127 FERC ¶ 61,150
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Tennessee Gas Pipeline Company — Docket Nos. RP09-282-002, RP09-282-001

ORDER ON REHEARING AND CLARIFICATION AND COMPLIANCE FILING

(Issued May 21, 2009)

1. On February 25, 2009, the Commission issued an order[1] accepting revised tariff sheets filed by Tennessee Gas Pipeline Company (Tennessee) on January 26, 2009 (January 26 filing). The January 26 filing proposes modifications to Tennessee's tariff to comply with the capacity release requirements promulgated by Order Nos. 712 and 712-A.[2] Tennessee also proposed certain tariff modifications pursuant to section 4 of the Natural Gas Act (NGA) unrelated to its compliance with Order Nos. 712 and 712-A. The Commission accepted the revised tariff sheets subject to conditions and further review,[3] effective February 26, 2009, as requested. Indicated Shippers[4] filed a request for rehearing of the February 25 Order. National Grid Gas Delivery Companies (National

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[1] *Tennessee Gas Pipeline Co.*, 126 FERC ¶ 61,171 (2009) (February 25 Order).

[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] In the February 25 Order (at P 18), the Commission requested further information related to the "flow through" of discounts from releasing shippers. Tennessee has responded and parties have commented on that response. Those issues are pending and will be considered in a future Commission order.

[4] In this case, the Indicated Shippers consist of BP Energy Company, BP America Production Company, Chevron U.S.A. Inc., ConocoPhillips Company, and Hess Corporation.

Grid)[5] filed a request for clarification or, in the alternative, rehearing of the February 25 Order. For the reasons discussed below, the Commission denies the request for rehearing by Indicated Shippers and grants, in part, and denies, in part, the request for clarification and denies the alternative request for rehearing by National Grid.

2. On March 24, 2009, Tennessee filed revised tariff sheets[6] to comply with the February 25 Order (March 24 compliance filing). The Commission accepts the revised tariff sheets to be effective on February 26, 2009, as proposed.

## I. Background

3. In Order Nos. 712 and 712-A, the Commission removed the maximum rate ceiling on capacity releases of one year or less that 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 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 releases made as part of a state-regulated retail access program.

4. In its January 26 filing, Tennessee proposed several changes to the capacity release provisions in Article III of the General Terms & Conditions (GT&C) of its tariff to reflect the various changes in the capacity release regulations made by Order Nos. 712 and 712-A. Tennessee also proposed several other modifications to clarify its capacity release provisions. Tennessee's filing was protested, including a limited protest and request for modifications by National Grid. Other parties filed comments, including Indicated Shippers. Tennessee filed an answer to the comments and protests.

## The February 25 Order

5. Tennessee proposed in sections 11.11(k) and 12.11(f) that for releases that become effective on or after July 30, 2008, any rate paid by a replacement shipper in any capacity release transaction with a term of one year or less which is not subject to the maximum rate cap is deemed to be a final rate and is not subject to refund. Several parties objected

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[5] The National Grid Gas Delivery Companies are The Brooklyn Union Gas Company d/b/a National Grid NY; KeySpan Gas East Corporation d/b/a National Grid; Boston Gas Company, Colonial Gas Company, and Essex Gas Company, collectively d/b/a National Grid; EnergyNorth Natural Gas Inc., d/b/a National Grid NH; Niagara Mohawk Power Corporation d/b/a National Grid; and The Narragansett Electric Company d/b/a National Grid, all subsidiaries of National Grid USA.

[6] The revised tariff sheets are listed in the Appendix to this order.

to these provisions. Indicated Shippers argued that the denial of refunds attributable to capacity released as part of a state retail unbundling program will have detrimental consequences on the market, gas consumers, and competition. The Commission rejected these contentions. Consistent with its holding in *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396 (2008) (*Texas Eastern*), the Commission reasoned that Order No. 712 removed the price ceiling on all capacity releases of one year or less, without regard to the purpose of the release, such as whether the release was to a marketer in a retail access program. Therefore, replacement shippers in such short-term releases are not entitled to any refunds when the Commission finds that the maximum rate proposed by the pipeline in a section 4 rate case is too high. However, the Commission pointed out that 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, the Commission stated that, 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.

