126 FERC ¶ 61,161
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

February 23, 2009

In Reply Refer To:
Kinder Morgan Interstate Gas
Transmission LLC
Docket No. RP09-265-000

Kinder Morgan Interstate Gas Transmission LLC
370 Van Gordon Street
Lakewood, CO 80228

Attention: Robert F. Harrington
Vice-President

Reference: Revised Tariff Sheets to Comply with Order No. 712 and 712-A

Ladies and Gentlemen:

1. On January 26, 2009, Kinder Morgan Interstate Gas Transmission LLC (Kinder Morgan) filed revised tariff sheets to its FERC Gas Tariff, Fourth Revised Volume No. 1-B proposing modifications to comply with the capacity release requirements promulgated by Order Nos. 712 and 712-A.[1] In addition, Kinder Morgan proposed tariff sheets containing minor tariff revisions consistent with Order No. 698[2] and Order No. 717.[3]

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[1] *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37,058 (June 30, 2008), FERC Stats. & Regs. ¶ 31,271 (2008), *order on reh'g*, Order No. 712-A, 73 Fed. Reg. 72,692 (December 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008) (Order No. 712).

[2] *Standards for Business Practices for Interstate Natural Gas Pipelines; Standards for Business Practices for Public Utilities*, Order No. 698, 72 Fed. Reg. 38,757 (July 16, 2007), FERC Stats. & Regs ¶ 31,251 (2007) (Order No. 698), *order on clarification and reh'g*, Order No. 698-A, 121 FERC ¶ 61,264 (2007).

[3] *Standards of Conduct for Transmission Providers*, Order No. 717, 73 Fed. Reg. 63,796 (October 27, 1980), FERC Stats. & Regs. ¶ 31,280 (2008) (Order No. 717).

The revised tariff sheets listed in the attached appendix are accepted effective February 26, 2009, as proposed, subject to the conditions discussed below.

2. Order No. 712 permits market-based pricing for short-term capacity releases and facilitates asset management arrangements (AMAs) by relaxing the Commission's prohibition on tying and its bidding requirements for certain capacity releases. Kinder Morgan proposes several changes to its General Terms and Conditions to provide that capacity releases of one-year or less are not subject to the maximum rate cap. Kinder Morgan also proposes additional modifications to clarify and revise the bidding requirements for capacity release transactions associated with an AMA or a state-approved retail open access program. Kinder Morgan proposes several other modifications that are not directly attributable to Order No. 712, but rather serve to clarify its capacity release provisions.

3. Public notice of Kinder Morgan's filing was issued on January 29, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[4] Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[5] all notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed the motions, parties to this proceeding. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. Motions to intervene and comments were filed by Atmos Energy Corporation (Atmos).

4. Atmos asks the Commission to require Kinder Morgan to include provisions allowing the "flow-through" of discounts from releasing shippers to their asset managers. For example, Atmos states that it is unclear whether and to what extent Kinder Morgan will permit a releasing shipper's asset manager to pay the same discounted usage and fuel rates that the pipeline provided to the releasing shipper. Atmos suggests that Kinder Morgan should clarify (or propose) a policy allowing the asset manager/replacement shipper to receive the same discounted usage and fuel rates applicable to the releasing shipper, particularly since a general refusal to allow "pass-through" of such discounts would impede asset management transactions, contrary to Order Nos. 712 and 712-A.

5. The issue of whether a pipeline must provide an asset manager/replacement shipper the same discounted or negotiated usage and fuel rates as it has given the releasing shipper only arises to the extent that the pipeline has provided such discounts or negotiated rates to the releasing shipper. The Commission does not permit pipelines to offer discounts below their minimum rates, which are based on the variable costs

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[4] 18 C.F.R. § 154.210 (2008).

[5] 18 C.F.R. § 385.214 (2008).

allocated to the service to which the rate applies.[6] Therefore, a pipeline such as Kinder Morgan using a Straight-Fixed Variable (SFV) rate design cannot discount its usage charges, because those usage charges only contain variable costs. The Commission has also held that pipelines may not discount their fuel retention rates, because fuel and lost and unaccounted for (LAUF) gas are variable costs.[7] Thus, the issue of the "flow-through" of discounted usage and fuel charges to an asset manager/replacement shipper does not arise on Kinder Morgan's system. However, pipelines with negotiated rate authority may enter into negotiated rate agreements which are not bounded by their tariff maximum and minimum rates. Kinder Morgan has negotiated rate authority, and thus does have authority to enter into negotiated rate agreements providing for fuel retention rates (and usage charges) that vary from those in its tariff.

