111 FERC ¶ 61,302
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Texas Gas Transmission, LLC Docket No. RP05-317-000

ORDER ACCEPTING AND SUSPENDING TARIFF SHEETS SUBJECT TO REFUND AND CONDITIONS, REJECTING TARIFF SHEETS, AND ESTABLISHING A HEARING

(Issued May 31, 2005)

1. On April 29, 2005, Texas Gas Transmission, LLC (Texas Gas) filed the revised tariff sheets listed in the Appendices to reflect a general Natural Gas Act (NGA) section 4 rate increase. Texas Gas states that this filing fulfills its obligations under Article XIV of the Stipulation and Agreement approved by the Commission in Docket No. RP00-260 requiring Texas Gas to make a rate filing to become effective no later than November 1, 2005, after a five-month suspension by the Commission.[1] The proposed rates represent a $58.3 million increase in Texas Gas' revenue requirements. Texas Gas also filed tariff revisions to its General Terms and Conditions (GT&C). Texas Gas proposed a June 1, 2005 effective date for its rate and tariff sheets. Finally, Texas Gas filed alternate *pro forma* tariff sheets and a request for waiver of section 154.205(b) of the Commission's regulations (18 C.F.R. § 154.205(b) (2004)) which prohibits changes in suspended tariff sheets. The alternate *pro forma* tariff sheets represent the inclusion of additional state and local franchise taxes if Texas Gas converts to a C corporation in order to retain its federal income tax allowance.

2. This order accepts and suspends the tariff sheets listed in Appendix A, to be effective November 1, 2005, subject to refund, conditions, and the outcome of the hearing established herein. The order also denies Texas Gas' request for waiver of section 154.205(b) of the Commission's regulations and rejects the *pro forma* tariff

[1] *Texas Gas Transmission Corp*., 98 FERC ¶ 61,244 (2002), *order on rehearing*, 99 FERC ¶ 61,328 (2002).

sheets. The revised tariff sheets listed in Appendix B are rejected without prejudice as premature, as discussed below. This order benefits the public interest by ensuring that Texas Gas' recourse rates and terms and conditions of service will be just and reasonable.

I. **Details of Filing**

3. Texas Gas states that its proposed changes will increase its revenue requirement to $299,591,570 which results in increases in Texas Gas' maximum recourse rates for all of its mainline transportation and storage services. The changes are based on an updated cost of service to reflect costs for the twelve-month base period ending January 31, 2005, as adjusted for known and measurable changes through the test period ending October 31, 2005. According to Texas Gas, the effects of increased competition in the natural gas industry have become more acute on Texas Gas' system since its last rate case, and that, combined with the continued maturation of the industry, has led to an increase in Texas Gas' overall business risk. In addition, the requested updated cost of service reflecting changes to return, capital structure, depreciation, related taxes and operation and maintenance expenses has also necessitated this rate increase.

4. Texas Gas' filing proposes various changes to its cost of service and cost components. The filing reflects a rate of return on equity of 13.81 percent and long-term debt costs of 5.92 percent on a capital structure consisting of 36.59 percent debt and 63.41 percent equity. Texas Gas proposes to increase the annual depreciation rate for fourteen plant categories (consisting mostly of General Plant accounts), decrease the rate for four plant categories and leave the rate for seven plant categories unchanged. Texas Gas also proposes to decrease the offshore transmission depreciation rate from 1.00 percent to 0.60 percent, and to leave unchanged the depreciation rates for onshore transmission plant and underground storage.

5. Texas Gas filed primary sheets in which it claims a federal income tax allowance. In addition, Texas Gas states that due to the uncertainty regarding the Commission's policy concerning income tax allowances, it is filing alternative *pro forma*, tariff sheets. Texas Gas explains that in *BP West Coast Products, LLC, v. FERC*, 374 F.3d 1263 (D.C. Circuit 2004) the court vacated a Commission order granting a tax allowance for corporate partner interests in a master limited partnership. In December 2004, the Commission requested comments in Docket No. PL05-5-000 on when it is appropriate to provide an income tax allowance for partnerships or similar pass-through entities that hold interests in a regulated public utility. Texas Gas states that it was acquired by the Loews Corporation from the Williams Companies in May 2003 and was converted from a C corporation to a limited liability company (LLC). Texas Gas asserts that while it does not file an income tax return, its taxable income and losses are recognized by its parent, which is a taxpaying C corporation. Texas Gas states that it has filed alternate *pro forma* tariff sheets, in the event that Texas Gas determines that it must convert back

to a C corporation in order to retain the federal income tax allowance. If that conversion takes place, Texas Gas asserts that it will be liable for additional state and local franchise taxes of approximately $1 million, and the alternate sheets would include that amount. Texas Gas requests waiver of section 154.205(b) of the Commission's regulations to permit the company to move the alternate sheets into effect at the end of the suspension should the company determine that the conversion is necessary for it to retain the income tax allowance.

