

131 FERC ¶ 61,179
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

May 27, 2010

In Reply Refer To:
Algonquin Gas Transmission, LLC
Docket No. RP10-609-000

Algonquin Gas Transmission, LLC
P.O. Box 1642
Houston, TX 77251-1642

Attention: Janice K. Devers, General Manager, Tariffs and Commercial Development

Reference: Revised Tariff Sheets and Letter Agreement Amending Negotiated Rate Agreement with National Grid

Ladies and Gentlemen:

1. On April 15, 2010, Algonquin Gas Transmission, LLC (Algonquin) filed tariff sheets¹ to permit Algonquin and a shipper with a negotiated rate agreement to allow the automatic pass-through of negotiated usage and/or fuel rates to such shipper's replacement customer(s). Algonquin also submitted a revised negotiated rate agreement with KeySpan Gas East Corporation D/B/A National Grid (National Grid), which provided that the negotiated usage rate between Algonquin and National Grid would apply to any replacement shipper. The Hess Corporation (Hess) filed comments on Algonquin's submission, noting that while it does not object to the revised tariff language or the revision to the negotiated rate agreement, it requests the Commission to find that all replacement shippers under the contract at issue, including for previous terms, are entitled to the negotiated usage rate. As discussed below, the Commission rejects Hess' protest, accepts the tariff sheets listed in Footnote No. 1 to be effective June 1, 2010, as proposed, and accepts the letter agreement with National Grid for filing.

¹ Fifth Revised Sheet No. 616, Original Sheet No. 616A and Second Revised Sheet No. 89 to Algonquin's FERC Gas Tariff, Fifth Revised Volume No. 1.

2. Algonquin proposes to add section 46.4(B)² to the General Terms and Conditions (GT&C) of its tariff to permit Algonquin to agree with a customer paying a negotiated usage or fuel charge, on a not unduly discriminatory basis, on the terms and conditions under which such negotiated usage or fuel rate will also be available to any replacement customer in a capacity release transaction in the event that the replacement customer elects to pay this rate. Proposed section 46.4(B) also gives the replacement customer the option of paying the recourse rates as an alternative to the offered negotiated usage or fuel rate. Algonquin states that the tariff provisions proposed herein are substantively identical to the provisions recently approved for *Texas Eastern Transmission, LP*.³

3. Algonquin states that the *Texas Eastern* Order clarified that negotiated rate tariff sheets are required to be filed for those replacement customers that elect to pay a negotiated usage or fuel rate pursuant to an agreement with the releasing customer to flow through such negotiated rate as part of the release. Currently, section 46.6 of Algonquin's GT&C requires Algonquin to file a Statement of Negotiated Rates prior to the commencement of service under a negotiated rate agreement. Algonquin states that the operation of the capacity release timeline may prohibit it from filing a Statement of Negotiated Rates prior to the commencement of service under a capacity release transaction for those negotiated rate agreements that incorporate a negotiated usage or fuel rate flowed through pursuant to proposed section 46.4(B). Accordingly, Algonquin is also proposing to revise section 46.6⁴ of the GT&C to permit Algonquin to file the Statement of Negotiated Rates as soon as reasonably practicable after the execution of the negotiated rate agreement with the replacement customer.

4. Algonquin also submitted a revised Statement of Negotiated Rates⁵ in conjunction with an agreement it entered into with National Grid pursuant to section 46 of the GT&C. The parties agreed that the usage rate specified in the negotiated rate agreement would be applicable for any replacement customer that acquires capacity from National Grid under the subject service agreement pursuant to the capacity release provisions in section 14 of the GT&C. Algonquin states that, as a result of the changes proposed herein, the revised negotiated rate agreement does not contain any impermissible material deviations from the form of service agreement and is consistent with its tariff. Algonquin also submitted a letter agreement with National Grid to indicate the parties' agreement to the negotiated rate provisions on the Statement of Negotiated Rates.

² See Fifth Revised Sheet No. 616.

³ 130 FERC ¶ 61,189 (2010) (*Texas Eastern*).

⁴ See Original Sheet No. 616A.

⁵ See Second Revised Sheet No. 89.

5. Public notice of the filing was issued on April 19, 2010. Interventions and protests were due on or before Tuesday, April 27, 2010. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2009)), all timely 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 the proceeding or place additional burdens on existing parties. On April 27, 2010, Hess filed an intervention and comments and on May 7, 2010, Algonquin filed an answer. On May 13, 2010, Hess filed an answer to Algonquin's answer. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), answers to protests are not accepted unless otherwise ordered by the decisional authority. The Commission will accept Algonquin's and Hess' answers because they will lead to a more accurate and complete record and provided information that assisted us in our decision-making process.