6. The Commission also denied National Grid's request that Tennessee be required to include in section 12.3[7] the same storage inventory disposition options contained in GT&C sections 12.1(g) and (k). Section 12.1(g) requires that the releasing shipper in a biddable release must state whether the release includes any conditions for recall or reput of released capacity, and section 12.1(k) requires such a releasing shipper to provide any other reasonable and non-discriminatory conditions concerning, *inter alia*, the disposition of storage balances on the termination of a release. Section 12.3 specifies the information that releasing shippers in non-biddable releases must provide to the pipeline before commencement of service. It does not require such releasing shippers to provide the information required by section 12.1(g) or (k).

7. The February 25 Order found that, while Order No. 712 permitted releasing shippers to condition a release of storage capacity on the subsequent sale or repurchase of storage inventory or on there being a certain amount of gas left in storage at the end of the release regardless of whether the release was posted for bidding, there was no reason to require Tennessee to specify that option in a tariff provision applicable to non-posted, non-biddable releases.

[7] Section 12.3(a)(i) for a release of one month or less, section 12.3(b)(i) for long-term releases at maximum rates, and section 12.3(d) for releases to a marketer under state-regulated retail access programs which apply to releases that are permitted without prior posting and bidding.

## II. Discussion

### A. Rehearing and Clarification

#### 1. Indicated Shippers' Request for Rehearing

8. Indicated Shippers argue the Commission erred in denying refunds to replacement shippers taking short-term capacity releases in state retail unbundling programs. Indicated Shippers request that the Commission direct Tennessee to modify its tariff to require that, when the Commission finds rates proposed in a section 4 rate case to be unjust and unreasonable, the pipeline must make refunds to the short-term state retail marketer replacement shippers. Indicated Shippers assert that while Order No. 712 discusses in detail the benefits of state-regulated retail unbundling programs to gas consumers and competition, the February 25 Order ignores the corresponding detrimental consequences on consumers and competition that would result from denying refunds of unjust and unreasonable rates to short-term state retail marketer replacement shippers. Indicated Shippers contend that the basis for the Commission's finding that short-term capacity releases are sufficiently competitive does not apply to short-term releases to state retail marketer replacement shippers. Indicated Shippers further contend that, to the contrary, pre-arranged releases to state retail marketers by an LDC are not subject to bidding and are not designed to reflect short-term variations in the market value of the capacity.

9. Indicated Shippers argue that the February 25 Order failed to address or respond to its concerns and that releases under state retail unbundling programs differ substantially from traditional capacity releases in which replacement shippers bid for capacity alone, not capacity and associated supply. Indicated Shippers further assert that replacement shippers in a state-regulated retail access program effectively step into the shoes of regulated LDCs to provide the gas supply requirements of retail consumers. Indicated Shippers contend that Tennessee's proposal would shift the LDC's financial responsibility for the capacity to the marketer while simultaneously allowing the LDC to retain the benefit of any refunds and consequently creates an unduly discriminatory competitive advantage for LDCs over state retail marketers.

10. Indicated Shippers contend that Order No. 712 does not require or even support denial of refunds of unlawfully high rates to state retail marketers. Indicated Shippers assert that most capacity releases in state-regulated retail access programs are for significantly less than one year and typically only one month. Indicated Shippers contend that, accordingly, an LDC can release capacity to the actual state retail marketer serving the retail customer for whom the capacity was originally acquired. Indicated Shippers assert that, in Order No. 712-A, the Commission specifically recognized that a state retail marketer's share of released capacity is based on the marketer's continuing participation in the state program and its market share.

11. Indicated Shippers argue that the state retail unbundling program's capacity release process is designed to provide seamless service to the retail customer and, in many cases, to pass-through the LDC's interstate pipeline capacity rates to the state retail marketer. Indicated Shippers assert that the February 25 Order will place a state retail marketer at a potential competitive disadvantage relative to an LDC. Indicated Shippers further assert that refunds constitute a windfall to the LDC, effectively reducing its cost of holding the capacity to a level below the just and reasonable level, while the retail marketer pays a rate that exceeds the cost-based just and reasonable rate. Indicated Shippers contend that this rate exclusion also diminishes competition and thereby the rate benefits to consumers that are intended to result from state retail programs making it more difficult for retail marketers competing with LDCs to attract and retain customers. Indicated Shippers further contend that the February 25 Order constitutes an unexplained departure from the pro-competitive goals articulated in Order No. 712.