6. Texas Gas proposes to continue its Rate Schedule STF, which is a seasonally priced short-term firm transportation service, and Rate Schedule HOT, which is an hourly overrun transportation service. Rate Schedule STF was accepted as part of the settlement in Docket No. RP00-260 and was to remain in effect for the term of the settlement. Texas Gas agreed to accept the same burden of proof and refund obligation for Rate Schedule STF service as for a new service in its next rate case. Rate Schedule HOT was accepted as part of Texas Gas' settlement in Docket No. RP00-495. The Commission determined that Rate Schedule HOT service would be considered a new service in Texas Gas' next rate case as provided in the settlement.[2]

7. Texas Gas proposes to change sections 10.2 through 10.5 of the GT&C of its tariff to establish an economic queue for allocating capacity for interruptible transportation and overrun service. Interruptible transportation and overrun services are currently allocated on a first-come, first-served basis. Texas Gas states that this proposal is consistent with the Commission's policy of allocating capacity to those who value it the most. Texas Gas states that it expects to implement its economic queue at the same time it implements its upgraded GasQuest computer system, which is expected to become operational no later than September 2006. Texas Gas asserts that approval of the economic queue will help Texas Gas to more efficiently complete the programming for and migrate data to its new customer service system.

8. Texas Gas states that the proposed rates reflect costs associated with certain facilities not yet in service and requests waiver of section 154.303(c)(1) of the Commission's regulations in order to reflect those costs. Texas Gas states that if those facilities are not placed into service by the end of the suspension period it will adjust its rates to reflect the elimination of the costs associated with those facilities.

[2] 101 FERC ¶ 61,359 (2002).

II. Notice, Intervention and Protests

9. Notice of Texas Gas' filing was issued on May 6, 2005. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. §154.210. Pursuant to rule 214, 18 C.F.R. § 385.214, all timely filed motions to intervene and any 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.

10. Atmos Energy Corporation (Atmos), The Cincinnati Gas & Electric Company (CG&E), The East Ohio Gas Company, d/b/a Dominion East Ohio, The Peoples Natural Gas Company, d/b/a Dominion Peoples, and Hope Gas, Inc., d/b/a Dominion Hope (Dominion LDCs), Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas (Elizabethtown), Indicated Shippers, KeySpan Delivery Companies (KeySpan), Memphis Light, Gas and Water Division, City of Memphis, Tennessee (MLGW), The Process Gas Consumers Group (PGC), ProLiance Energy, LLC (ProLiance), PSEG Energy Resources & Trade LLC (PSEG), and Western Tennessee Municipal Group, Jackson Energy Authority, City of Jackson, Tennessee, and The Kentucky Cities (WTMG)) have filed protests opposing Texas Gas' proposed rate increases. Baltimore Gas and Electric Company (BGE) requests the maximum suspension and a hearing. Other interveners filed comments. The protestors generally state that Texas Gas has not presented sufficient proof that these proposed rate changes are just and reasonable; instead, the protestors suggest that these changes are excessive and unjust and unreasonable. ProLiance argues that this increase would have a large impact on the customers of Texas Gas, increasing base demand tariff rates by as much as 23 percent and storage service related costs by as much as 39 percent. MLGW complains that since Texas Gas' last rate case, its Account No. 858 contracts have expired, resulting in a $5.25 million reduction to Texas Gas' cost of service and making the rate increase even more excessive. PGC comments that although Texas Gas attributes these rate increases to more competition and the Commission's implementation of regulatory policies to improve customer flexibility, PGC members have few, if any, competitive alternatives and will be forced to pay significantly higher rates.

11. CG&E, Indicated Shippers, MLGW, PGC, and WTMG also complain that Texas Gas' proposed rate of return of 10.92 percent, which includes a return on equity of 13.81 percent is unjustified. WTMG questions Texas Gas' claims that this return on equity is necessary due to the risk associated with the more competitive environment, stating that Loews Corporation purchased Texas Gas because of its financial success and relatively low risk. Atmos and PGC protest Texas Gas' proposed $16 million shift in cost-recovery responsibility from the demand to the commodity component of its rates. PGC states that this shift is a departure from straight-fixed variable (SFV) rate design, which it characterizes as the Commission's longstanding and preferred rate design.