6. Hess's essential argument is that, as a predecessor replacement shipper of the same capacity that is the subject of the filed contract between Algonquin and National Grid, Algonquin should have passed through to Hess the \$0.00 per dekatherm (dth) negotiated rate Algonquin had provided to National Grid, and that Algonquin's failure to do so was unduly discriminatory and contrary to the parties' intent. Hess states that it previously obtained capacity through release from National Grid for National Grid's Algonquin Ramapo Expansion Project under Contract No. 510369 (the same contract Algonquin seeks to revise in this proceeding). Hess states that it obtained that capacity as an asset manager in accordance with the Commission's policies promulgated in Order No. 712,⁶ as further clarified in *Texas Eastern Transmission LP, et al.*⁷ Hess further states that the release was for the first year of the negotiated rate agreement between Algonquin and National Grid (November 1, 2008 – October 31, 2009). Hess asserts that Algonquin refused to pass through the negotiated usage rate provided for in that agreement to Hess as the replacement customer and also rebuffed subsequent requests by Hess for a refund of the usage charges invoiced by Algonquin. According to Hess, the revised Contract No. 510369 submitted by Algonquin in the instant docket confirms the fact that replacement customers for National Grid's capacity are indeed similarly situated to National Grid and as such are entitled to receive the negotiated usage rate.

7. Hess notes that it had previously sought clarification from the Commission that Order No. 712 required pipelines to pass through negotiated usage rates to a replacement customer in the context of asset management arrangements (AMA), and that such request

⁶ *Promotion of a More Efficient Capacity Release Market*, Order No. 712, FERC Stats. & Regs. ¶ 31,271, *order on reh'g*, Order No. 712-A, FERC Stats. & Regs. ¶ 31,284 (2008), *order on reh'g*, Order No. 712-B, 127 FERC ¶ 61,051 (2009).

⁷ 129 FERC ¶ 61,031 (2009) (Flow Through Order), *order denying further classification*, 130 FERC ¶ 61,111 (2010) (Clarification Order).

was related to Algonquin's refusal to pass through the negotiated usage rate to Hess. Hess notes that in the both the Flow Through Order, and the Clarification Order, the Commission stated that while it appeared to be more likely that an asset manager would be similarly situated to the releasing shipper than in the standard type of capacity release, the Commission declined to make a blanket determination that an asset manager replacement shipper is always similarly situated to the releasing shipper. According to Hess, the Commission stated that if Hess believed a pipeline violated the Commission's policies and the Flow Through Order, then Hess could file a complaint with the Commission.

8. With regard to the instant filing, Hess argues that the only difference between its rate agreement with Algonquin and the one filed herein is the statement that Algonquin now agrees to pass through the negotiated usage rate to any replacement shipper. Hess argues that Algonquin received no consideration for agreeing to pass through the usage rate. Thus, Hess argues, the revised statement of rates indicates that the intent of the parties was that the new sentence applies to the entire term of the negotiated rate agreement between Algonquin and National Grid.⁸

9. In its answer, Algonquin argues that Hess is attempting to re-litigate claims that the Commission has already rejected in other proceedings. Algonquin states that, as Hess acknowledges, its first claim related to the pass-through of negotiated usage/fuel rates to asset managers was previously addressed by the Commission in the Flow Through and Clarification Orders, which established the general rule on the pass-through of negotiated usage and fuel charges, namely that the Commission "will permit pipelines to decide *on a case-by-case basis* whether to give the asset manager the same discounted or negotiated usage or fuel rate." Algonquin asserts that Hess' claim herein is yet another attempt to argue that asset managers are always similarly situated to the releasing shippers and therefore always entitled to the same usage or fuel rate. Algonquin further asserts that, as the Commission has now established that a pipeline is permitted to determine whether an asset manager is similarly situated to a releasing shipper on a case-by-case basis, Hess' arguments in this proceeding are a collateral attack on these prior orders and, as such, should be denied.

10. Algonquin further asserts that Hess' claim that the instant filing entitles Hess to a flow through of the negotiated rate for usage charges on a retroactive basis is without merit. Algonquin states that the proposed revision to National Grid's negotiated rate tariff sheet reflects a new commercial term recently requested by National Grid and agreed to by Algonquin in a letter agreement dated March 26, 2010. Algonquin asserts that the new commercial term was requested and negotiated after the October 31, 2009 expiration of the capacity release transaction with Hess. Algonquin further states that this

⁸ Hess Protest at 6.

commercial term is not retroactive in effect. Algonquin states that, consistent with the agreement for this new commercial term to be effective on a prospective basis, it did not propose that the usage rate would be applied retroactively or to replacement customers that “had acquired” capacity from National Grid, nor has Hess provided any credible basis as to why it would be appropriate to do so. Algonquin states that the negotiated rate tariff sheet reflecting the new term of service included in the instant filing is proposed to be effective on June 1, 2010.

