheets⁴ originally accepted by that order.

¹ *Texas Gas Transmission, LLC*, 127 FERC ¶ 61,132 (2009) (May 8 Order).

² 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; First Utility District of Tipton County, Covington, Tennessee; City of Friendship, Friendship, 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.

³ The Kentucky Cities are the Cities of Carrollton and Henderson, Kentucky. They are municipal distributor-customers of Texas Gas.

⁴ Second Revised Sheet No. 2 and First Revised First Revised Sheet No. 2200 to

(continued...)

I. Background

2. Section 10 of Texas Gas's General Terms and Conditions (GT&C) provides for three types of contract extension rights to be included in transportation service agreements. These are (1) a bilateral evergreen clause, (2) a unilateral rollover right, and (3) a right of first refusal (ROFR). Section 10.2(a) provides that Texas Gas will agree to bilateral evergreen clauses in all service agreements, except for certain limited-term agreements. Under such a bilateral evergreen clause, the service agreement would be automatically extended at the end of its primary term for an agreed-upon period, unless either the pipeline or the shipper gives advance notice that it will terminate the agreement. Section 10.2(b) provides that, in place of a bilateral evergreen clause, Texas Gas will agree to a continuous unilateral rollover term, exercisable only by the shipper, provided that the rollover term is at least five years and the shipper agrees to pay the applicable maximum rate. Section 10.4 provides long-term, maximum rate firm shippers the ROFR required by section 284.221(d)(2) of the Commission's regulations. Section 10.4 also states that Texas Gas may negotiate a contractual ROFR for other firm shippers on a not unduly discriminatory basis.

3. In its April 9, 2009 filing, Texas Gas proposed to add the following language at the beginning of section 10: "If a service agreement is extended in accordance with any of the provisions in this Section 10, Customer shall execute a new service agreement as provided in the then-current tariff." Texas Gas explained that it was making this proposal because of its affirmative obligation to ensure that its service agreements are in conformance with its tariff's current *pro forma* agreements, consistent with *Southern Star*.⁵ Texas Gas stated that requiring customers to sign a new service agreement each time an agreement is extended would ensure that all new service agreements either conform to the current tariff's *pro forma* service agreement or contain a set of readily identifiable non-conforming provisions. Texas Gas acknowledged that this change may shift some administrative burden onto customers, but argued that the benefits of meeting its regulatory obligations exceed the administrative burden of the service agreement renewal process.

4. In response to Texas Gas's filing, customers expressed concern that without knowing what other revisions Texas Gas may make to its *pro forma* service agreements, the proposed tariff provision could deny customers the continued benefit of provisions in their existing service agreements. Customers also argued that Texas Gas's proposal

FERC Gas Tariff, Third Revised Volume No. 1.

⁵ *Southern Star Central Gas Pipeline, Inc.*, 125 FERC ¶ 61,082 (2008) (*Southern Star*).

would diminish their rollover rights, essentially changing automatic rollover rights into nothing more than a ROFR. Customers further argued that Texas Gas should be required to demonstrate that there would be no substantive differences between the service agreements under which they currently take service and the new *pro forma* service agreements that they would be required to execute upon contract extension. Other customers argued that Texas Gas could achieve its goal—compliance with Commission policy regarding the filing of non-conforming service agreements—by simply filing all non-conforming agreements with the Commission, noting that *Southern Star* did not require generic modification of existing contracts, either currently or upon extension.

5. In response to these concerns, Texas Gas stated that its filing was part of a larger program that involves a thorough review of its contracts for unfiled agreements that materially deviate from its *pro forma* agreements, and that it has been working with the Commission's Office of Enforcement to remedy any concerns. Texas Gas explained that the sole purpose of this tariff revision was to provide Texas Gas with tariff authority to enhance its ability to comply with Commission policy, noting that it was making a number of additional tariff changes in response to its internal review of its contracts and tariff.⁶ Texas Gas responded to the concerns of customers by explaining that nothing in its proposed tariff change would nullify rollover rights or non-conforming provisions; rather, the provision was meant to ensure that Texas Gas and shippers specifically intend to carry forward non-conforming provisions in extended service agreements. Texas Gas affirmed that extension rights in existing service agreements would not be affected by its proposal. However, Texas Gas also stated that if its *pro forma* agreements or tariff has changed such that a contract being extended would have different rights after the extension than before, any changes in rights should be negotiated as part of the extension. Texas Gas argued that any additional administrative burden that customers may face on account of this proposal is outweighed by the benefit of reducing the number of non-conforming service agreements that must be filed and await Commission approval.

