126 FERC ¶ 61,264
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

March 25, 2009

In Reply Refer To:
Empire Pipeline, Inc.
Docket No. RP09-267-000

Empire Pipeline, Inc.
6363 Main Street
Williamsville, NY 14221

Attention: Antoinetta D. Mucilli
Senior Attorney

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

Dear Ms. Mucilli:

1. On January 26, 2009, Empire Pipeline, Inc. (Empire) filed revised tariff sheets[1] to reflect changes in compliance with Order No. 712-A[2] and a minor conforming change to its General Terms and Conditions (GT&C) Section 20. On August 1, 2008, Empire filed tariff sheets to comply with Order No. 712 and such tariff sheets were accepted by Commission order issued October 29, 2008.[3] We accept Empire's instant revised tariff sheets as in compliance with Order No. 712-A, to become effective February 25, 2009, subject to conditions as discussed below.

2. In Order Nos. 712 and 712-A, the Commission removed the maximum rate ceiling on capacity releases of one year or less, which take effect within one year after the pipeline is notified of the release. The Commission also modified its regulations in order to facilitate asset management arrangements (AMAs) by relaxing the Commission's

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[1] *See* Appendix.

[2] *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).

[3] *Empire Pipeline, Inc.*, 125 FERC ¶ 61,120 (2008).

prohibition on tying and on its bidding requirements for certain capacity releases. The Commission further clarified that its prohibition on tying does not apply to conditions associated with gas inventory held in storage for releases of firm storage capacity. Finally, the Commission waived its prohibition on tying and bidding requirements for capacity release made as part of a state-approved retail access program. Because its filing to comply with Order No. 712 was accepted by the Commission on October 29, 2008, in the instant filing, Empire proposes several changes to the capacity release provisions in Article III of the GT&C of its tariff to reflect the various changes in the capacity release regulations made by Order No. 712-A.

3. Public notice of this filing was issued on January 29, 2009. Notices of intervention and unopposed timely filed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008). Any opposed or untimely filed motion to intervene is governed by the provisions of Rule 214. Hess Corporation (Hess) filed a limited protest and request for clarification and National Grid Gas Delivery Companies (National Grid)[4] filed a request for clarification.

4. On February 18, 2009, Empire filed a motion for leave to answer and an answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits answers to protests unless otherwise ordered by the decisional authority. We will accept Empire's answer because it has provided information that assisted us in our decision-making process.

5. Hess asserts that Empire's proposed tariff revisions will deny refunds to any short-term replacement shippers, including short-term State retail marketer replacement shippers. Hess argues that Empire should be required to provide refunds to state retail marketer replacement shippers obtaining capacity on a short-term basis as part of a state-mandated retail unbundling program, and to the extent Empire does not deem replacement shippers eligible for refunds, the Commission should clarify that releasing shippers are eligible for refunds on Empire's system.

6. In *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396 (2008) (*Texas Eastern*), the Commission found that it was consistent with Order No. 712 to deem rates paid by replacement shippers for terms of one year or less to be final and not subject to refund.[5]

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[4] The National Grid Gas Delivery Cos. consists of: The Brooklyn Union Gas Co.; KeySpan Gas East Corp.; Boston Gas Co.; Colonial Gas Co.; Essex Gas Co.; EnergyNorth Natural Gas Co.; Niagara Mohawk Power Corp.; and Narragansett Electric Co.

[5] *Texas Eastern* at P 13.

The Commission explained that, as a result of Order No. 712, the pipeline's maximum rates no longer apply to such short-term releases. Therefore, replacement shippers are not entitled to any refunds when the Commission finds that the maximum rates proposed by the pipeline in a section 4 rate case are too high. However, the Commission also stated that a releasing shipper paying a recourse rate higher than the maximum just and reasonable rate determined in a rate case would be eligible for refunds because Order No. 712 did not remove any maximum rates for the pipeline's sale of its own capacity.[6] Therefore, the refunds must be paid by the pipeline to the releasing shipper. The Commission finds that the discussion in *Texas Eastern* provides sufficient guidance on this issue and that the suggested tariff revisions to expressly require that Empire make such refunds to the releasing shipper are unnecessary.

