

124 FERC ¶ 61,313
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Freebird Gas Storage, LLC

Docket Nos. RP08-304-000
RP08-304-001

ORDER ON SUSPENDED TARIFF SHEETS

(Issued September 30, 2008)

1. On May 1, 2008, the Commission issued an order¹ accepting and suspending tariff sheets tendered by Freebird Gas Storage, LLC (Freebird) in the captioned proceeding on April 1, 2008, to be effective the earlier of October 1, 2008, or on a date set by a subsequent Commission order, subject to further review. Upon further review of the proposed tariff revisions, the Commission accepts the tariff sheets listed on Appendix A, to be effective October 1, 2008, subject to the conditions discussed below. The tariff sheet listed on Appendix B is rejected as moot.

Background

2. On December 19, 2007, Enstor acquired all of the ownership interests in Freebird Assets, Inc., which was the owner of all of the ownership interests in Freebird. Freebird states that the purpose of the instant filing is to revise various parts of its tariff, including the rate statements, rate schedules, General Terms and Conditions (GT&C), and Forms of Service Agreements to conform to Enstor's standard business practices, to correct, update and/or remove certain tariff provisions; and to make minor "housekeeping" changes to the tariff.

3. On April 1, 2008, Freebird filed, in Docket No. RP08-304-000, First Revised Volume No. 1 of its FERC Gas Tariff to revise its entire tariff to conform to the standard business practices of its new parent company, Enstor, Inc. (Enstor); to correct, update

¹ *Freebird Gas Storage, LLC*, 123 FERC ¶ 61,105 (2008).

and/or remove certain tariff provisions; and to make other minor "housekeeping" changes to its tariff. On April 4, 2008, Freebird filed, in Docket No. RP08-304-001, Original Sheet No. 3, to include a hardcopy of its system map in its revised tariff, which it excluded from the Original Sheet No. 3 tendered with the April 1, 2008 filing. No protests or adverse comments were filed in either docket.

4. The proposed major substantive changes to Freebird's tariff include modifications to: (1) more accurately reflect when fuel charges may be imposed; (2) remove the Interruptible Imbalance Trading Service Rate Schedule; (3) revise its treatment of retained gas quantities; (4) revise its method for allocating firm capacity; (5) update its credit terms; (6) clarify certain capacity release provisions; (7) revise certain nomination and scheduling provisions; (8) revise the risk of loss allocation; (9) request exemption from the Standards of Conduct rules; (10) clarify its service termination provisions; and (11) provide a no-fault customer termination option. Freebird proposed an effective date of May 1, 2008.

5. On May 1, 2008, the Commission issued an order² in Docket Nos. RP08-304-000 and RP08-304-001 accepting and suspending the tendered tariff sheets, to be effective the earlier of October 1, 2008, or on a date set by a subsequent Commission order, subject to further review.

6. On May 16, 2008, the Commission issued a data request to Freebird requesting additional information concerning Freebird's filing. Freebird submitted responses to the data request on June 16 and 24, 2008.

Issues

Interruptible Imbalance Trading Service Rate Schedule

7. Freebird proposes to remove its interruptible Imbalance Trading Rate Schedule (IBTS Rate Schedule) since it asserts that no customers utilize that rate schedule. In response to data request number 2, which requested that Freebird explain how it proposes to comply with Order No. 637's requirement that pipelines offer imbalance management services, Freebird responded that it does not have an exemption from the Commission concerning the provision of imbalance management services but that it offers parking and lending services to help provide shippers with the flexibility they need. Freebird also states that its tariff expressly states that it will not inhibit the provision of third party imbalance management services.³ Furthermore, Freebird states that since no shipper has

² *Id.*

³ *See* Sheet No. 131, section 6.4 and Sheet So. 148, section 22.6.

ever entered into an IBTS service agreement, it has no operating experience with how this rate schedule is intended to operate. Also, Freebird states that its shippers should not have to be concerned about avoiding penalties attributable to imbalances since it has an operational balancing agreement with Tennessee. In addition, Freebird states that proposed section 8.8 of its GT&C, Inventory Management, provides shippers with another option with which they can manage an imbalance situation. Freebird stated in its data response that section 8.8 affords shippers the opportunity to enter into corresponding transactions to handle volumes that have not been received or delivered after a proper nomination was made.