May 8 Order

6. In the May 8 Order, the Commission accepted Texas Gas's proposed tariff revisions, subject to the understanding that Texas Gas's proposal is administrative in nature, and that it would have no substantive effect as to the rights or obligations under a new service agreement when a customer elects to rollover an expiring agreement that permits such rollover.⁷ The Commission's determination relied on statements from

⁶ Texas Gas cites its filing in Docket No. RP09-515-000 as an example of such tariff changes.

⁷ Although Texas Gas originally requested an effective date of May 9, 2009, for its revised tariff sheets, it proposed an August 1, 2009 effective date in its answer in order to

(continued...)

Texas Gas indicating that its proposal was not meant to nullify non-conforming terms or rollover rights in existing agreements.⁸ With that understanding, the Commission found Texas Gas's proposal to be a reasonable means of assisting Texas Gas in continually monitoring the status of its service agreements to determine when it would need to file a non-conforming service agreement with the Commission.⁹

7. In order to mitigate the increased administrative burden to customers that Texas Gas acknowledged would result from its filing, the Commission imposed conditions on its acceptance of Texas Gas's proposal. The Commission required Texas Gas to provide shippers with the following for each initial service agreement executed as a result of this tariff change: (1) a draft service agreement based upon the current *pro forma* service agreement that reflects the terms and conditions of service under the expiring contract, and (2) an explanation of how each component in the expiring service agreement is included in the proposed draft service agreement (or in the GT&C of Texas Gas's current tariff).¹⁰

II. Requests for Clarification and Rehearing

8. Texas Gas filed a request for clarification or, in the alternative, rehearing of the May 8 Order, asserting three specifications of error. First, Texas Gas states that its proposal is not purely ministerial in nature, and that by conditioning acceptance of its proposal in this way, the Commission severely undercuts one of the primary goals of the proposal—to allow Texas Gas and its customers to mutually agree to eliminate non-conforming provisions when service agreements are extended. Texas Gas states that it did not assert that its proposal was ministerial in its earlier filings, and that while its intent was not to nullify non-conforming terms or rollover rights, the proposal would affect the rights of customers by requiring that any changes be negotiated as part of an extension so that agreements are extended on mutually agreeable terms. Texas Gas states that the May 8 Order ignored this aspect of the proposal. Texas Gas states that there are

provide time for Texas Gas to make additional tariff filings as part of its comprehensive review of its tariff and service agreements. Subsequent to the May 8 Order, Texas Gas requested, and the Commission granted, deferral of the effective date to December 1, 2009.

⁸ May 8 Order, 127 FERC ¶ 61,132 at P 18 (citing Texas Gas, April 28, 2009 Answer, at 8).

⁹ *Id.* P 19.

¹⁰ *Id.* P 20.

some historical agreements that contain non-conforming provisions that Texas Gas would not support carrying forward because they are out-of-sync with Commission policy and/or Texas Gas's tariff.¹¹ Texas Gas hopes that this provision, in addition to other efforts Texas Gas is currently making, will result in fewer non-conforming agreements by providing the parties an opportunity to negotiate, as part of any extension of service, to eliminate non-conforming provisions.

9. Texas Gas states that the Commission's understanding of the proposal as purely ministerial could leave Texas Gas without the bargaining power necessary to bring customers to the table to negotiate the removal of non-conforming provisions. Texas Gas states that this characterization of the proposal compromises the primary purpose of the filing and undercuts Commission policy insofar as it would require Texas Gas to support the filing of non-conforming provisions that it is unwilling to operate under, and which could be contrary to Commission policy and/or Texas Gas's tariff. Accordingly, Texas Gas requests that the Commission clarify the May 8 Order and find that Texas Gas's proposal is not purely ministerial in nature, and that it would provide Texas Gas and its customers the right to negotiate to remove existing non-conforming provisions from extended service agreements. To the extent the Commission does not grant clarification, Texas Gas seeks rehearing of the May 8 Order.

