

141 FERC ¶ 61,213
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Enterprise Texas Pipeline LLC

Docket Nos. PR07-12-005
PR08-30-001

ORDER ON COMPLIANCE FILING

(Issued December 18, 2012)

1. On March 30, 2010, Enterprise Texas Pipeline LLC (Enterprise Texas) submitted its revised Statement of Operating Conditions (SOC) for transportation service, pursuant to Natural Gas Policy Act (NGPA) section 311 and as required to comply with the Commission's March 2010 Order.¹ In its March 2010 Order, the Commission approved a settlement with regard to Enterprise Texas's rate petition (Settlement) and addressed the disputed SOC revisions on the merits. As discussed below, we accept the revised SOC, effective June 23, 2008, subject to conditions.

Background

2. Enterprise Texas operates an intrastate natural gas pipeline system with over 6,000 miles of gathering and transmission lines. In 2008 Enterprise Texas completed construction of the Sherman Extension, a 178-mile extension from its northern mainline to the Barnett Shale region of Texas. In June 2008, Enterprise Texas filed in Docket No. PR07-12-003 to revise the terms and conditions of its SOC and in September 2008 in Docket No. PR08-30-000 to revise its rates in order to reflect the Sherman Extension facilities. WTG Gas Marketing, Inc. and West Texas Gas, Inc. (collectively, WTG) protested these filings.

3. In November 2009, Enterprise Texas filed an unopposed Settlement resolving all issues in Docket No. PR08-30-000. The March 2010 Order accepted the Settlement and required Enterprise Texas to file within 15 days a revised SOC implementing two

¹ *Enterprise Texas Pipeline LLC*, 130 FERC ¶ 61,153 (March 2010 Order).

separate rate zones, one for the Sherman Extension and one for the remainder of its system.

4. The March 2010 Order also addressed on the merits the issues related to the SOC for transportation services, rejecting some sections and accepting others subject to conditions. Among other things, Enterprise Texas proposed to revise section 14.1 to state, “[t]ransporter will not be obligated to provide any Transportation which results in the delivery of unprocessed gas to a point other than a processing plant,”² and make a corresponding change to section 6.4.5. WTG argued that this proposal would effectively cut off service to numerous WTG residential and city gate customers who are interconnected only through a portion of the Enterprise Texas system where the gas stream has not been processed. Further, WTG contends that there are no possible transportation arrangements that it can make with other pipelines from the outlet of Enterprise Texas’s plant to enable it to serve its city gate customers. WTG asserts that the revision to sections 14.1 and 6.4.5 thus amounts to a unilateral denial of service option. WTG also argued that Enterprise Texas’s proposal was operationally indefensible, because Enterprise Texas had long engaged in this sort of transportation without complaint, and because Enterprise Texas would continue to willingly receive unprocessed gas even as it proposes to refuse to deliver unprocessed gas.

5. In the March 2010 Order, the Commission found that Enterprise Texas’s proposal would give it unfettered discretion to refuse to make deliveries from parts of the system that transport unprocessed gas, unless delivery is to a processing plant. The Commission held that Enterprise Texas failed to show a need for such broad authorization, having provided no “technical, engineering, or scientific analysis to show why, after more than thirty years of service to WTG’s delivery points, it must now process gas going to WTG’s delivery points.”³ The Commission remarked that Enterprise Texas’s “concern regarding liability exposure,” could have instead been addressed “with a proposal to require customers taking such unprocessed gas to indemnify it for all damages.”⁴

6. In addition, in the March 2010 Order, the Commission found section 14.1 of the SOC for transportation to be unclear in defining when Enterprise Texas applies the gas quality standards found in section 14.1.1 through 14.1.11. The Commission stated that these standards did not appear appropriate for unprocessed gas and thus, it appeared unlikely that Enterprise Texas actually applies those standards to receipts onto the part of its system designed to handle unprocessed gas. The Commission directed Enterprise

² *Id.* P 32.

³ *Id.* P 31.

⁴ *Id.*

Texas to define with specificity standards that apply to receipt of unprocessed gas and where on its system it will apply these standards.

Enterprise Texas's Compliance Filing

7. On March 30, 2010, Enterprise Texas filed its proposed compliance. Enterprise Texas states that it has updated its statement of rates to reflect those rates agreed to in the Settlement. Enterprise Texas states that, as directed, it has eliminated its earlier filed revisions to sections 6.4.5 and 14.1 of its SOC.

