

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Florida Gas Transmission Company

Docket Nos. RP04-12-000
RP04-12-004
RP04-12-005
RP00-387-004

ORDER CONDITIONALLY APPROVING SETTLEMENT, DISMISSING
REHEARING REQUEST, ACCEPTING COMPLIANCE FILING
AND DIRECTING FURTHER COMPLIANCE FILING

(Issued December 21, 2004)

1. On August 13, 2004, Florida Gas Transmission Company (FGT) filed a Stipulation and Agreement of Settlement (Settlement) resolving all issues set for hearing or technical conference in the Commission's orders issued on October 31, 2003 (October 31, 2003 Order) and April 20, 2004 (April 20, 2004 Order) in Docket No. RP04-12-000.¹ The Settlement further resolves certain issues related to FGT's implementation of Order No. 637 in Docket No. RP00-387-004. As discussed below, we find that the Settlement is in the public interest and, therefore, we will conditionally approve it and direct a further compliance filing. This order also addresses a rehearing request and compliance filing in Docket Nos. RP04-12-004 and RP04-12-005, respectively.

Background

2. FGT provides firm transportation service primarily under Rate Schedules FTS-1 and FTS-2. Under both rate schedules, deliveries are made at primary points within FGT's Market Area, the State of Florida. FTS-1 rates are designed using a traditional cost-of-service for the portion of FGT's facility in service prior to 1995, when it placed a major system expansion in service (Phase III expansion). Under FTS-1, the maximum

¹ *Florida Gas Transmission Company*, 105 FERC ¶ 61,171 (2003), *order on reh'g*, 107 FERC ¶ 61,074 (2004).

backhaul rate is the same as the maximum forward haul rate. The FTS-2 rate is an incremental rate using a levelized cost-of-service applicable to FGT's Phase III expansion and its subsequent expansions. FGT's tariff does not set forth a separately stated FTS-2 backhaul rate.

3. FGT also provides a relatively small amount of mileage-based firm transportation service under Rate Schedule FTS-WD on the portion of its system west of Florida, designated the Western Division.

4. On October 1, 2003, FGT filed a general rate case under section 4 of the Natural Gas Act (NGA)² to increase its annual revenues by approximately \$56 million, and to revise its tariff, effective November 1, 2003. The proposed tariff revisions changed FGT's method for calculating reservation charge credits, modified the reconversion rights of SFTS shippers, and required that NNTS nominations be for at least 25 MMBtu/day. FGT also included pro forma proposals to: (1) track capital costs related to system security, as well as certain types of capital costs not related to security; (2) change the basis for designing FTS-2 rates from a levelized cost-of-service to a traditional cost-of-service; and (3) address Order No. 637 issues related to within-the-path allocation of capacity at secondary points, and outside-the-path segmentation.

5. In the October 31, 2003 Order, the Commission accepted and suspended FGT's tariff sheets, subject to refund and conditions, and established a technical conference and hearing procedures. The Commission directed that the technical conference address FGT's proposals for a minimum nomination under Rate Schedule NNTS, and for modified reconversion rights of SFTS shippers. Also, the Commission rejected FGT's proposal to track certain capital construction costs not related to security, and set for hearing its proposal to track security-related capital costs. In addition, the Commission approved FGT's revised reservation charge crediting mechanism, subject to conditions. Finally, the Commission directed that FGT's pro forma proposals for segmentation and capacity allocation be considered along with requests for rehearing in FGT's on-going Order No. 637 compliance proceeding. In the April 20, 2004 Order, the Commission granted in part and denied in part requests for rehearing of the October 31, 2003 Order, accepted FGT's November 25, 2003 compliance filing to that order, and addressed issues subject to the technical conference.

6. In Docket No. RP04-12-004, FGT timely sought rehearing of the April 20, 2004 Order regarding the definition of force majeure in its tariff. On May 20, 2004, in Docket No. RP04-12-005, FGT filed revised tariff sheets to comply with the April 20, 2004 Order regarding reservation charge credits and requested an extension of time to comply

² 18 U.S.C. § 717c (2000).

with the Commission's directive to revise the definition of force majeure in its tariff (May 20, 2004 Compliance Filing).³

7. The parties held settlement conferences, and, on April 28, 2004, the parties reached a settlement in principle. FGT subsequently filed the Settlement at issue here, and the administrative law judge certified the Settlement on September 27, 2004.⁴

Settlement

8. The parties to the Settlement are listed in Appendix A of the Settlement and will be referred to as the "Settling Parties." The major provisions of the Settlement are as follows:

9. Article I states that this Settlement resolves all issues which were set for hearing and for technical conference by the October 31 Order. It also includes pro forma tariff revisions in compliance with Order No. 637.