12. Indicated Shippers, MLGW, ProLiance, and WTMG question Texas Gas' adjustments to depreciation rates. Indicated Shippers state that Texas Gas has proposed to increase the depreciation accrual rate for 14 categories, but has not provided justification. MLGW comments that Texas Gas proposed no changes to the depreciation rates for Underground Storage and Onshore Transmission; however, Texas Gas' filing includes a test period adjustment for both of these items in the amount of $485,195 and $716,140, respectively, with no support for these adjustments. Also, MLGW notes that Texas Gas proposed to increase depreciation rates to 20 percent for all computer-related categories, with no explanation.

13. Indicated Shippers, MLGW, and ProLiance assert that additional information is needed regarding Rate Schedule STF. ProLiance doubts that the peak and off peak rates for this service reflect the appropriate cost of providing it. Indicated Shippers, MLGW, ProLiance and WTMG also contend additional information is needed regarding Rate Schedule HOT. WTMG asserts that Texas Gas downplays the volumes allocated to its Rate Schedule HOT for electric generation because it generated only $123,878 of revenue for Texas Gas during the base period.

14. Further, CG&E, Indicated Shippers, ProLiance, and WTMG complain that Texas Gas has understated its projected throughput, causing rates to increase. WTMG comments that Texas Gas' revenue requirement is spread over an unrealistically low number of billing determinants. Additionally, Indicated Shippers believe that increased rates may be partially caused by understated levels of IT service.

15. ProLiance argues that Texas Gas should be required to show that establishing economic queues to allocate IT and overrun capacity will not have any adverse effects on the liquidity of capacity on the Texas Gas system and that it does not favor Texas Gas over other shippers with different available capacity. ProLiance further states that while it does not necessarily oppose this change, it needs more detail on how it will be administered. Atmos protests the proposed economic queues for allocating capacity. PSEG comments that it supports economic queues for allocating capacity.

16. Additional issues brought up by protestors include, but are not limited to: (1) seasonal allocation of storage costs, (2) the allocation of costs on both a Demand and Demand-QE basis, (3) the allocation of $1.4 million of "Customer Accounts" exclusively to transmission customers, (4) the allocation of costs to incremental storage services, (5) corporate and overhead allocations, (6) Texas Gas' lack of detail regarding a $78 million increase in total cost of plant, (7) the allocation of revenue from Rate Schedule PAL, (8) the income tax allowance, and (9) O& M expenses.

17. The protestors and the interveners filing comments generally request that the Commission suspend the proposed rate for five months, the maximum period allowed by section 4, and set the matter for hearing.

III. Discussion

18. The Commission accepts and suspends Texas Gas' primary tariff sheets listed in Appendix A to be effective November 1, 2005. The Commission finds that the parties have raised numerous issues concerning Texas Gas' proposed rate and tariff changes that are best addressed at a hearing. The rate issues to be addressed at the hearing established by this order include, but are not limited to, cost of service, rate design, rate of return, capital structure, throughput, and depreciation rates.

19. The Commission rejects without prejudice Texas Gas' revised sheets establishing economic queues to allocate IT and overrun capacity. While these revised tariff sheets may not be inconsistent with Commission policy, these revised tariff sheets are premature. The revised tariff sheets provide that the proposed revision would commence on the effective date of Texas Gas' new customer service system. The tariff sheets provide for a continuation of the first come, first served allocation method until that time. Texas Gas explains it expects to implement its economic queue at the same time it implements its upgraded GasQuest computer system, which is expected to become operational no later than September 2006. Since Texas Gas does not intend to implement its new capacity allocation method until some indeterminate time in the future, these revised tariff sheets are rejected without prejudice as premature.

20. The Commission denies Texas Gas' request for waiver of section 154.205(b) in order to give it the option of moving its alternate *pro forma* tariff sheets into effect at the end of the suspension period. Texas Gas requested the waiver due to uncertainty as to the Commission's policy concerning the recovery of tax allowances by a limited liability companies, such as Texas Gas is currently. Texas Gas noted that the Commission had requested comments on this issue, but had not yet responded to the comments. Texas Gas suggested that this uncertainty might cause it to convert to a C corporation, and the filed alternate *pro forma* tariff sheets reflecting the additional tax costs which it claimed it would incur as a C corporation. On May 4, 2005, the Commission issued a Policy Statement on Income Tax Allowances in Docket No. PL05-5-000 (Policy Statement).[3] The Commission stated that it would permit an income tax allowance for all entities or individuals owning public utility assets, provided that an entity or individual has an actual or potential income tax liability to be paid on that income from those assets. The

[3] 111 FERC ¶ 61,139 (2005).