8. Enterprise Texas states that, in accord with the Commission's suggestion that it require customers taking unprocessed gas to indemnify it for all damages and that it narrowly address displacement transactions, Enterprise Texas proposes to amend sections 13.1 and 13.2 of its SOC to require indemnification by shippers in case of deliveries of unprocessed gas. Enterprise Texas adds that the proposed change is "narrowly addressed" to only those situations where the deliveries occur by displacement upstream of the receipt point. Section 13.1, which describes how and when the shipper must indemnify the pipeline, would be revised to include gas "delivered upstream by displacement."⁵ Section 13.2, which previously imposed a blanket, mutual limitation to direct actual damages on any interactions, regardless of fault, would be revised to not apply to either party "in the case of deliveries upstream by displacement."⁶

⁵ Section 13.1 would now read as follows (changes in italics):

Shipper agrees to indemnify and hold harmless Transporter, its officers, agents, employees, and contractors against all suits, claims, liability, loss, damages, costs (including attorneys' fees and court costs), or encumbrances whatsoever brought by any person or entity against Transporter, its officers, agents, employees, and contractors with respect to Gas transported, parked or loaned, *or delivered upstream by displacement*, in accordance with Shipper's transportation service agreement and this Statement of Operating Conditions; provided, however, Shipper shall not be liable for the gross negligence or willful misconduct of Transporter. This general indemnity shall not apply to any matter otherwise subject to a specific indemnity set out in this Statement of Operating Conditions.

⁶ Section 13.2 would now read as follows (changes in italics):

Except in the case of deliveries upstream by displacement,

(continued...)

9. In response to the Commission's directive to specify standards that apply to receipt of unprocessed gas and where on its system Enterprise Texas will apply these standards, Enterprise Texas states that it has consistently applied all of the gas quality standards set forth in section 14.1 of the SOC throughout its entire system, that is, there are no separate standards applicable to those parts of the system receiving unprocessed gas. Enterprise Texas adds that, to the best of its knowledge, it is not aware of any prior instance where the uniform application of the gas quality standards has been an issue with its shippers.

Notice of Filing and Responsive Pleadings

10. Notice of Enterprise Texas's filing was issued on April 1 2010. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.⁷ Pursuant to Rule 214,⁸ all timely filed motions to intervene and any unopposed motions 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 this proceeding or place additional burdens on existing parties.

11. On April 9, 2010, WTG filed a protest. On April 21, 2010, Enterprise Texas filed an answer to WTG's protest, in which it characterizes WTG's protest as a late-filed request for rehearing and urges the Commission to reject it as statutorily barred. On April 22, 2010, WTG filed an answer to Enterprise Texas's answer, refuting Enterprise Texas's characterization. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits both an answer to a protest and an answer to an answer, unless otherwise ordered by the decisional authority.⁹ However, Enterprise Texas's answer

Transporter's and Shipper's liability to each other shall, in addition to any other limitations set forth in this statement of operating conditions, be limited to direct actual damages only. Such direct actual damages shall be the sole and exclusive remedy hereunder and all other remedies or damages at law or in equity are waived. *Except in the case of deliveries upstream by displacement*, in no event shall Transporter or Shipper be liable to each other for incidental, consequential, special, or punitive damages regardless of negligence or fault.

⁷ 18 C.F.R. § 154.210 (2012).

⁸ 18 C.F.R. § 385.214 (2012).

⁹ 18 C.F.R. § 385.213(a)(2) (2012).

could also be considered a motion to reject WTG's filing. Since motions and timely answers to motions are permitted by rule, we will accept both pleadings.¹⁰ Finally, we deny Enterprise Texas's motion to reject WTG's April 9, 2010 pleading, which we find to be a *bona fide* protest.

WTG Protest

12. WTG protests Enterprise Texas's proposed addition of the phrase "except in the case of deliveries upstream by displacement," to section 13.2, the limitation of liability clause. WTG asserts that while the transmittal letter indicates that this exception would apply only in the case of deliveries of processed gas, such a limitation is not reflected in the actual tariff language.