10. Article II establishes the Settlement rates, as set forth in Appendix B of the Settlement, for FGT's services effective April 1, 2004 and April 1, 2005. The Settlement rates are based on a pretax return of 14.93 percent, using a straight fixed variable (SFV) rate design. Rates for services into the Market Area continue to be postage-stamp rates; rates in the Western Division continue to be mileage-based. Rates for SFTS service are based on a 50 percent load factor of the FTS-1 rates. Rates for ITS-1 and PNR services reflect an average of the FTS-1 and FTS-2 rates, and are based on a 100 percent load factor. Article II further provides that the FTS-2 rates continue to be based on an incremental cost of service. Backhaul and forward haul FTS-2 rates are separately stated and are the same.

11. Section 8 of Article II provides for revised fuel rates for forward hauls or backhauls where receipts and deliveries take place in the Market Area. This provision establishes a fuel reimbursement charge for forward hauls of 0.25 percent for each compressor station in the path, not to exceed the maximum Effective Fuel Reimbursement Charge of 2.75 percent. The minimum fuel charge is 0.25 percent. The fuel reimbursement charge for backhauls where the receipt and deliveries points are within the Market Area is 0.25 percent.

12. Article III states that FTS-2 rates are levelized until March 31, 2005, and thereafter are based on a traditional cost of service.

³ By Notice issued on June 2, 2004, FGT was granted an extension of time to file its revised tariff language to the date FGT filed the Settlement in this proceeding.

⁴ *Florida Gas Transmission Company*, 108 FERC ¶ 63,047 (2004).

13. Article IV waives the Commission's prior requirement that FGT reclassify certain offshore facilities as gathering, and allows FGT to continue to recover the cost of service related to such facilities in its transmission rates.
14. Article V establishes a 2.13 percent depreciation rate for FGT's onshore non-incremental transmission plant. For the incremental system's onshore transmission plant, the straight-line book depreciation rate remains four percent through March 31, 2005, becomes 1.3 percent from April 1, 2004 through March 31, 2005, and 2.5 percent beginning April 1, 2005.
15. Article VI sets forth the Parties agreement on certain regulatory accounting matters.
16. Article VII continues rate cap provisions for Settling Parties receiving service under Rate Schedule FTS-2.
17. Article VIII provides waivers of FGT's tariff and the Commission's regulations to the extent necessary to provide various classes of shippers limited options to reduce their MDTQ, to reconvert from FTS-1 service to SFTS service, to temporarily convert from FTS-1 service to FTS-WD service, to roll-over a portion of their MDTQ, and to be temporarily assessed a Special Fuel Surcharge. Article VIII also revises FGT's ROFR tariff provisions, and establishes a limited-term moratorium on FTS-1 shippers having to match a bid higher than the maximum tariff rate in order to retain capacity.
18. Article IX sets forth the Settling Parties' agreement giving FGT the right to recover, through a Capital Surcharge, certain capital costs incurred for system security, for pipeline integrity under the Pipeline Safety Improvement Act of 2002, and for pipeline relocations required by the Florida Department of Transportation to accommodate expansions or improvements to the Florida Turnpike.
19. The Capital Surcharge shall be stated separately as a reservation surcharge for incremental and non-incremental services, and as a volumetric surcharge for SFTS service. FGT must incur \$20 million in Capital Costs in order to implement the surcharge. Any Capital Costs not directly assignable to incremental or non-incremental systems shall be allocated on a 50/50 basis. FGT must make a Capital Surcharge filing between 60 and 30 days prior to April 1 of any year, and the parties agree not to seek a suspension beyond April 1 of any year. The first Capital Surcharge filing may not become effective prior to April 1, 2006.
20. The Capital Surcharge will be calculated based on the costs of completed projects as of the prior December 31, using the Settlement's pretax return of 14.93 percent, and the Settlement's depreciation rates with reductions for accumulated depreciation and

deferred income taxes. The SFTS surcharge will be calculated using a 50 percent load factor of the FTS-1 Capital Surcharge.