8. Section 284.12(b)(2)(ii) of the Commission's regulations⁴ requires pipelines to establish tariff provisions permitting shippers and their agents to offset imbalances accruing on different contracts held by the shipper with the pipeline and to trade imbalances with other shippers where such imbalances have similar operational impact on the pipeline's system. Freebird's only stated reason for proposing to remove that rate schedule is because none of Freebird's shippers are using it. As noted in data request item number 2, proposed section 8.8 appears to become operational only after the imbalance has occurred, after the non-defaulting party provides notice of a receipt or delivery default and only at the option of the non-defaulting party. In any event, section 284.12(b)(ii) requires pipelines to offer netting and trading, regardless of whether pipelines also offer other imbalance management services pursuant to section 284.12(b)(iii). Freebird has not provided any compelling reason (such as cost) to modify its existing tariff, which complies with requirement in section 284.12(b)(2)(ii) that it offer shippers the opportunity to net and trade imbalances. However, Freebird may also comply with the requirements of section 284.12(b)(2)(ii) by including a provision in its tariff to permit the netting and trading of imbalances. Freebird is therefore directed to file tariff sheets to include in First Revised Volume No. 1 of its FERC Gas Tariff either an IBTS Rate Schedule or a provision permitting shippers and their agents to offset imbalances accruing on different contracts held by the shipper with the pipeline and to trade imbalances with other shippers, in accordance with section 284.12(b)(2)(ii).

Nominations

9. In response to data request number 3(a), Freebird states, that its proposal to revise section 8.2(b) of the General terms and Conditions (GT&C) of its tariff, to provide that intraday nominations for firm storage service will be given priority over scheduled and flowing interruptible storage service, does not conform entirely to NAESB Standard 1.3.2(iv), which provides that "bumping is not allowed during the Intraday 2 Nomination Cycle." Freebird states that it will clarify that intraday nominations for firm storage

⁴ 18 C.F.R. § 284.12(b)(2) (2008).

service will comply with the NAESB nomination standards. The Commission directs Freebird to revise the language in proposed section 8.2(b) to comply with the NAESB nomination standards as Freebird has agreed.

10. In response to data request number 3(b), Freebird states that its proposed revision to section 8.2(b), to state that Freebird has the right to prorate a shipper's Maximum Daily Injection Quantity or Maximum Daily Withdrawal Quantity for a nomination that takes effect after the beginning of a gas day, is consistent with NAESB Standard 1.3.9 which provides that "[a]ll nominations, including intra-day nominations, should be based on a daily quantity; thus, an intra-day nominator need not submit an hourly nomination." Freebird states that it intends to follow this standard. Freebird states however, that to the extent that a customer has nominated intra-day quantities that Freebird cannot fully accommodate, Freebird requests the ability to prorate those quantities as necessary. Freebird states that it intends to apply this provision in a non-discriminatory manner. The Commission approves this proposed revision to section 8.2(b) and requires Freebird to file revised tariff sheets to further revise section 8.2(b) to provide that Freebird will apply this provision in a non-discriminatory manner, consistent with the NAESB standards.

11. Freebird proposes to revise section 8.6 of its GT&C to require each shipper to make nominations in good faith. In response to staff's data request number 3(e), which requested that Freebird explain why this change was necessary, Freebird states that it is willing to remove this provision since all parties are presumed to be acting in good faith. The Commission directs Freebird to remove this provision as Freebird has agreed.

Net Present Value Method of Evaluating Bids

12. Data request number 6 requested that Freebird explain why the formula for determining the net present value of the bids has been removed from proposed section 3.1(b) although proposed section 3.1(b) retains the highest net present value as a method of evaluating bids. Freebird states in its response that, to address any possible inconsistency and confusion, it proposes to remove the "net present value" reference from section 3.1(b). Freebird states that it is replacing the formula used to calculate the present value of a bid submitted pursuant to an open season with a provision that specifies that all bids submitted in response to a particular notice of an open season will be evaluated in accordance with the criteria set forth in the open season notice.⁵ The Commission directs Freebird to remove the reference to "net present value" in section 3.1(b), as Freebird has agreed.

⁵ Citing, e.g., *Egan Hub Storage, LLC*, 116 FERC ¶ 61,174, at P 11-12 (2006).

Tie-Breaker

13. Freebird proposes, in section 3.1(d) of its GT&C, to use a closed bidding process to break ties. In response to data request number 7(a), which asked Freebird to explain how this proposal complies with the Commission's regulations and the NAESB standards, Freebird states that it will delete the reference to closed bidding to comply with the Commission's regulations and the NAESB standards. In response to data request number 7(b), which requested that Freebird explain why proposed section 3.1(d) requires tied bidders submitting new bids through the closed bidding process to submit bids with a higher economic value than the original bid, Freebird stated that it will delete the "higher economic value than the original bid" language. Freebird is directed to file revised tariff sheets to delete the reference to closed bidding and to remove the "higher economic value than the original bid" language, to eliminate the requirement that subsequent bids have a higher economic value than the original bid.

Additional Security for Borrowed Gas

14. Freebird proposes to revise section 3.4(j) of its GT&C to provide that a shipper who previously posted security for borrowed gas may be required to provide additional security within two days of Freebird's request if the market value of the borrowed gas increases by ten percent (10%) or more.⁶ In response to data request number 9, Freebird states that it intends this provision to read "two business days." Freebird is directed to file revised tariff sheets to provide for two business days to provide additional security pursuant to section 3.4(j).