13. WTG contends that the proposed changes are ambiguous and go well beyond anything authorized in the March 2010 Order. WTG points to Enterprise Texas's statement in the subject filing that "all of the gas quality standards set forth in section 14.1 of the SOC [apply] throughout its entire system." WTG interprets this to mean that all gas received for, and delivered to, WTG and every other shipper, whether by displacement or otherwise, must meet the quality standards. According to WTG, there is no rational basis for approving different liability standards in section 13.2 on a pipeline system whose operations are said to be safe, and which has the same gas quality specifications "throughout its entire system." WTG adds that it remains true, as the Commission found in the March 2010 Order, that Enterprise Texas has presented no evidence supporting its vague assertions that any shipper has suffered any economic harm from displacement deliveries of unprocessed gas. According to WTG, it also stands to reason that there is no basis for imposing additional economic burdens on shippers through unjustified changes to SOC section 13.2.

14. WTG further argues that the proposed additions to SOC section 13.2 are unclear or counter-intuitive because, as worded, the exception for deliveries upstream by displacement presumably means that for these deliveries there is *no* limitation of liability. WTG contends that this may not be what Enterprise Texas intends, but the words are unfathomable on any other basis. WTG argues that, in any event, Enterprise Texas should not be permitted to disclaim liability when it delivers gas that conforms to the specifications stated in section 14 of its SOC, whether the gas is delivered by forward haul, backhaul, exchange, or otherwise. WTG adds that shippers like itself who purchase gas at system pooling points, and have no knowledge or control over the physical receipt points into Enterprise Texas's system, should not be forced to waive their right to recovery for Enterprise Texas's negligence, whether or not the gas is delivered by

¹⁰ See 18 C.F.R. §§ 385.202, 385.212(a), 385.213(a)(3), 385.213(d) (2012).

displacement. WTG concludes that the proposed changes to the SOC are not narrowly tailored to any proven problem on Enterprise Texas's system, as required by the Order, and have not been explained or supported with any evidence on this record, and the Commission should reject them because they do not comply with the March 2010 Order and are otherwise unreasonable.

Enterprise Texas's Pleading

15. On April 21, 2010, Enterprise Texas filed an answer to WTG's protest, in which it characterizes WTG's protest as a late-filed request for rehearing and urges the Commission to reject it as statutorily barred. Enterprise Texas argues that its proposed revisions to section 13 of its SOC "were made in a good faith attempt to respond to the Commission's suggestion as to how Enterprise Texas could address its previously articulated concerns regarding" safety and liability.¹¹ Enterprise Texas notes that WTG's protest appears to be limited to section 13.2, which WTG claims goes beyond anything authorized in the March 2010 Order.

16. Enterprise Texas, however, argues that "Enterprise Texas's changes have nothing to do with anything that was or was not 'authorized' by the Commission."¹² Rather, Enterprise Texas argues, the March 2010 Order merely suggested ways that Enterprise Texas could change its tariff. Since WTG objects to these "could" phrases, Enterprise Texas argues, WTG's objection is in fact to the March 2010 Order, and not to Enterprise Texas's instant filing. Enterprise Texas also suggests that WTG's motivation is to preserve processing opportunities at its facilities in Mexico.

17. Enterprise Texas also acknowledges WTG's assertions that section 13.2 is unclear as written. Enterprise Texas offers to revise the new language, so that it would instead read "except in the case of deliveries of *unprocessed gas for the purpose of making redeliveries* upstream by displacement."¹³

¹¹ Enterprise Texas April 21, 2010 Pleading at 3.

¹² *Id.*

¹³ *Id.* n.3. With this latest proposal, section 13.2 would now read as follows (changes in italics):

Except in the case of deliveries of unprocessed gas for the purpose of making redeliveries upstream by displacement, Transporter's and Shipper's liability to each other shall, in addition to any other limitations set forth in this statement of operating conditions, be limited to direct actual damages

(continued...)

WTG's Answer

18. On April 22, 2010, WTG filed an answer to Enterprise Texas's answer, refuting Enterprise Texas's claim that it is in fact seeking rehearing. WTG asserts that its prior filing was an answer to a compliance filing, which is permissible.

19. In addition, WTG seeks to correct errors in the record. WTG states that, despite Enterprise Texas's assertion to the contrary, neither it nor its affiliates own any processing facilities in Mexico. WTG further states that Enterprise Texas's proposed correction to section 13.2 is based on two misunderstandings of WTG's argument. WTG clarifies that it is arguing that Enterprise Texas proposes to discriminate against unprocessed gas without any reasonable basis for doing so. WTG also clarifies that Enterprise Texas's correction would not fix the apparent error whereby, whenever gas is delivered by displacement, not only shippers but also Enterprise Texas would be exposed to unlimited liability. WTG argues that, taken as written, such a provision is not narrowly tailored, as the March 2010 Order required.