6. The Commission has held that the usage charge to be paid by the replacement shipper is a matter between the replacement shipper and the pipeline, and the releasing shipper cannot bind the pipeline to accept any particular usage charge from the replacement shipper. Therefore, the pipeline "generally should not be required to give the replacement shipper the same discount" of the usage charge that it gave the releasing shipper.[8] In *El Paso*, the Commission explained that:

> the discount in the usage charge negotiated between the releasing shipper and El Paso is related only to the contract between the releasing shipper and the pipeline and to the transportation services actually performed by El Paso for the releasing shipper under that contract and is not relevant to other contracts and services to other shippers, including replacement shippers.[9]

7. While pipelines are not subject to a blanket requirement that they must give replacement shippers the same usage charge discounts (or negotiated usage and fuel rates) given to the releasing shipper, pipelines are subject to the Commission's general

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[6] 18 C.F.R. § 284.10(c)(4)(ii) and (5)(ii)(A) (2008).

[7] *Mississippi River Transmission Corp.*, 98 FERC ¶ 61,119 (2002).

[8] *El Paso Natural Gas Co.*, 61 FERC ¶ 61,333, at p. 62,309 (1992) (*El Paso*).

[9] *Id.*

policy that selective discounts must be given on a not unduly discriminatory basis to similarly situated shippers.[10] These same policies apply to negotiated usage and fuel charges.

8. Order No. 712 did not modify the Commission's existing policy concerning the pipeline's offering usage charge discounts to replacement shippers.[11] Nor did Order No. 712 address any issue concerning the offering of negotiated usage and fuel charges to replacement shippers. However, Order No. 712's modification of the Commission's regulations to facilitate AMAs does raise the following issues in this proceeding:

(1) whether it would be unduly discriminatory for Kinder Morgan to deny an asset manager replacement shipper the same negotiated usage and fuel and LAUF charge that was provided to the releasing shipper, at least during periods when the asset manager is using the released capacity to satisfy the delivery or purchase obligation contained in the release to the asset manager;[12]

(2) if a negotiated rate agreement between Kinder Morgan and the releasing shipper provides that the discount or negotiated rate is only applicable at certain specified receipt or delivery points as permitted by Commission policy,[13] should the asset manager/ replacement shipper's use of those points be considered to be within the usage contemplated by Kinder Morgan when it granted the negotiated rate to the releasing shipper? For this reason, should Kinder Morgan be required to offer the same negotiated rate to the asset manager/replacement shipper at those points, but not at any other point?

(3) whether Kinder Morgan should be required to include in its tariff a provision concerning the circumstances under which it would provide similar negotiated usage and fuel charges to an asset manager/replacement shipper; or

(4) whether the circumstances of individual releases to asset managers are sufficiently case-specific that pipelines should be allowed to decide whether to grant

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[10] *See Williston Basin Interstate Pipeline Co.* (*Williston Basin*), 85 FERC ¶ 61, 247, at p. 62,028-30 (1998), and cases cited, for a discussion of this policy.

[11] *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396, at P 21 (2008).

[12] *See* § 284.8(h)(3) of the Commission's regulations, as revised by Order No. 712-A (defining a release to an asset manager).

[13] *Williston Basin Interstate Pipeline Co.*, 110 FERC ¶ 61,210 at P 5 and 22, *reh'g denied*, 112 FERC ¶ 61,038, at P 19 (2005).

negotiated usage and fuel and LAUF charges to the asset manager/replacement shipper on a case-by-case basis, subject to a general requirement of no undue discrimination.

9. Before deciding these issues, the Commission requires additional information from Kinder Morgan, and will give the parties an opportunity to provide supplemental comments. In this regard, the Commission directs Kinder Morgan to file the following information in a compliance filing within 30 days of the date of this order: (1) how many of Kinder Morgan's existing shipper contracts include negotiated usage and fuel rates, (2) how many of any such contracts limit the negotiated rate to specific points, (3) a general description of how Kinder Morgan intends to determine whether to grant negotiated usage and fuel charges to asset manager/replacement shippers, and (4) what factors it will consider in determining whether to grant such negotiated rates.

10. Kinder Morgan is directed to file additional information discussed above in a compliance filing within 30 days of the date of this order. Parties may file additional comments within 20 days of the date of Kinder Morgan's compliance filing.

By direction of the Commission. Commissioner Kelliher is not participating.

Kimberly D. Bose,
Secretary.

Appendix

Kinder Morgan Interstate Gas Transmission LLC
FERC Gas Tariff, Fourth Revised Volume No. 1-B

Tariff Sheets to be Effective February 26, 2009:

Fifth Revised Sheet No. 46
First Revised Sheet No. 46A
Second Revised Sheet No. 48
Third Revised Sheet No. 48A
Second Revised Sheet No. 48A.01
Second Revised Sheet No. 48A.02
Fourth Revised Sheet No. 49
Fourth Revised Sheet No. 51
Second Revised Sheet No. 52
Second Revised Sheet No. 52B
First Revised Sheet No. 53D
Fourth Revised Sheet No. 89A
Second Revised Sheet No. 90A