Commission further stated that, therefore, a tax-paying corporation, a partnership, a limited liability corporation, or other pass-through entity would be permitted an income tax allowance on the income imputed to the corporation, or to the partners or the members of pass-through entities, provided that the corporation or the partners or the members, have an actual or potential income tax liability on that public utility income. The Commission noted that any pass-through entity seeking an income tax allowance in a specific rate proceeding must establish that its partners or members have an actual or potential income tax obligation on the entity's public utility income. The Commission's issuance of the Policy Statement removes the uncertainty regarding the Commission's income tax policy upon which Texas Gas request for waiver of section 154.205(b) was premised. Accordingly, the request for waiver is denied as moot, and the alternate *pro forma* tariff sheets are rejected. Parties may litigate at the hearing the appropriate tax allowances for Texas Gas consistent with the Commission's new policy.

21. The Commission grants Texas Gas' request to include costs associated with facilities not yet in service in its proposed rates but directs Texas to remove those costs from its rates if those facilities are not yet placed into service by November 1, 2005.

IV. <u>Suspension</u>

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

23. The Commission's policy regarding rate suspensions is that rate 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. *See Great Lakes Gas Transmission Co.*, 12 FERC **&** 61,293 (1980) (five-month suspension). 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. *See Valley Gas Transmission, Inc.*, 12 FERC **&** 61,197 (1980) (one-day suspension). Such circumstances do not exist here. Accordingly, the Commission will suspend Texas Gas' revised tariff sheets listed in the Appendix A for five months and will permit them to take effect November 1, 2005, subject to refund and subject to the conditions set forth in the body of this order and the ordering paragraphs below.

The Commission orders:

(A) The tariff sheets listed in the Appendix A are accepted and suspended, to be effective November 1, 2005, subject to refund and conditions and subject to the outcome of the hearing established in this proceeding.

(B) First Revised Sheet Nos. 221, 222, 223 and 224 are rejected without prejudice as discussed in the body of this order.

(C) The Commission denies Texas Gas' request for waiver of section 154.205(b) of the Commission's regulations and rejects the *pro forma* tariff sheets listed in the Appendix.

(D) The Commission grants Texas Gas' request for waiver of section 154.303(1) of the Commission's regulations as discussed in the body of this order.

(E) Pursuant to the authority of the NGA, particularly sections 4, 5, 8 and 15 thereof, a public hearing will be held in Docket No. RP05-317-000 concerning the lawfulness of Texas Gas' proposed rates.

(F) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose pursuant to 18 C.F.R. § 375.304, must convene a prehearing conference in this proceeding to be held within twenty (20) days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington D.C. 20426. The prehearing conference shall be held for the purpose of establishment of a procedural schedule. The Presiding Administrative Law Judge is authorized to conduct further proceedings in accordance with this order and the Commission's rules of practice and procedure.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

APPENDIX A

Texas Gas
Accepted and Suspended to be Effective November 1, 2005

<u>FERC Gas Tariff, Second Revised Volume No. 1</u>

First Revised Sheet No. 11
First Revised Sheet No. 12
First Revised Sheet No 13
First Revised Sheet No. 14
First Revised Sheet No. 15
First Revised Sheet No. 16
Fifth Revised Sheet No. 20
Fourth Revised Sheet No. 21
Fifth Revised Sheet No. 22
Fourth Revised Sheet No. 23
Third Revised Sheet No. 24
Fourth Revised Sheet No. 25
Fifth Revised Sheet No. 26
First Revised Sheet No. 27
Third Revised Sheet No. 28
Fifth Revised Sheet No. 29
Fifth Revised Sheet No. 30
Second Revised Sheet No. 31
Third Revised Sheet No. 32
Third Revised Sheet No. 33
First Revised Sheet No. 34
Fourth Revised Sheet No. 36
Second Revised Sheet No. 37
Second Revised Sheet No. 38
Second Revised Sheet No. 39
Second Revised Sheet No. 40
Sheet No. 129
Sheet No. 153

APPENDIX B

Texas Gas
Rejected Tariff Sheets

FERC Gas Tariff, Second Revised Volume No. 1

First Revised Sheet No. 221
First Revised Sheet No. 222
First Revised Sheet No. 223
First Revised Sheet No. 224

Pro Forma Sheets

Pro Forma Sheet No. 20
Pro Forma Sheet No. 21
Pro Forma Sheet No. 22
Pro Forma Sheet No. 23
Pro Forma Sheet No. 24
Pro Forma Sheet No. 26
Pro Forma Sheet No. 27
Pro Forma Sheet No. 28
Pro Forma Sheet No. 29
Pro Forma Sheet No. 30
Pro Forma Sheet No. 32
Pro Forma Sheet No. 37
Pro Forma Sheet No. 38
Pro Forma Sheet No. 39
Pro Forma Sheet No. 40