Commission Determination

20. We accept Enterprise Texas's rate sheet, which is unopposed and which conforms to the settlement. We also accept all of Enterprise Texas's SOC revisions as unopposed and in compliance with the March 2010 Order, except for section 13.2. We accept the proposed revisions to section 13.1, but require Enterprise Texas to modify its proposed revision to section 13.2 consistent with the discussion below.

21. In the March 2010 Order, the Commission found that Enterprise Texas's sole stated concern with respect to delivering unprocessed gas to WTG and others is that such deliveries could expose it to liability for the potential damage that could occur to the downstream facilities and persons to which it is delivered.¹⁴ The March 2010 Order found that "Enterprise Texas could resolve its concern regarding liability exposure with a proposal to require customers taking such unprocessed gas to indemnify it for all

only. Such direct actual damages shall be the sole and exclusive remedy hereunder and all other remedies or damages at law or in equity are waived. *Except in the case of deliveries of unprocessed gas for the purpose of making redeliveries upstream by displacement*, in no event shall Transporter or Shipper be liable to each other for incidental, consequential, special, or punitive damages regardless of negligence or fault.

¹⁴ March 2010 Order, 130 FERC ¶ 61,153 at P 25 and 30.

damages.”¹⁵ As permitted by the March 2010 Order, Enterprise Texas proposes to revise section 13.1 to require shippers to indemnify it “against all suits, claims, liability, loss, damages, costs (including attorneys’ fees and court costs), or encumbrances whatsoever brought by any person or entity . . . with respect to Gas . . . *delivered upstream by displacement*, in accordance with Shipper’s transportation service agreement and this Statement of Operating Conditions.” WTG has not raised any specific objection with respect to the proposed revision to section 13.1, and the Commission accordingly accepts that revision as consistent with the March 2010 Order.

22. However, the Commission finds that Enterprise Texas’s proposed revision to section 13.2, detailed above, is overbroad. That revision would remove any limit on a shipper’s liability to Enterprise Texas “in the case of deliveries of unprocessed gas for the purpose of making redeliveries upstream by displacement.” While the section 13.1 indemnification requirement, accepted above, is limited to situations where Enterprise Texas delivers gas upstream by displacement “in accordance with Shipper’s transportation service agreement and this Statement of Operating Conditions,” proposed section 13.2 contains no similar limit on a shipper’s potential liability to Enterprise Texas for more than “actual direct damages” with respect to deliveries of unprocessed gas. The section 13.1 indemnification provision appropriately exempts a shipper from indemnifying Enterprise Texas for liability in situations where Enterprise Texas failed to act in accordance with its Statement of Operating Conditions or a service agreement, for example by accepting unprocessed gas onto its system which did not satisfy the gas quality provisions in its Statement of Operating Conditions. By contrast, proposed section 13.2 would remove any limit on a shipper’s liability to Enterprise Texas with respect to deliveries of unprocessed gas, regardless of the overall circumstances of the transaction and whether Enterprise Texas had acted in accordance with its Statement of Operating Conditions and the service agreement.

23. In the March 2010 Order, we only authorized Enterprise Texas to propose to require shippers taking unprocessed gas to indemnify it for all liability it might incur for damage to downstream facilities and persons as a result of the delivery of the unprocessed gas in accordance with Enterprise Texas’s Statement of Operating Conditions. Enterprise Texas may, consistent with that authorization, revise section 13.2 to clarify that its provision limiting a shipper’s liability to actual direct damages would not apply in the limited circumstance where (1) Enterprise Texas incurs liability beyond actual damages related to damage to downstream facilities and persons as a result of its delivery of unprocessed gas and (2) Enterprise Texas complied with all aspects of its Statement of Operating Conditions and contractual obligations to the shipper to whom the unprocessed gas was delivered. Accordingly, the Commission accepts revised section

¹⁵ *Id.* at 31.

13.2, subject to the condition that Enterprise Texas modify that provision consistent with the above discussion.

The Commission orders:

(A) Enterprise Texas' SOC for transportation service is hereby accepted, subject to the conditions on section 13 discussed in the body of this order, effective June 23, 2008.

(B) Enterprise Texas is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.