10. Second, Texas Gas states that the May 8 Order appears to require that if Texas Gas and its customer cannot agree to eliminate non-conforming provisions from a service agreement, Texas Gas must agree to include the provisions in an extended agreement, even if the provisions have become inconsistent with Commission policy, Texas Gas's tariff, or could be determined to be unduly discriminatory. Texas Gas seeks clarification that it does not have to agree to carry over non-conforming provisions that it deems to be unduly discriminatory or that Texas Gas is unwilling to make generally available to other customers. Texas Gas seeks further clarification that if it is forced to carry forward a non-conforming provision with which it disagrees, it should not have to support the provision before the Commission and could instead request that the Commission reject the non-conforming provision, or if accepted, request that it not be required to incorporate the provision in its tariff and offer it to all customers.

11. Texas Gas notes that prior to its recent review of its contracts, the question of whether it must support a non-conforming agreement filing was not an issue because Texas Gas only considered whether an agreement was non-conforming at the time of

¹¹ *See, e.g.*, Texas Gas, June 8, 2009 Rehearing Request at 16 (referencing older agreements in which Texas Gas and a customer may have agreed to reserve capacity on specific facilities for the sole use of a certain customer and thereby requiring Texas Gas to withhold capacity from the system).

initial execution, not when such agreements were extended or rolled over. Texas Gas explains that in new agreements, parties expressly choose to agree to non-conforming provisions with an understanding of the regulatory environment and potential risks involved in filing before the Commission. However, with respect to older agreements subject to extension,¹² Texas Gas argues that the May 8 Order could require it to support certain non-conforming agreements against its will, contrary to the voluntary nature of section 4 of the Natural Gas Act. Accordingly, Texas Gas requests the above-mentioned clarifications, and to the extent the Commission denies clarification, Texas Gas seeks rehearing.

12. Third, Texas Gas seeks clarification of the conditions imposed by the May 8 Order on the acceptance of Texas Gas's proposal. Texas Gas seeks clarification that it only needs to provide a draft service agreement and explanation to the extent requested by the customer, and that when such a request is made, that Texas Gas should only be required to provide an explanation of those provisions that could be determined to be non-conforming when carried over to the new agreement.

13. Cities seek clarification of two points of the May 8 Order.¹³ First, they request that the Commission clarify that if the process by which a contract is to be extended is not successful—i.e. Texas Gas cannot demonstrate that there will be no substantive effect on a customer's rights—then Texas Gas must file the pre-existing agreement as non-conforming so that the customer can continue to take service under the pre-existing agreement. Second, Cities seek clarification of the term "initial service agreement" in Paragraph 20 of the May 8 Order, which Cities assert could be interpreted as requiring Texas Gas to only show that there will be no changes in substantive rights the first time the contract rolls over, and that in subsequent extensions, the pipeline could require customers to sign an agreement that does not contain the rights in a customer's pre-existing contract. Accordingly, Cities request clarification that Texas Gas must comply with the conditions set forth in Paragraph 20 of the May 8 Order every time any agreement is executed as a result of the Texas Gas's proposed tariff change.

14. In response to Texas Gas's request for clarification/rehearing, on June 19, 2009, Memphis Light, Gas and Water Division, City of Memphis, Tennessee (Memphis) filed an answer urging the Commission to deny Texas Gas's requests. On June 24, 2009,

¹² Texas Gas notes that these situations could arise in light of the provision in Texas Gas's existing tariff that allows customers to unilaterally extend an agreement if they are willing to pay the maximum rate for a term of five years.

¹³ On July 16, Cities filed an erratum to their request for clarification to correct a typographical error.

Texas Gas filed a motion to strike Memphis's answer, arguing that Memphis failed to seek leave to file its answer, and that good cause does not exist to accept an answer to a rehearing request. On June 26, 2009, Memphis filed an answer to Texas Gas's motion, refuting Texas Gas's arguments. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept Memphis's answer and will, therefore, reject it. As the subsequent motion and answer present arguments as to whether the Commission should accept Memphis's answer, they too are rejected.

III. Discussion

15. Upon further consideration of Texas Gas's proposed tariff revision and in light of Texas Gas's characterization of its proposal in its request for clarification/rehearing, we grant rehearing of the May 8 Order and reject the tariff sheets filed by Texas Gas in this proceeding.