21. Once FGT files for a Capital Surcharge, it must file annually to increase or decrease the surcharge to reflect adjustments recorded during the prior year for additions, retirements, accumulated depreciation, and accumulated deferred income taxes. The Capital Surcharge may not include any deferred costs or interest except for allowance for funds used during construction (AFUDC).

22. The first Capital Surcharge filing is limited to \$0.01 per MMBtu/day of a shipper's FTS-1 or FTS-2 Maximum Daily Transportation Quantity (MDTQ). The total Capital Surcharge in subsequent filings may not exceed \$0.02 per MMBtu/day per rate schedule. A shipper may challenge the Capital Surcharge filing. Challenges are limited to whether capital expenditures are eligible capital costs that are: (1) defined in the Settlement; (2) prudently incurred; (3) calculated properly; and (4) properly allocated to the incremental and non-incremental systems. Also, in the event a Capital Surcharge is instituted, certain shippers will receive a 50 percent discount on the surcharge under the service agreements and volumes listed in Appendix L of the Settlement. The Commission's regulations and FGT's tariff shall be waived as necessary to provide the Capital Surcharge discount to the named parties.

23. FGT also is required to provide annual reports to Settling Parties who execute a confidentiality agreement, regarding the details of capital projects and costs that may be eligible for recovery.

24. Article X provides that FGT is not required to provide reservation charge credits for outages that result from force majeure events on a facility owned by a shipper or by an upstream pipeline.

25. Article XI states that FGT shall file an NGA section 4 general rate case no later than October 1, 2009.

26. Article XII states that FGT may not file an NGA section 4 rate case to increase its base tariff prior to October 1, 2007, and defines the rights of Settling Parties to challenge the Settlement and the applicability of a Settlement provision, or FGT's tariff, to particular transactions, practices, or conduct by FGT after the effective date.

27. Article XIII resolves FGT's compliance with Order No. 637 with respect to within-the-path capacity allocation and outside-the-path segmentation. Further, within five days of the Settlement's effective date, FGT and all Settling Parties will withdraw with prejudice their respective petitions for review of the Commission's Order No. 637 orders issued in Docket No. RP00-387-000, et al.

28. Article XIV defines the effective date of the Settlement, and sets forth the consequences of the Commission accepting the Settlement with conditions or modifications.

29. Article XV states that a final Commission order approving the Settlement shall constitute a waiver of compliance with all Commission policies, rules, regulations, and a waiver of FGT's tariff to the extent necessary to effectuate the provisions of the Settlement. Further, any opposing party will not be charged Settlement rates, but rather Motion Rates, subject to refund and further review by the Commission. In section 4, as of the Effective Date, the Settlement rates and terms will no longer be subject to refund as to shippers that either support or do not oppose the Settlement.

30. Article XVI provides that the Settlement is filed under Rule 602 and is privileged until it is approved and becomes effective.

31. Article XVII contains standard reservations that the Settlement is a negotiated agreement, and does not provide any support for any policy, methodology, or principle detailed in the Settlement.

32. Article XVIII provides that FGT will file revised tariff sheets to implement the terms of the Settlement within 15 days following the Effective Date.

Comments

33. Supportive comments were filed by People Gas System, a Division of Tampa Electric Company (Peoples), Florida Municipal Natural Gas Association⁵ (FMNGA), Indicated Shippers, Seminole Electric Cooperative, Inc. (Seminole), Florida Power & Light Company (FPL), Tampa Electric Company (Tampa Electric), Florida Gas Transmission Company (FGT), Industrial Gas Users of Florida (IGUF) and the Florida

⁵ The FMNGA consists of the following customers of Florida Gas Transmission Company: City of Chattahoochee, City of Clearwater Gas System, Crescent City Natural Gas, City of DeFuniak Springs, Geneva County Gas District, Lake Apopka Natural Gas District, City of Leesburg, City of Live Oak, City of Madison, Okaloosa Gas District, Palatka Gas Authority, City of Perry, Southeast Alabama Gas District, and City of Sunrise.