12. Indicated Shippers argue that elimination of the short-term rate cap does not justify denial of refunds to marketers under a state retail unbundling program. Indicated Shippers assert that an LDC's short-term release to a marketer participating in a state retail program differs from other short-term capacity releases, because the released capacity is needed to serve the LDC's retail customers. Indicated Shippers further assert that while short-term capacity releases have a market-based rate, pre-arranged short-term releases under a state retail unbundling program are not subject to bidding on the capacity, and consequently do not reflect the market value of the capacity. Indicated Shippers contend that the pass-through rate is based either on the pipeline's maximum tariff rate or, where applicable, a discount or negotiated rate provided for in the released contract between the pipeline and the LDC. Indicated Shippers further contend that since the replacement shipper-marketers in a state-regulated retail unbundling program must continue to serve the LDC's retail customers, one purpose of such programs is to lower consumer costs by allowing the marketer to utilize the released capacity more efficiently than the LDC, thereby lowering the transportation cost component paid by the retail customers. Indicated Shippers assert that if the replacement shipper is required to pay that unlawful rate, the retail marketer must seek to recover that excessive rate.

13. Indicated Shippers argue that barring retail marketers under short-term releases from receiving refunds has an unduly discriminatory impact on retail marketers. Indicated Shippers assert that the LDC will have an incentive to enter into short-term releases and that a state retail marketer replacement shipper has no negotiating leverage over the term of the capacity release since the state retail marketer needs the capacity associated with its retail customer's gas supply requirements in order to serve the retail customers.

14. Indicated Shippers argue that the Commission's holding regarding refunds will harm competition since the marketers will be required to pay a higher rate than the LDC for the same capacity and require unjust and unreasonable rates in violation of the NGA

since consumers are likely to bear at least some costs attributable to unlawful rates. Indicated Shippers further argue that requiring case-by-case LDC-state retail marketer replacement shipper negotiations is an inefficient and unnecessary process, which will cost market participants significant time and resources and does not ensure that the LDC will agree to pass-through the refunds to its competitor (i.e., the retail marketer replacement shipper).

## Discussion

15. For the reasons set forth below, Indicated Shippers' request for rehearing is denied. In Order No. 712, the Commission revised its regulations to remove the price cap on short-term capacity releases. As a result, the pipeline's maximum cost-of-service rates no longer apply to such releases. It follows that when the Commission finds in a pipeline section 4 rate case that the pipeline's proposed maximum rates are too high, the short-term replacement shipper is not entitled to refunds. To the extent the releasing shipper was paying a recourse rate in excess of the just and reasonable rate, however, it is entitled to a refund, including during the period the short-term release was in effect.[8]

16. As described above, Indicated Shippers argue at length that the Commission's reasons for removing the price cap for all short-term releases in Order No. 712 are not applicable to short-term releases by an LDC as part of a state-regulated retail access program. For example, Indicated Shippers contend that LDCs making such releases have market power, and such releases are not made at rates reflecting short-term variations in the market value of the capacity as intended by Order No. 712. Indicated Shippers asserts that, instead, LDCs typically release capacity to the same retail marketers on a monthly or other regular short-term basis based upon each marketer's share of the retail market often at the same rate the LDC is paying the pipeline. These contentions concerning the applicability of the reasons for removing the price cap to consecutive short-term releases to retail marketers under a state-regulated retail access program are an impermissible collateral attack on the regulations adopted by Order No. 712. In Order No. 712-A, the Commission expressly held that such consecutive short-term releases in a state-regulated retail access program are appropriately treated as separate short-term releases for purposes of Order No. 712's removal of the maximum rate ceiling.[9] If the Indicated Shippers, who participated in the Order No. 712 rulemaking proceeding, desired to contest Order No. 712-A's holding on this issue, it should have sought rehearing of that order. Having failed to do so, it is too late now for it to contest the removal of the price cap on such releases.

[8] *Columbia Gas Transmission LLC*, 126 FERC ¶ 61,084, at P 16 (2009).

[9] Order No. 712-A, at P 117.