16. As discussed above, the Commission's May 8 Order was explicitly premised on the understanding that Texas Gas's filing would not substantively affect rollover rights in existing service agreements that customers elect to rollover.¹⁴ Although Texas Gas's proposal was to some extent ambiguous—indicating that it would have no substantive effect¹⁵ while at the same time also indicating that the provision would simply ensure that the parties intend to carry non-conforming provisions forward¹⁶—this understanding of the proposal was gleaned from statements in Texas Gas's filings. In an effort to clarify this ambiguity and ensure that all parties understood the exact nature of the

¹⁴ May 8 Order, 127 FERC ¶ 61,132 at P 18 (“Our acceptance of this provision, however, is subject to our understanding that Texas Gas's proposal is administrative in nature, and that it will have no substantive effect as to the rights or obligations under a new service agreement when a customer elects to rollover an expiring agreement that permits such rollover.”).

¹⁵ *See, e.g.*, Texas Gas, April 28, 2009 Answer at 8 (“Memphis and Cities both argue that the new Section 10 language will nullify non-conforming agreement terms and/or rollover rights. As discussed above, it will not.”).

¹⁶ *Id.* (“[The proposal] will simply ensure that Texas Gas and its shipper specifically intend to carry forward non-conforming provisions. . . .”).

Commission's decision in the May 8 Order, the Commission specifically conditioned its acceptance of Texas Gas's proposal on what it understood the proposal to mean.¹⁷

17. In its request for clarification/rehearing, Texas Gas explains that, contrary to the Commission's understanding, the proposed tariff revision is intended to have the substantive effect of requiring shippers to renegotiate service agreements at the time of their extension, thus allowing Texas Gas to seek removal of any material deviations. In light of Texas Gas's explanation in its request for clarification/rehearing as to the substantive impact that its proposal could have on existing agreements, we find Texas Gas has not supported that its proposed tariff revision is just and reasonable, particularly as applied to existing service agreements under which the shipper has a unilateral rollover right.

18. By its terms, Texas Gas's proposal would apply to all the extension rights set forth in section 10 of its GT&C: a bilateral evergreen provision, a unilateral rollover right held by the customer if certain conditions are met, and a regulatory or contractual ROFR. However, the only real substantive effect of the proposal would be with respect to service agreements containing unilateral rollover rights. That is because, in the situation where a service agreement contains a bilateral evergreen provision or ROFR, Texas Gas can require the shipper to execute a new service agreement regardless of its proposed change to section 10. Under the bilateral evergreen provision, Texas Gas has the right to terminate the current service agreement and can therefore require the customer to execute a new service agreement under the current *pro forma* service agreement. Under the ROFR, Texas Gas and the customer would, in any event, execute a new service agreement under the current *pro forma* service agreement after the ROFR procedures are completed and the relevant capacity has been awarded to the original customer.

¹⁷ We note that this interpretation is not only consistent with representations made in Texas Gas's filing, but also with section 10.2 of Texas Gas's GT&C, which grants shippers a unilateral rollover right so long as the shipper agrees to a five-year term at the maximum tariff rate, and which Texas Gas did not propose to qualify as part of this proceeding. *See* Texas Gas, FERC Gas Tariff, Third Revised Vol. No. 1, First Revised Sheet No. 2200 (“[Except in certain cases], Pipeline will agree to a continuous unilateral rollover term, exercisable only by Customer; however, such rollover term must be for at least five (5) years, and customer must agree to pay the applicable maximum rate. Such rollover will be automatic unless Customer notifies Pipeline in writing at least one year in advance of the expiration of the primary term of its agreement, or any succeeding rollover term, that it intends to exercise its right of first refusal or wishes to negotiate a different extension period.”).

19. However, Texas Gas does not currently have a contractual right to require modifications in service agreements containing a unilateral rollover right, exercisable solely by the customer, as provided in GT&C section 10.2(b). Such service agreements remain in effect until the shipper notifies Texas Gas that it desires to terminate the agreement. As explained in its request for clarification/rehearing, Texas Gas intends for its proposal to effectively modify this unilateral rollover provision, so as to give it the bargaining power to require customers with certain historical non-conforming agreements to execute a new agreement under the current *pro forma* service agreement, with different substantive terms. We find that without examining the specific contracts with unilateral rollover rights and the non-conforming provisions that Texas Gas wishes to change or eliminate, and without knowing whether these non-conforming agreements have been filed with the Commission, we cannot find just and reasonable Texas Gas's proposed tariff language giving it a blanket authorization to renegotiate all such contracts when they are rolled over.