11. Algonquin argues that the fact that Hess was a replacement customer at some point prior to the time that Algonquin and National Grid agreed to the new commercial term for pass-through does not establish whether or not Hess should be considered similarly situated to National Grid (or prospective replacement shippers) for the period it contracted for the release capacity. Algonquin states that Hess’ argument that the instant filing “confirms the fact that replacement customers for National Grid are indeed similarly situated to National Grid” confuses the regulatory requirement that “selective discounts must be given on a not unduly discriminatory basis to similarly situated shippers”⁹ and a commercial term agreed to between National Grid and Algonquin as part of a negotiated rate agreement. Algonquin states that Commission policy requires it to provide selective discounts to similarly situated shippers. Algonquin further states that proposed section 46.4(B) of its GT&C permits it to agree with shippers, including National Grid, “on a not unduly discriminatory basis to the terms and conditions pursuant to which Algonquin will offer such Negotiated Rate(s) to Replacement Customers.” Algonquin asserts that, in this case, National Grid and Algonquin agreed that the negotiated usage rate will be passed through on a prospective basis to “any replacement customer,” and, because it is applicable to any future replacement shipper, it is consistent with Commission requirements on pass-through and is not unduly discriminatory. Algonquin argues that, contrary to Hess’ assertion, its agreement with National Grid does not confirm that “replacement customers for National Grid are similarly situated to National Grid” or that “all replacement customers are similarly situated.” For the above reasons, Algonquin requests that the Commission reject the Hess’ comments and accept the revised tariff sheets to become effective as proposed.

12. Hess, in its answer, reiterates its contention that National Grid did not give Algonquin any additional consideration to include the revised language in the negotiated rate agreement. Hess also reiterates that the implicit intent of the negotiated rate agreement has always been to allow any replacement shipper to receive the same negotiated usage rate of zero as National Grid for the capacity released under Contract No. 510369 and that if the instant filing had been tendered to change the original intent of

⁹ Flow Through Order at P 4, (*citing Williston Basin Interstate Pipeline Co.*, 85 FERC ¶ 61,247, at 62,028-30 (1998)).

the contract, the filing would have clearly stated such. Hess counters Algonquin's contention that Hess' comments herein are a collateral attack on the *Texas Eastern* proceedings by arguing that the issues Hess raises herein are case specific to Contract No. 510369, which is the subject of this proceeding. Hess also reiterates its request that the Commission issue an order finding that, as an asset manager replacement shipper, Hess is entitled under Contract No. 510369 and under the circumstances of this filing consistent with Commission policy to have received National Grid's negotiated usage rate.

13. The Commission finds that the tariff provisions proposed by Algonquin are just and reasonable and in accordance with our policy on pass-through of negotiated usage or fuel rates to replacement shippers. We reject Hess' request that we find that Algonquin is required to pass through the negotiated usage rate to any replacement customer during the entire term of National Grid's contract, particularly on a retroactive basis. As Algonquin points out, its willingness to pass through the negotiated usage rate to National Grid's replacement shippers is the result of an agreement between itself and National Grid that the parties propose to become effective on June 1, 2010.¹⁰ The capacity release obtained by Hess took place from November 1, 2008 through October 31, 2009, prior to the current proposed agreement with National Grid. Thus, at that time Algonquin was entitled to determine whether a particular replacement shipper was similarly situated to National Grid and thus whether to pass through the negotiated usage charge. Neither that contract nor any information provided by Hess indicates that it was the parties' intention at that time that the usage rate should be passed through to all replacement shippers. In fact, Algonquin's refusal to pass through that rate to Hess indicates that Algonquin understood differently. Accordingly, we will not require Algonquin to retroactively apply the negotiated usage rate to Hess.

14. The Commission also rejects Hess' argument that the proposed tariff sheets and letter agreement confirm the fact that all replacement shippers for National Grid's capacity, including previous shippers, are similarly situated to National Grid and as such are entitled to receive the negotiated usage rate. As Hess recognizes,¹¹ the Commission declined to make a blanket determination in the Clarification Order that an asset manager replacement shipper is always similarly situated to the releasing shipper. We have no information in this case to make a broad determination as to whether past replacement shippers for the National Grid capacity are similarly situated to any future replacement shippers. The timing of the release and other factors may have led to Algonquin's determination that replacement shippers were not similarly situated to National Grid.

¹⁰ See Second Revised Sheet No. 89.

¹¹ Hess Protest at 5.

15. We likewise reject Hess' argument that this is the appropriate forum to consider Hess' claim. The subjects of the instant filing are the modified tariffs sheets and negotiated rate agreement filed by the pipeline to be effective June 1, 2010 and not any possible past claims under a pre-existing contract. Accordingly, and as we have stated previously, to the extent Hess believes that Algonquin or any other pipeline has violated the policies set forth in the Flow-Through Order, or any other Commission policies or regulations, it may file a complaint with the Commission so that we may make a determination based on the specific facts of that dispute.

16. For the reasons stated above, the Commission denies Hess' protest and accepts the tariff sheets listed in Footnote No. 1 to be effective June 1, 2010, as proposed and accepts the letter agreement with National Grid for filing.

By direction of the Commission.

Kimberly D. Bose,
Secretary.