Industrial Gas Users (FIGU), the Florida Cities⁶, and Commission Trial Staff (Trial Staff).⁷

34. Supporters generally agree that the Settlement is consistent with the public interest and represents a fair and equitable resolution of all rate issues involved in this proceeding, as well as certain issues in FGT's Order No. 637 proceeding. They emphasize that the Settlement results from months of negotiating efforts by all involved parties, and urge the Commission to approve it without modification to ensure that it goes into effect.

35. Supporters highlight specific aspects of the Settlement as being particularly beneficial. For example, Peoples notes that the Settlement establishes: (1) a limited NGA section 4 rate filing procedure to enable FGT to recover capital costs; (2) the Kansas-Nebraska methodology for allocating A&G costs between FGT's incremental and non-incremental customers; (3) procedures for the recovery of costs associated with a Levelization Adjustment Regulatory Asset; (4) rate cap provisions; and (5) force majeure provisions. Indicated Shippers assert that the resulting rates from the Settlement, with the exception of the ITS-1 and PNR rates, are only slight increases from FGT's pre-filed rates. FPL contends that the Settlement provides rate certainty, additional transportation options earlier than otherwise possible, and a stable business environment. Tampa Electric indicates that the Settling Parties account for a majority of the firm demand for services on FGT's system. Tampa Electric further states that the Settlement permits the transition from a levelized to a traditional cost of service basis for incremental services in a way that preserves the economic bargain entered into by shippers in their long-term FTS-2 service agreements.

36. Trial Staff also filed supportive comments, asserting that the Settlement includes many features that will benefit FGT's system and its shippers in the long term, places FGT in a stronger position for operating in future markets, and avoids expensive litigation in a highly contested proceeding. Additionally, Trial Staff contends that the

⁶ The Florida Cities include JEA, the Orlando Utilities Commission, Lakeland Electric, the City of Tallahassee, Florida, the City of Gainesville d/b/a/ Gainesville Regional Utilities, and Florida Gas Utility, a Florida inter-local agency. The members of Florida Gas Utility are the Florida Municipal Power Agency, City of Lake Worth, City of St. Cloud, City of Blountstown, City of Chipley, City of Ft. Meade, Ft. Pierce Utility Authority, City of Homestead, Town of Jay, Kissimmee Utility Authority, City of Lake City, City of Marianna, City of Starke, City of Vero Beach, and City of Williston.

⁷ Unless otherwise indicated, parties that filed supportive comments will be referred to collectively as "supporters."

Settlement rates represent very substantial reductions from the rates FGT proposed in its October 1, 2003 general NGA section 4 rate filing.

37. Trial Staff also notes that the Settlement eliminates levelized rates for the Incremental System by April 1, 2005, allowing FGT to stop deferring the recovery of depreciation dollars to a future period under the levelized rate design. Trial Staff notes that the Settlement precludes FGT from filing a section 4 general rate case before October 1, 2007, but requires FGT to file a rate case no later than October 1, 2009. Trial Staff asserts that these provisions afford certainty to all affected parties and allows the Commission the opportunity to review FGT's rates in a reasonable time frame. Furthermore, Trial Staff argues that the Settlement allows FGT the flexibility to file limited section 4 rate cases during the Settlement term to recover specified capital expenditures associated with pipeline security enhancements.

38. Tractebel Calypso LNG Marketing, LLC (Calypso Marketing) filed comments in support of the Settlement, but requests certain typographical corrections be made to Attachment A of the Explanatory Statement to the Settlement.⁸

39. Reedy Creek Improvement District (Reedy Creek) filed supportive comments, but suggests two minor revisions which, in its opinion, would improve the Settlement, while not altering any of its essential. Specifically, Reedy Creek suggests a modification to Article IX section 1, to require FGT to actively participate in any proceeding before the Florida Department of Transportation (FDOT) and other state agencies in order to mitigate costs associated with capital cost expenditures. Reedy Creek contends that this provision is desirable to ensure that capital costs associated with the replacing or relocating facilities for the Florida Turnpike are prudent. Reedy Creek argues that shippers cannot challenge the prudence of FGT's compliance with the orders of the FDOT, and that therefore, FGT participate in state agency proceedings to the extent necessary to ensure that FGT's and its customers interests are considered in locating or expanding the Florida Turnpike.