U.S Bankruptcy Code

15. At footnote 27 of the Transmittal to the April 1, 2008 filing, in describing its proposed changes to the early termination provisions to be consistent with the U.S. Bankruptcy Code's (Bankruptcy Code) treatment of "forward contracts," Freebird states that section 22.7 provides that the tariff shall at all times be construed consistently with the Bankruptcy Code. Data request number 11 requested that Freebird explain the intent of this provision, why Freebird believes it is necessary, and whether Freebird intends this provision to override the Commission's regulations and policies in favor of the Bankruptcy Code even when Freebird and/or its customer(s) are not in bankruptcy. Freebird replies that it intended to

⁶ Citing, e.g., *Bluewater Gas Storage LLC*, 117 FERC ¶ 61,351, at P 5-6 (2006).

make clear that it does not intend to use provisions in its tariff to circumvent the Bankruptcy Code.⁷ Freebird also states that, to the extent that both Freebird and/or its customer(s) are not in bankruptcy, Freebird does not intend for this provision to override the Commission's regulations and policies. Freebird is directed to revise its tariff to clarify that to the extent that both Freebird and/or its customer(s) are not in bankruptcy, Freebird does not intend for this provision to override the Commission's regulations and policies.

Sale of Shipper's Gas

16. Freebird proposes in section 23.5 of its GT&C to permit it to apply the proceeds from a private sale of a shipper's gas following early termination of a service agreement to satisfy amounts owed by the shipper to Freebird. Data request number 15 requested that Freebird explain how this proposal complies with the Commission's set-off policies. In response, Freebird states that it is aware that the Commission's set-off policies discourage what it perceives to be the "confiscation" of gas insofar that such a provision does not adequately protect the rights of the shipper and other parties that may have an interest in the gas.⁸ Freebird further states that its proposal is consistent with prior Commission authority suggesting that parties may avail themselves of state law remedies, such as warehousemen's liens, when they are still seeking payment for service after the termination of the service agreement.⁹ Freebird states that it is willing to remove the reference to "private sale" of the shipper's gas from section 23.5, and to otherwise limit the scope of section 23.5 to available remedies under either state law or the Uniform Commercial Code.

17. In *Katy*, the pipeline proposed to give itself the right to sell customer inventory as an offset to amounts due and payable to the pipeline at the date of contract termination.¹⁰ The Commission stated in *Katy* that it has previously addressed the issue of the pipeline's

⁷ Citing, *Natural Gas Pipeline Co.*, 106 FERC ¶ 61,175, at P 56 (2004) (instructing pipeline to include a provision in its tariff to address the interaction of the creditworthiness provisions and the Bankruptcy Code).

⁸ Citing *Katy Storage and Transportation, L.P.*, 106 FERC ¶ 61,145 (2004) (*Katy*).

⁹ Citing, e.g., *Monroe Gas Storage Co., LLC*, 121 FERC ¶ 61,285, at P 65 (2007) (holding that storage provider may assert liens or interest in the gas held in its storage system); *Tres Palacios Gas Storage, LLC*, 120 FERC ¶ 61,253, at P 60 (2007) (permitting storage provider "to establish a lien or interest on all gas received from the shipper in order to satisfy charges for storage or transportation").

¹⁰ See *Katy* at P 40.

right of set-off in situations where monies are owed the pipeline at the termination of a shipper's contract, citing *Tennessee*,¹¹ where the Commission addressed Tennessee's proposal to confiscate gas left on its system (i.e., take title to gas left on its system) by a non-creditworthy shipper whose contract has been terminated. The Commission rejected Tennessee's proposal, reasoning that the pipeline had not provided any legal justification of its right to confiscate a shipper's gas, and the Commission noted it was concerned that such a provision did not adequately protect the rights of the shipper and other parties that may have an interest in the gas. However, the Commission stated that although it was not providing Tennessee with a priority to gas on its system, the Commission saw no reason why Tennessee should be prevented from obtaining a carrier or other lien as permitted under state law.¹² The Commission similarly found that Katy did not provide sufficient justification of its right to confiscate a shipper's gas. For the same reasons enunciated in *Tennessee*, the Commission rejected Katy's proposal, without prejudice to Katy revising its operating statement to provide that carrier liens imposed must be consistent with applicable law.¹³ The Commission directs Freebird to remove the reference to "private sale" from its proposed tariff as it has agreed and, consistent with *Katy* and *Tennessee*, directs Freebird to revise its proposed tariff to limit the scope of its proposal to establishing a carrier or other lien in accordance with state law.

