

131 FERC ¶ 61,052
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 19, 2010

In Reply Refer To:
Texas Gas Transmission, LLC
Docket No. RP09-1051-001

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

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

Reference: Rate Schedule NNS Agreement No. 13646

Ladies and Gentlemen:

1. On October 16, 2009, the Commission ordered Texas Gas Transmission, LLC (Texas Gas) to explain why Texas Gas viewed as non-conforming the service agreement with ProLiance Energy, LLC (ProLiance) filed on September 18, 2009, in this proceeding.¹ On November 16, 2009, Texas Gas filed its explanation with the Commission. As discussed below, the Commission finds that the subject agreement contains impermissible material deviations, and directs Texas Gas to remove the ProLiance Agreement from the list of non-conforming agreements in Texas Gas' tariff.
2. On September 18, 2009, Texas Gas filed with the Commission No-Notice Transportation Service (NNS) Agreement No. 13646 with ProLiance (ProLiance Agreement), and the related tariff sheet listing the agreement as non-conforming.² Texas Gas stated that the agreement had not previously been filed with the Commission and that it contained a non-conforming provision permitting varying contract demands and nominated daily quantities during the summer season. Specifically, for the months of

¹ *Texas Gas Transmission Co.*, 129 FERC ¶ 61,046 (2009) (October 16 Order).

² Fifth Revised Sheet No. 99A to FERC Gas Tariff, Third Revised Volume No. 1.

May and September, the contract specifies a contract demand and nominated daily quantity of 45,410 MMBtu/day, while for June through August the contract demand and nominated daily quantity is 22,149 MMBtu/day.

3. A joint protest was filed by the Western Tennessee Municipal Group,³ Jackson Energy Authority, City of Jackson, Tennessee, and the Kentucky Cities⁴ (collectively, Cities), asserting that the ability to vary contract demand and nominated daily quantity was a valuable right, and that it was against Commission policy for Texas Gas to offer this right to ProLiance, but not to other shippers. On October 6, 2009, Texas Gas filed an answer to the Cities' protest, contending that Commission's policy allows the continuance of existing contracts that have been ongoing and relied upon by the parties for many years.⁵ Texas Gas asserted that the ProLiance Agreement was such a longstanding contract.⁶ In its filings, Texas Gas explained that the provision at issue was first incorporated into an agreement executed in 1998. Texas Gas stated 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.

4. On October 16, 2009, the Commission issued an order accepting and suspending, subject to conditions, the revised tariff sheet and the filed service agreement. The Commission found that the agreement filed by Texas Gas appeared to conform to Texas Gas' NNS *pro forma* service agreement. The Commission directed Texas Gas to explain why the agreement was non-conforming.

³ 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.

⁴ The Kentucky Cities are the Cities of Carrollton and Henderson, Kentucky. They are municipal distributor-customers of Texas Gas.

⁵ Citing *Texas Eastern Transmission, LP*, 119 FERC ¶ 61,337, at P 11 (2007).

⁶ A more extensive summary of the parties' positions is contained in the October 16 Order.

5. On November 16, 2009, Texas Gas filed to comply with the October 16 Order by providing an explanation. Public notice of Texas Gas' filing was issued on November 23, 2009, with comments and protests due on or before November 30, 2009. No protests or adverse comments were filed.

6. In its explanation, Texas Gas states that the additional blanks on the NNS *pro forma* service agreement are provided in order to permit a customer's contract demand and nominated daily quantity to increase (but not decrease) by specified amounts on specific dates and to remain at that new, increased level unless subject to another increase on a later date. Texas Gas asserts that the blanks in the NNS *pro forma* service agreement do not provide shippers with the flexibility to decrease these quantities. In support of this contention, Texas Gas states that the blanks were added for the first time to the NNS *pro forma* service agreement as part of a filing made for the specific purpose of permitting a customer's contract demand and nominated daily quantity to increase on a going forward basis, starting on a date specified in the agreement.

7. Texas Gas also states that the language of the tariff further demonstrates that the blanks are for increases in contract demand and nominated daily quantity, not the varying contract demand levels contained within the ProLiance Agreement. Section 2.3 of the NNS Rate Schedule, Texas Gas elaborates, provides that the parties "may agree at the time of contract execution that the Contract Demand will *increase* by specified amounts at a specific point in time."⁷ Texas Gas further contends that "[n]either the NNS Rate Schedule nor Section 6.3 of the General Terms and Conditions of Texas Gas' FERC Gas Tariff contemplates monthly fluctuations in [contract demand] or [nominated daily quantity] under the NNS rate schedule."⁸ Thus, Texas Gas concludes that the tariff language supports its claim that the provision in the ProLiance Agreement that provides for both increases and decreases on a monthly basis does not conform with the *pro forma* service agreement. Texas Gas also reiterates its assertions that the contract is permissible because (1) it is a longstanding agreement which has been in place since 1998; (2) the provision allowing monthly variations in ProLiance's contract demand and nominated daily quantity did not affect ProLiance's firm capacity rights or firm demand charges; and (3) the only changes to contract demand and nominated daily quantity have occurred during the summer months, when firm capacity is available to meet all customers' needs. Texas Gas also renews its request that the Commission not require Texas Gas to provide the option of varying contract demand to all of its customers.

⁷ Texas Gas November 16, 2009 Explanation, at 6 (emphasis in original).