⁸ Specifically, Calypso Marketing seeks the following corrections. "Segmented Transaction Paths" in section 3.2.2(b) should be "Segmented Transaction paths." In that same section, "Primary Capacity Flow path," should be corrected to read "Primary Capacity Path." Finally, in that section, "Primary Receipt" should be "Primary Receipt Point." In section 3.3.2(b) of Attachment A, "Segmented Transaction Paths," should be "Segmented Transaction paths," and "Primary Contract Path" should be "Primary Capacity Path." In section 3.3.2(c) of Attachment A, "Segmented Nominations" should be corrected to "nominations for Segmented Transactions." In support of these corrections, Calypso Marketing indicates that FPL, Peoples, Florida Power Corporation, and the Florida Municipal Natural Gas Association agree with its request to correct the typographical errors.

40. Reedy Creek also suggests adding the italicized language below to the last sentence of Article XIV:

If a modification or condition is materially adverse and not acceptable to a Party (and is not removed, *or modified so as to be acceptable to all Parties*, by the Commission on rehearing), then the Settlement shall be deemed null and void and of no force and effect.

41. Reedy Creek suggests that its proposed language will diminish the likelihood that the Settlement will be deemed null and void. Reedy Creek states that its suggested modifications will substantially improve the likelihood of unanimous acceptance of the Settlement, without affecting its essential elements.

42. In opposition to the Settlement, AES LNG Marketing, L.L.C. (AES Marketing)⁹ argues that, without adequate support in the record, the Settlement sets backhaul rates equal to the forward haul rates. AES Marketing asserts that FGT's delivery capacity and capabilities currently decline on the southern end of its system. Under these circumstances, AES Marketing argues that the introduction of high volume deliveries into the southern end of FGT's system through one of the planned Bahamas-to-Florida pipelines would create expanded capacity on FGT's system, as well as other operating benefits.¹⁰ AES Marketing also believes that a portion of such deliveries will need to be transported on FGT's system, in all likelihood, by backhaul. AES Marketing asserts that due to the benefits to FGT from such deliveries, the resulting volumes should be transported on FGT's system under a separate backhaul rate that is lower than the FTS-2 forward haul rate.

⁹ AES Marketing, an affiliate of AES Ocean Express LLC (Ocean Express) plans to construct an LNG terminal in the Bahamas to receive, store, and regassify LNG. By order issued on January 29, 2004, Ocean Express was granted a certificate to construct and operate facilities extending from a receipt point on the Exclusive Economic Zone boundary between the United States and the Bahamas to delivery points in Broward County, Florida, to bring up to 842,000 Dth/day of natural gas from its affiliate's LNG facility in the Bahamas. *AES Ocean Express LLC*, 106 FERC ¶ 61,090 (2004). On September 9, 2004, Ocean Express filed to amend its certificate granted by the January 29, 2004 Order.

¹⁰ In addition to Ocean Express' proposal, *supra*, AES Marketing refers to proposals to build pipelines to deliver revaporized LNG into Florida by Tractebel Calypso Pipeline, LLC, which was granted a certificate on March 24, 2004 (*Tractebel Calypso Pipeline, LLC*, 106 FERC ¶ 61,273 (2004)), and Seafarer US Pipeline System, Inc., which recently filed a certificate application in Docket No. CP05-25-000, *et al.*

43. Alternatively, AES Marketing argues for a comeback provision in the Settlement under which FGT would be required to file a general rate case within a 2007 timeframe, or a separately stated new backhaul rate, to coincide with the introduction of large-volume deliveries into the southern end of its system. Accordingly, AES Marketing requests that the Commission either condition the Settlement to require FGT to file a backhaul rate under Rate Schedule FTS-2 when the first Bahamas-Florida pipeline commences service, or reject the Settlement outright.

44. Finally, AES Marketing contends that failure to condition the Settlement could hamper the development of competition in the Florida natural gas markets

Reply Comments

45. FGT filed comments responding to Calypso Marketing, Reedy Creek, and AES Marketing. Florida Power Corporation (Florida Power), Peoples, Seminole, Tampa Electric, and Trial Staff each filed a response to AES Marketing's protest.