20. Texas Gas continues to support its proposal as necessary to ensure ongoing compliance with the Commission's regulations requiring the filing of non-conforming service agreements for approval by the Commission.¹⁸ Texas Gas asserts that some of its customers have long-term, historical agreements predating Order No. 636, and those agreements may have provisions which could be viewed as not conforming with either its current tariff and Commission policy. For example, Texas Gas hypothesizes that such an historical agreement could contain a provision requiring Texas Gas to reserve capacity on specific facilities for the sole use of the shipper and could be viewed as requiring Texas Gas to withhold capacity, contrary to Commission policy. Texas Gas contends that it cannot and should not be required to retain such a provision.

21. The Commission does not agree that Texas Gas' proposed modification of shippers' unilateral rollover rights is necessary to ensure ongoing compliance with the Commission's regulations requiring the filing of non-conforming service agreements. To the extent that Texas Gas identifies service agreements that deviate materially from its current *pro forma* service agreement and which have not been filed with the Commission, section 154.112(b) of the Commission's regulations requires Texas Gas to file those contracts as soon as possible, regardless of any rollover rights. Texas Gas may not wait until the time of contract extension to file those agreements. As explained in *Southern Star*, "[p]ipelines' failure to file non-conforming agreements imperils the Commission's

¹⁸ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,010 (2001) (*Columbia*).

responsibility under the Natural Gas Act to ensure provisions are just and reasonable and are not unduly discriminatory or preferential.”¹⁹

22. When Texas Gas makes such a filing, the Commission will consider whether the material deviation is permissible pursuant to the standards described in *Columbia Gas Transmission Corp.*,²⁰ and the Commission may require the modification of any contract containing a material deviation that is not permissible.²¹ At the time of such filing, or at any time that Texas Gas believes individual contracts have become unjust and unreasonable, Texas Gas may make the case for revising non-conforming terms, and other interested parties may state their views. This will give the Commission the opportunity to consider the nature of the specific non-conforming terms and the views of relevant parties before determining whether agreements containing those terms should be revised.²² The Commission will not, however, grant Texas Gas blanket approval to undermine the unilateral rollover right contained in its tariff with respect to agreements Texas Gas wishes to revise, as Texas Gas requests in this case.

23. The Commission recognizes that Texas Gas is attempting to take pro-active steps to improve compliance with the Commission’s policy regarding the filing of non-conforming service agreements. Indeed, the Commission originally approved this provision based on the understanding that Texas Gas sought an additional tool to monitor its agreements and file such agreements when necessary. However, we cannot accept the proposal, and its resulting impact on contracts not presently before us, as characterized in Texas Gas’s request for clarification/rehearing.

24. Accordingly, we find that Texas Gas has not adequately supported its proposal in light of the clarifications made in its request for clarification/rehearing, and we therefore

¹⁹ *Southern Star*, 125 FERC ¶ 61,082 at P 7.

²⁰ *Columbia*, 97 FERC ¶ 61,221 at 62,003-04.

²¹ See, e.g., *LSP-Cottage Grove, L.P. v. Northern Natural Gas Co.*, 109 FERC ¶ 61,390 (2004), *order on reh’g*, 111 FERC ¶ 61,108 (2005).

²² See, e.g., *Texas Gas Transmission, LLC*, 129 FERC ¶ 61,168 (2009) (accepting proposed revisions in Docket No. RP09-515-001 to incorporate bypass and regulatory out provisions into Texas Gas’s tariff and voiding inconsistent terms in existing service agreements).

reject its proposed tariff revisions. Because we reject Texas Gas's proposal, we do not reach the remaining arguments raised on rehearing by Texas Gas and Cities.²³

The Commission orders:

(A) Rehearing of the May 8 Order is granted, as discussed in the body of this order.

(B) Texas Gas's proposed tariff sheets listed in footnote no. 4 are hereby rejected.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²³ On October 13, 2009, Texas Gas filed a motion for a technical conference to discuss implementation of its proposed tariff revisions. In light of our determination here to reject the provision, the request for such a technical conference is moot.