17. Indicated Shippers' remaining contentions about adverse effects on retail access programs and the retail consumers served by such programs all fail to take into account the fact that such programs are regulated by state public service commissions.[10] Indicated Shippers suggest that, if the pipeline makes the refunds to the LDC, the marketers' lack of negotiating leverage with the LDC will enable it to keep the refunds. As a result, the marketers' transportation costs will be higher than the LDC's costs, leading to unfair competition between the LDC and the marketers and higher costs for retail consumers served by the marketers. These contentions are all based upon the false premise that the LDC's disposition of the refunds is entirely within its discretion. In fact, as a regulated public utility, the LDC must dispose of the refunds as directed by the state public service commission. Our capacity release regulations and policies contain nothing that would prevent a state commission from requiring the LDC to dispose of those refunds in whatever manner the state public service commission finds will best achieve the goals of its retail access program. For example, as the February 25 Order pointed out, section 284.8(b) permits the releasing shipper to include terms and conditions in its releases. Therefore, if a state commission and the participants in a state-regulated retail access program wish to require the LDC to pass through any refunds it receives from the pipeline to the marketers in the program, they can do so by requiring the LDC to include such a condition in its releases to the marketers.[11] Alternatively, the state public service commission could require the LDC to flow the refunds through directly to the retail consumers served by the retail access program or dispose of the refunds in some other manner.

18. We conclude the issue as to the appropriate distribution of any refunds received by an LDC in a state unbundling program is appropriately left to the state public service commissions with jurisdiction over such programs.

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[10] *See* 18 C.F.R. § 284.8(h)(4), as adopted by Order No. 712-A, which defines the releases in retail access programs that are eligible for the exemption from bidding as "any prearranged capacity release that will be utilized by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program *approved by the state agency with jurisdiction over the local distribution company that provides delivery service to such retail consumers*. (Emphasis supplied.)

[11] Similarly, the parties can structure the release to provide that the rate to be paid by the retail marketer will be equal to the maximum rate in the pipeline's tariff rate, including a provision for any refunds to go to the retail marketer. While Order No. 712 removed the price cap for short-term capacity releases to permit such releases at a rate in excess of the pipeline's maximum rate, there is nothing in Order No. 712 to prevent a releasing shipper from nevertheless agreeing with a replacement shipper that the rate for a short-term release will be equal to the pipeline's maximum rate or some percentage of that rate.

## 2. National Grid's Request for Clarification or Rehearing

19. National Grid requests clarification or rehearing of the Commission's denial of its request that Tennessee revise section 12.3 of its GT&C to require releasing shippers in non-biddable releases to provide the pipeline with the same information which GT&C sections 12.1(g) and (k) require to be included in notices of biddable releases. For the reasons discussed below, the Commission grants in part and denies in part National Grid's requested clarification. The Commission also reconsiders its decision not to require Tennessee to modify section 12.3 of its GT&C.

20. Section 12.1 of Tennessee's GT&C lists, in subsections (a) through (k), all the information a releasing shipper must include in its request that the pipeline post a firm storage capacity release for bidding. Section 12.1(g) requires that the releasing shipper state whether the released storage rights are to be subject to recall or reput, and if so, the specific conditions for recall or reput of the capacity; section 12.1(k) requires the releasing shipper to provide any other objective and non-discriminatory conditions concerning, *inter alia*, the disposition of storage balances on the termination of a release. Section 12.3 governs non-biddable storage capacity releases. It requires that, before the commencement of service under such a release, the releasing shipper must provide Tennessee the information specified in sections 12.1(a) – (f) and (j). Thus, releasing shippers making non-biddable releases need not provide the information specified in sections 12.1(g) and (k), concerning recall of storage capacity and disposition of storage inventory, or the information listed in subsections (h) and (i), which involves bidding procedures.

21. National Grid requests that the Commission clarify that releasing shippers have the option to include conditions in storage capacity releases concerning the disposition of storage inventory, in notices of both biddable and non-biddable releases, despite the February 25 Order's holding that Tennessee need not require releasing shippers in non-biddable releases to inform Tennessee of such conditions. National Grid asserts that, as the Commission correctly recognized in the February 25 Order, Order No. 712 afforded shippers the right to condition all releases of storage capacity on the transfer or sale of storage inventory. National Grid further asserts that failure to grant the requested clarification would arbitrarily deprive Tennessee's storage customers of the right to tie the transfer of storage inventory to the release of storage capacity in various non-biddable capacity releases.