46. FGT has no objection to making the typographical corrections to Attachment A of the Explanatory Statement, as suggested by Calypso Marketing. However, FGT objects to Reedy Creek's modifications to Article IX and Article XIV of the Settlement for several reasons. First, FGT states that all Settling Parties agreed to support the Settlement as filed. Second, FGT argues that Reedy Creek's suggested change to Article IX is vague and overly broad, because it refers to "any" proceeding in "other state agencies." FGT states that this creates confusion as to what constitutes "active" participation before an agency which "affects" costs. Third, FGT argues that, pursuant to Article IX, the parties already have the right to challenge FGT's expenditures on the basis of prudence. Therefore, there is no need for the proposed modifications as parties can challenge FGT's actions if they are imprudent. Finally, with regard to the FDOT's decision to expand the Florida Turnpike, FGT argues that FDOT's decision has already been made. FGT states that the only remaining decision for the FDOT to make affecting FGT is the exact location and design of the highway facilities. FGT states that it is already engaged in negotiations with FDOT in an effort to minimize any relocations of FGT's pipeline. FGT also objects to Reedy Creek's suggested revision to Article XIV, asserting that the existing language already covers removal of a materially adverse modification or condition. Therefore, FGT contends, there is no need to list the particular means of removal. FGT adds that, as a settling party, Reedy Creek agreed to support the Settlement as filed.

47. In response to AES Marketing, FGT, Florida Power, Peoples, Seminole, Tampa Electric and Trial Staff generally assert that AES Marketing's interest in the Settlement is attenuated, because AES Marketing is not now and may never be a shipper on the FGT system and currently has no existing physical gas operation in Florida. In short, they state that AES Marketing is not a real party in interest. They add that the true parties in

interest on the FGT pipeline system support the Settlement. Moreover, they argue that the benefits of the Settlement outweigh the nature of AES Marketing's arguments against it, characterizing AES Marketing's concerns as premature and speculative.¹¹ Seminole points out that, as a non-settling party, AES Marketing is free to raise any issue it wishes in the future regarding the appropriateness of FGT's backhaul rates, through any forum. Tampa Electric further notes that, under the terms of the Settlement, FGT may file its next general NGA section 4 rate case as early as October 1, 2007, and no later than October 1, 2009. Tampa Electric states that the issue of the backhaul rate for Rate Schedule FTS-2 can appropriately be addressed at such time and that, when the introduction of revaporized liquefied natural gas (LNG) into FGT's system becomes a reality, AES Marketing may at that time attempt to demonstrate that the facts and circumstances warrant a change to the existing backhaul rate.

48. FGT also challenges AES Marketing's request for a come-back provision in 2007, asserting that the Settlement already provides a 2009 come-back provision.

Procedural Matters

49. On September 22, 2004, ProLiance Energy, LLC (ProLiance) filed a motion for late intervention. ProLiance states that good cause exists to grant its motion, since it only recently became aware of the need to file in this proceeding. ProLiance states that its late intervention should not disrupt this proceeding or place additional burdens upon the parties, and that it agrees to take the record as it currently finds it.

50. On September 29, 2004, FGT filed an answer to ProLiance's motion, arguing that ProLiance failed to satisfy its burden for late intervention. FGT states that, aside from the constructive notice it had from the series of notices and orders issued in this case, ProLiance is not new to FGT's system, and has been selling gas to FGT customers since at least September 2003. FGT states that, while ProLiance's dealings with FGT as a shipper are of a recent nature, ProLiance executed its interruptible agreements with FGT on May 8, 2004 and should have intervened at that time, rather than almost five months

¹¹ For example, FGT states that no LNG facilities have been constructed at this time, and no developer has even commenced construction of such facilities. FGT states that, in the event that new LNG supplies are delivered, FGT would not be able to transport all of the expected volumes without completed additional facilities. Further, if additional facilities are installed to move gas in a reverse direction, the gas would not be moved by displacement, and therefore not be a true backhaul entitled to a backhaul rate. Additionally, as volumes to be delivered are unknown, the costs associated with building facilities are unknown. Florida Power is confident that, should the availability of significant additional supplies of gas, including regasified LNG, become a reality, FGT will take the necessary steps to provide firm backhaul service to its shippers.

after negotiations were completed and over one month after the Settlement was filed. FGT adds that allowing ProLiance's late intervention will disrupt the proceedings and place an undue burden on the parties. FGT asserts that, because ProLiance was not involved in any of the settlement negotiations, adding ProLiance to any future negotiations would require significant effort on the part of all other parties, and would seriously hamper the parties' ability to quickly resolve a single issue.