Affiliate Definition

18. Data request number 16 requested that Freebird explain how its proposed definition of "affiliate" in section 2.1 of the GT&C complies with the Commission's policies and regulations. Freebird replies that the Commission's regulations define "affiliate" at 18 C.F.R. § 358.3(b), as part of the rules setting forth the Standards of Conduct of Transmission Providers. Freebird states that its proposed definition does not track the Commission's definition verbatim. Freebird further states that, while it is currently subject to the Standards of Conduct, it is seeking Commission authorization to remove its compliance obligations by virtue of being an independent natural gas storage provider with market-based rate authorization.¹⁴ Freebird states that, as such, there should be no need for it to include the definition of affiliate in its tariff once it is able to remove the Standards of Conduct language from its tariff. Freebird states that it agrees to

¹¹ *Tennessee Gas Pipeline Co.*, 103 FERC ¶ 61,275 (2003) (*Tennessee*).

¹² *Citing Tennessee*, 103 FERC ¶ 61,275 at P 76; *see also Northern Natural Gas Company*, 103 FERC ¶ 61,276 (2003).

¹³ *Katy*, at P 41 (*Citing Honeoye Storage Corporation*, 102 FERC ¶ 61,340, at P 4 (2003); *Northern Natural Gas Company*, 102 FERC ¶ 61,276 (2003)).

¹⁴ *Citing* 18 C.F.R. § 358.3(a)(3) (2008).

remove this definition upon receiving Commission authorization to remove the Standards of Conduct language from its tariff.

19. On July 23, 2008, the Commission issued an order granting Freebird's request for exemption from the standards of conduct requirements of Part 358 of the Commission's regulations.¹⁵ Freebird is therefore directed to remove this definition from its tariff as it has agreed.

Alternative Bid Evaluation Method

20. Proposed section 3.1(b) of the GT&C states that the method for evaluating bids will be identified in the open season and shall include (i) determining the highest net present value from competing bids when all other terms are equivalent (ii) determining the highest unit value of service when all bids do not contain equivalent other terms or (iii) an alternative, objective and non-discriminatory method chosen by Freebird. Data request number 20 requested that Freebird justify this proposal and state whether part (iii) intends to give Freebird full discretion as to the method utilized. Freebird states in its response that it proposed this third alternative method of conducting an open season for available capacity in the event that both Freebird and its shippers agreed on an alternative method. Freebird further states that it does not intend to have full discretion as to the method utilized; rather, it will be by mutual agreement of the parties. In addition, any such chosen method under section 3.1(b)(iii) would be posted prior to the open season and would be applied in a non-discriminatory manner.

21. Freebird is directed to revise its tariff sheets to provide that the method utilized will be by mutual agreement of the parties and that any such chosen method under section 3.1(b)(iii) will be posted prior to the open season and will be applied in a non-discriminatory manner.

Force Majeure

22. Freebird proposes in section 15.1(b) to allow a credit to storage reservation charges for firm shippers receiving service under Rate Schedule FSS during force majeure events lasting more than three days. In its response to data request number 21, Freebird states that it does not require the three-day delay and agrees to

¹⁵ *Freebird Gas Storage, LLC*, 124 FERC ¶ 61,077 (2008).

remove this language. The Commission directs Freebird to remove the three-day delay as it has agreed.

Third Party Title Transfers

23. Data request number 22 requested that Freebird reconcile the apparent prohibition of third party title transfers in section 18.1(c) of Freebird's GT&C with Commission policy. Freebird responded that it will modify section 18.1(c) to reflect the availability of third party title transfers. The Commission directs Freebird to modify section 18.1(c) as it has agreed.

The Commission orders:

The tariff sheets listed in Appendix A are accepted to be effective October 1, 2008, subject to Freebird filing revised tariff sheets, within 15 days of the date this order issues, containing the modifications discussed herein. The tariff sheet listed in Appendix B is rejected as moot.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX A

Freebird Gas Storage, LLC
FERC Gas Tariff, First Revised Volume No. 1

Tariff Sheets Accepted Subject to Modification Tendered With the April 1, 2008 Filing in
Docket No. RP08-304-000

Title Page	Original Sheet No. 104
Original Sheet No. 1	Original Sheet No. 105
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Appendix A, Cont'd.

Original Sheet No. 140	Original Sheet No. 200
Original Sheet No. 141	Original Sheet No. 201
Original Sheet No. 142	Original Sheet No. 202
Original Sheet No. 143	Original Sheet No. 203
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Original Sheet No. 158-199	

Tariff Sheet Accepted Subject to Modification Tendered with the April 4 Filing in
Docket No. RP08-304-001

Original Sheet No. 3

APPENDIX B

Freebird Gas Storage, LLC
FERC Gas Tariff, First Revised Volume No. 1

Tariff Sheet Rejected as Moot Tendered with the April 1 Filing in
Docket No. RP08-304-000

Original Sheet No. 3