22. In addition, National Grid notes that under section 284.13(b)(1)(viii)[12] of the Commission's regulations, pipelines are required to post "[s]pecial terms and conditions applicable to a capacity release transaction, including all aspects in which the contract

[12] 18 C.F.R. § 284.13(b)(1)(viii) (2008).

deviates from the pipeline's tariff."[13] National Grid assumes that, because Tennessee is not requiring shippers wishing to release storage capacity in non-biddable circumstances to provide information concerning related storage inventory transfer rights and obligations, such information is not required to be posted by Tennessee. National Grid requests confirmation that this is the case.

23. National Grid is correct that releasing shippers are permitted to condition a release of storage capacity on the subsequent sale or repurchase of storage capacity or on there being a certain amount of gas left in storage at the end the release, regardless of whether the release is biddable or non-biddable. Therefore, National Grid's request that the February 25 Order be so clarified is granted.

24. However, the Commission denies National Grid's request for clarification that Tennessee need not post information about conditions in a storage capacity release concerning the sale and/or repurchase of gas in storage. Section 284.13(b)(1)(viii) of the Commission's regulations requires that pipelines post any "special terms and conditions" applicable to a capacity release transaction no later than the first nomination under a transaction. A provision in a storage release tying the release of storage capacity to conditions concerning the gas in storage is a special term or condition of the release that must be posted by the pipeline.

25. In light of this holding, the Commission has reconsidered its holding in the February 25 Order that Tennessee need not revise its tariff to require releasing shippers in non-biddable releases to inform Tennessee of conditions in their releases concerning recall of storage capacity and disposition of inventory in storage. Given Tennessee's obligation to post this information on its website, it must obtain this information from the releasing shipper. Accordingly, the Commission requires that, within 15 days of the date of this order, Tennessee file tariff sheets revising section 12.3 of its GT&C to require releasing shippers in non-biddable releases to provide the pipeline the information set forth in GT&C sections 12.1(g) and (k).

## B. The Compliance Filing

### 1. Details of the Filing

26. In the February 25 Order, the Commission accepted Tennessee's initial Order Nos. 712 and 712-A compliance filing, subject to Tennessee: (1) revising section 11.3(c) of its tariff to eliminate the requirement that releasing shippers in non-biddable releases provide detailed information required by section 11.1(l) of its tariff; (2) revising sections 11.11(d) and 12.11(c) of its tariff to reflect the requirement that the lifting of the price cap for short-term releases only applies to releases that take effect within one year of the date

[13] *Id.*

the pipeline is notified of the release; (3) modifying sections 11.3(a)(iii) and 12.3(a)(iii) of its tariff to adequately reflect the non-applicability of the 28-day hiatus and rollover limitations to certain non-biddable releases; and (4) eliminating sections 11.3(a)(iv) and 12.3(a)(iv) of its tariff. On March 24, 2009, Tennessee filed revised tariff sheets to comply with the February 25 Order. [14]

### 2. Notice

27. Public notice of Tennessee's filing in Docket No. RP09-282-001 was issued on March 26, 2009. Comments were due as provided in section 154.210 of the Commission's regulations.[15] No comments or protests were filed.

### 3. Discussion of the Compliance Filing

28. The Commission finds that Tennessee's proposed tariff revisions are in satisfactory compliance with the February 25 Order and Order Nos. 712 and 712-A. Accordingly, the Commission accepts Tennessee's revised tariff sheets to become effective February 26, 2009, as proposed.

The Commission orders:

(A) Tennessee's revised tariff sheets listed in the Appendix to this order are accepted as in satisfactory compliance with the February 25 Order, as discussed in the body of this order.

(B) Tennessee must, within 15 days of the date of this order, file tariff sheets revising section 12.3 of its GT&C to require releasing shippers in non-biddable releases to provide the pipeline the information set forth in GT&C sections 12.1(g) and (k).

(C) The request for rehearing of Indicated Shippers is denied, as discussed in the body of this order.

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[14] See Appendix

[15] 18 C.F.R. § 154.210 (2008).

(D) The request for clarification by National Grid is granted, in part, and denied, in part, and its alternative request for rehearing is denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.

**Appendix**

Tennessee Gas Pipeline Company
FERC Gas Tariff, Fifth Revised Volume No. 1
Tariff Sheets Accepted Effective February 26, 2009

Substitute Fifth Revised Sheet No. 328
Substitute Tenth Revised Sheet No. 329
Substitute Fourth Revised Sheet No. 336
Substitute Fourth Revised Sheet No. 342
Substitute Tenth Revised Sheet No. 347