51. On October 14, 2003, ProLiance filed a response to FGT, largely reiterating the arguments set forth in its motion for late intervention. ProLiance adds that administrative law judges have issued orders granting motions for late intervention where parties only recently became aware of the potential impact of settlement discussions. ProLiance further argues that an initial order has not been issued in this proceeding, and therefore, its motion for late intervention should be granted.

52. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept FGT's answer to ProLiance's protest, and ProLiance's response, since those pleadings provided information that assisted in our decision-making process.

53. We will reject, however, ProLiance's motion for late intervention. In ruling on a motion to intervene out of time, the Commission applies the criteria set forth in its Rule 214(d), 18 C.F.R. § 385.214(d) (2004), and considers, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether any disruption to the proceeding might result from permitting the intervention, and whether any prejudice to or additional burdens upon the existing parties might result from permitting the intervention. Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interests of any party. Therefore, the Commission is more liberal in granting late intervention at the early stages of a proceeding, but is more restrictive as the proceeding nears its end.¹²

54. In this case, ProLiance seeks to intervene almost one year after this proceeding was initiated, and six months after a settlement conference was noticed and held at the Commission. In addition, FGT notes in its answer, and ProLiance did not refute in its response, that ProLiance has been selling gas to FGT customers since at least September 2003 and has two interruptible agreements with FGT, which were executed on May 8, 2004. Rather than providing an explanation for its failure to seek intervention in a timely manner, ProLiance, in response to FGT, merely reiterates its assertion that it

¹² *Transok, L.L.C.*, 89 FERC ¶ 61,055 at 61,186 (1999).

could be impacted by the rates established in this proceeding. Accordingly, ProLiance has failed to provide good cause for allowing its late intervention here.

Discussion

55. We find that the Settlement represents a fair and reasonable resolution of the issues in this proceeding and is in the public interest. Accordingly, we will conditionally approve it. Given FGT's stated agreement to make the typographical corrections suggested by Calypso Marketing, we will direct FGT to submit a compliance filing, reflecting those corrections, within 15 days of the effective date of the Settlement, in accordance with Article XVIII thereof.

56. In approving the Settlement, we note that it is supported by FGT's entire customer load. This diverse group of customers consists of Florida utilities and local distribution companies, industrial customer groups, and producer marketing interests.

57. We find that FGT and its customers benefit from the Settlement. As noted by Trial Staff, the Settlement rates represent very substantial reductions from the rates FGT proposed in its October 1, 2003 general NGA section 4 rate filing. The Settlement also resolves Order No. 637 issues, provides rate caps, and avoids the business uncertainty associated with protracted litigation. For these reasons, and the additional reasons identified by the supporting Settling Parties, we find that the Settlement is in the public interest.

58. Further, we find no merit in the arguments put forth by AES Marketing in its opposing comments. AES Marketing does not contest that the Settlement rates are just and reasonable at the present time. Rather, it is concerned that the Settlement backhaul rate will become unjust and unreasonable when additional volumes are delivered into the southern end of FGT's system from new pipelines planned to transport revaporized LNG. AES Marketing asserts that such deliveries will have an immediate and beneficial impact on FGT. However, these assertions are speculative at this time. Because these deliveries will not occur for at least several years, it is unclear how the introduction of these supplies will impact the operation of FGT's system. This impact will be dependent on the volumes of regasified LNG that will be delivered into FGT's system, where these supplies will be delivered on FGT's system, and the extent to which additional facilities will be required to enable FGT to transport the additional volumes. Since FGT currently applies the same maximum base rates to backhauls as to forward hauls under both Rate Schedules FTS-1 and FTS-2 and proposes no change in that practice in this rate case, the Commission could only require FGT to lower its maximum backhaul rate by taking action under NGA section 5.¹³ The Commission finds that it would be premature to

¹³ *Western Resource, Inc. v. FERC*, 9 F.3d 1568, 1577-80 (D.C. Cir. 1993).