⁸ *Id.*

8. The Commission finds that the filed agreement contains impermissible material deviations from the NNS *pro forma* service agreement and must be revised. If a pipeline and a shipper enter into a contract that materially deviates from the pipeline's form of service agreement, the Commission's regulations require the pipeline to file the contract containing the material deviations with the Commission.⁹ In *Columbia Gas Transmission Corporation*,¹⁰ the Commission clarified that a material deviation is any provision in a service agreement that (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff and (2) affects the substantive rights of the parties.¹¹ A material deviation may be permissible if the Commission finds that such deviation does not constitute a substantial risk of undue discrimination.¹² Therefore, there are two general categories of material deviations: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination. Moreover, if the Commission permits the contract containing the material deviation, the Commission's regulations require the pipeline to file tariff sheets that reference the materially deviating contract in its tariff.¹³

9. The Commission finds that the ProLiance Agreement contains material deviations from the NNS *pro forma* service agreement effective at the time of the October 16 Order. Based upon the information provided by Texas Gas' November 16, 2009 explanation, Texas Gas' NNS *pro forma* service agreement as effective at the time of the October 16

⁹ 18 C.F.R. § 154.1(d) (2009).

¹⁰ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001) (*Columbia*).

¹¹ In *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 27 (2003), the Commission stated that “[s]ince there would appear to be no reason for the parties to use language different from that in the form of service agreement other than to affect the substantive right of the parties, this effectively means that all language that is different from the form of service agreement should be filed with the Commission.” *Id.* P 32.

¹² *Columbia*, 97 FERC ¶ 61,221 at 62,004.

¹³ 18 C.F.R. § 154.112(b) (2009).

Order did not include blanks permitting the monthly variations in contract demand and nominated daily quantity contained within the ProLiance Agreement.¹⁴

10. Given the finding here that the ProLiance Agreement is not conforming with the NNS *pro forma* service agreement, the Commission finds that the provision that permits ProLiance to vary its monthly contract demand levels and nominated daily quantities during the summer months presents a substantial risk of undue discrimination and, thus, is an impermissible material deviation from Texas Gas' NNS *pro forma* service agreement. The right to vary contract demand "is a valuable right since it allows shippers to pay reduced reservation charges during times of the year when they have less need for service."¹⁵ The Commission has previously suggested that such provisions may be permissible if part of a longstanding agreement entered into prior to the Commission's clarification of the standards governing materially non-conforming provisions in 2001.¹⁶ The Commission permitted such an exception in order to protect the reliance interest of the parties on contracts to which they agreed. However, such an exception cannot be used to justify extending this right indefinitely beyond the terms of the original contract unless the right is offered to all similarly situated shippers.¹⁷

¹⁴ Moreover, following the issuance of the Commission's October 16 Order and Texas Gas' November 16, 2009 explanation, revised NNS *pro forma* service agreements filed in Docket No. RP09-548-000, *et al.*, became effective December 1, 2009. The revised NNS *pro forma* service agreement does not contain the blanks for the monthly variations in contract demand and nominated daily quantities contained within the ProLiance Agreement. Thus, the ProLiance Agreement has not been rendered conforming by the revised NNS *pro forma* service agreement.

¹⁵ *Texas Eastern Transmission, LP*, 102 FERC ¶ 61,028, at P 5 (2003), *reh'g denied*, 106 FERC ¶ 61,066 (2004).

¹⁶ *Texas Eastern Transmission, LP*, 119 FERC ¶ 61,337, at P 11 (2007) (citing *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001); *ANR Pipeline Co.*, 97 FERC ¶ 61,222 (2001)).

¹⁷ For example, in *Texas Eastern*, the Commission explained that the exception for longstanding contractual provisions applied to existing contracts relied upon by the parties, but that any new contracts containing such non-conforming provisions must be filed with, and approved by, the Commission. *Texas Eastern*, 119 FERC ¶ 61,337 at P 11.

11. With regard to the agreement filed in this proceeding, the reliance interests of the parties do not justify continuation of the non-conforming monthly variations in contract demand. The parties are not relying on their rights under an existing service agreement; rather, they wish to carry forward a non-conforming provision into a new service agreement that Texas Gas characterizes as an “extension” of the prior 1998 agreement.¹⁸ The Commission finds that it would be unduly discriminatory to permit ProLiance to continue to vary monthly contract demand levels in this superseding replacement contract, if the right is not made available to similarly situated shippers.¹⁹ The 1998 agreement was never examined by the Commission and in any event is effectively extinguished by the new agreement, which superseded and replaced it.

12. Accordingly, Texas Gas must either offer this variable contract demand service to all of its similarly situated shippers, something which Texas Gas has indicated it is unwilling to do, or Texas Gas and ProLiance must renegotiate an agreement without the impermissible non-conforming language from the subject agreement.²⁰ The revised tariff sheet submitted with the service agreement must be modified to remove the ProLiance

¹⁸ Texas Gas states that it and ProLiance originally included the provision permitting contract demand to fluctuate during the summer months in a contract executed in 1998. October 6, 2009 Answer, at 3. The prior agreement, which Texas Gas states that it entered into in 1998, was never filed with the Commission, and thus the Commission has not reviewed the 1998 agreement’s terms or when the agreement was due to expire. Texas Gas and ProLiance executed a new service agreement in 2008, which “supersede[d] and replace[d]” the prior agreement. ProLiance Service Agreement in Texas Gas’ September 18, 2009 Filing; *see also* October 6, 2009 Answer, at 3.

¹⁹ It appears that contrary to the requirements of section 154.1(d) of the Commission’s regulations, 18 C.F.R. § 154.1(d) (2009), Texas Gas failed to file 1998 agreement, which also contained the non-conforming provision permitting varying contract demand. Texas Gas is reminded that it must submit required filings on a timely basis or face possible sanctions by the Commission.

²⁰ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001); *ANR Pipeline Co.*, 97 FERC ¶ 61,222 (2001).

Agreement from the list of permissibly non-conforming agreements. Texas Gas is directed to make a compliance filing within 30 days consistent with the findings in this letter order.

By direction of the Commission.

Kimberly D. Bose,
Secretary.