7. Moreover to the extent Hess suggests that Empire should be required to provide refunds to state retail marketer replacement shippers obtaining capacity on a short-term basis as part of a state-mandated retail unbundling program, and to make refunds to the releasing shippers, the Commission finds that the holding in *Texas Eastern* that the pipeline need not make refunds to replacement shippers in short-term releases applies to marketers in retail access programs in the same manner as it applies to any other short-term replacement shipper. However, section 284.8(b) of the Commission's regulations permits the releasing shipper to include terms and conditions in its releases. Such conditions may address the issue of the releasing shipper's disposition of any refunds it receives from the pipeline. Thus, if a state commission and the participants in a state retail access program wish to provide for a local distribution company (LDC) to pass through refunds it receives from the pipeline to the marketers in the program, they can do so through conditions in the LDC's releases to the marketers.

8. National Grid asserts that Section 12(d) of Empire's existing tariff, which Empire did not propose to change, states:

> Notwithstanding Sections 12 (a)(viii) and 12.4(a) hereof, Existing Shipper may establish a security requirement for Prearranged or Potential Shippers that is less than that prescribed by Section 2.2(e) of these General Terms and Conditions, provided that the security requirement is adequate to cover a value determined under Section 2.2(e)(i)(B) without regard to revenues creditable to the Existing Shipper under Section 12.9 hereof.

9. National Grid seeks clarification from Empire that this language permits releasing shippers the flexibility to voluntarily assume responsibility for a replacement shipper's payment obligations to the pipeline in lieu of requiring the replacement shippers to satisfy Empire's creditworthiness standards. National Grid states that some smaller marketers

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[6] *Id.*

find it burdensome to comply with the pipeline's creditworthiness requirements. To the extent that Empire believes that this language cannot be read as National Grid suggests, National Grid asks the Commission to require Empire to clarify that Empire's tariff permits releasing shippers to voluntarily assume responsibility for replacement shippers' charges in place of requiring such shippers to satisfy Empire's creditworthiness standards.[7]

10. In its Answer, Empire asserts that, as National Grid points out, this provision permits an existing shipper to establish a security requirement for a prearranged shipper that is less than the requirement in Empire's tariff. Empire argues that this addresses National Grid's concern that it may be burdensome for a smaller marketer to meet a pipeline's creditworthiness requirements and argues that further modification to its tariff is not mandatory, not required by Order No. 712, and is beyond the scope of the rule.

11. The Commission finds National Grid's request to be beyond the scope of an Order No. 712-A compliance filing. Moreover, Empire did not propose to change the subject provision and National Grid has not shown that it is unjust and unreasonable. National Grid argues that the Commission has stated that pipelines could give the releasing shipper the option to assume liability for the usage charge in the event of a replacement shipper's default. However, this finding by the Commission concerned an option that the pipelines could permit to their shippers, it was not a mandate that the pipeline must provide such an option.[8] To the extent that Empire's answer does not satisfy National Grid, the Commission will not require Empire to modify its tariff. Empire, of course, is free to propose any additional creditworthiness provisions to the Commission for consideration.

12. Empire's proposed tariff sheets listed in the Appendix are accepted to be effective February 25, 2009.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[7] *Citing Dominion Transmission, Inc.*, FERC Gas Tariff, Third Revised Volume No. 1, Substitute Revised Sheet No. 1153.

[8] National Grid Protest at 5, *citing Dominion Cove Point LNG, LP*, 104 FERC ¶ 61,184 at para. 7 (2003), *citing Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,299 (2000).

APPENDIX

Empire Pipeline, Inc.
FERC Gas Tariff, Original Volume No. 1

Tariff Sheets Accepted Effective February 25, 2009

First Revised Sheet No. 163
First Revised Sheet No. 165
First Revised Sheet No. 166
First Revised Sheet No. 168
First Revised Sheet No. 173
First Revised Sheet No. 183
First Revised Sheet No. 213