consider this section 5 issue in this rate case, since the facts relevant to deciding that issue depend upon further developments and are thus subject to change. In sum, AES Marketing has not provided sufficient reasons for the Commission to reject the Settlement or exercise its discretion to institute a section 5 investigation at this time.¹⁴

59. Furthermore, pursuant to the Settlement, FGT may file its next general NGA section 4 rate case as early as October 1, 2007. The issue of a backhaul rate for Rate Schedule FTS-2 can be addressed in FGT's subsequent rate filing. In addition, as a non-consenting party to the Settlement, AES Marketing may seek to have its concerns addressed under section 5 of the NGA when the introduction of revaporized LNG into FGT's system becomes a reality.

60. We will not require FGT to make the modifications suggested by Reedy Creek. Contrary to Reedy Creek's argument, we do not find that its suggested changes would further clarify or enhance the effectiveness of the Settlement. In addition, we agree with FGT that the Settlement sufficiently provides for the ability to challenge FGT's expenditures (under Article IX) and redress for materially adverse modifications or conditions to the Settlement (under Article IX).

61. Finally, although the Settlement's pro forma rate sheets indicate that shippers may be assessed a Capital Cost Surcharge in the future, FGT did not add pro forma revisions to its General Terms and Conditions describing the procedures for calculating and filing for the Surcharge, as described in Article IX of the Settlement. FGT's current and potential shippers should have notice of such procedures through its tariff. Therefore, we will direct FGT to file actual tariff sheets reflecting the procedures for calculating and filing for the Surcharge as described in Article IX of the Settlement.

Pending Rehearing Requests in Docket No. RP04-12-004

62. Pursuant to Article X, section 2, of the Settlement "all Parties' and FGT's requests for rehearing of the [April 20, 2004 Order] shall be deemed withdrawn." Because the Settlement resolves all issues in this proceeding, we will dismiss as moot the rehearing request pending in Docket No. RP04-12-004.

May 20, 2004 Compliance Filing in Docket No. RP04-12-005

63. In its May 20, 2004 Compliance Filing, FGT filed tariff sheets¹⁵ to provide for partial reservation charge credits only in force majeure situations, and for reservation

¹⁴ *General Motors Corp. v. FERC*, 613 F.2d 939 (D.C. Cir. 1979).

¹⁵ Sheet Nos. 14, 15, 22H, 22I, 59 and 60.

fixed cost surcharges to be included in instances of full reservation charge crediting. FGT also requested an extension of time in which to revise the definition of force majeure in its tariff, as required by the April 20, 2003 Order. Timely protests were filed by FPC, Seminole, Peoples, FMNGA and FPL asserting that the proposed sheets were not in compliance with the April 20, 2004 Order, because they did not include a revised definition of force majeure. On June 15, 2004, FGT filed an answer to the protests, stating that it would comply by filing settlement language in the context of its general rate case Settlement. FGT further requested the Commission to clarify that tariff revisions in compliance with the April 20, 2004 Order would be effective November 1, 2003. On June 2, 2004, FGT's request for extension of time was granted.

64. We find that the Settlement pro forma tariff language approved by this order, effective November 1, 2003, moots the protests in Docket No. RP04-12-005, as well as proposed Sheet Nos. 14, 22H, and 59 in FGT's May 20, 2004 Compliance Filing. The remaining tariff sheets¹⁶ included in that filing revise sections of Rate Schedules FTS-1, FTS-2 and FTS-WD consistent with the April 20, 2004 Order, and we will accept them effective November 1, 2003.

The Commission orders:

- (A) The Settlement is hereby approved, as modified.
- (B) FGT is hereby directed to submit actual tariff sheets corresponding to the pro forma Settlement tariff sheets, as modified herein, within 15 days of the Settlement's effective date.
- (C) The pending rehearing request in Docket No. RP04-12-004 is hereby dismissed.

¹⁶ Second Revised Sheet Nos. 15 and 22I, and Third Revised Sheet No. 60 to FERC Gas Tariff, Third Revised Volume No. 1.

(D) FGT's May 20, 2004 Compliance Filing in Docket No. RP04-12-005 is hereby accepted in part, effective November 1, 2003, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.