129 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Eastern Transmission, LP — Docket Nos. RP99-480-024, RP09-143-000

ORDER REQUIRING COMPLIANCE FILING

(Issued October 15, 2009)

1. On December 3, 2008, in Docket No. RP99-480-024, Texas Eastern Transmission, LP (Texas Eastern) filed two letter agreements and revised tariff sheets to modify previously filed and accepted negotiated rate agreements. The negotiated rate agreements included negotiated fuel rate caps and a provision that those negotiated fuel rate caps would apply to any replacement shipper to whom the customer might release its capacity. Subsequently, on December 5, 2008, in Docket No. RP09-143-000, Texas Eastern filed a request that the Commission acknowledge (a) that the capacity release posting and bidding requirements of its tariff and Commission regulations will not apply to the negotiated fuel caps associated with these negotiated rate agreements, and (b) that it is not required to file individual negotiated rate sheets with each replacement shipper on the basis of the negotiated fuel cap. In the alternative, Texas Eastern requested that the Commission grant it the appropriate waivers of the posting and bidding and filing requirements associated with the negotiated fuel caps.

2. On December 30, 2008, the Commission accepted and suspended Texas Eastern's proposed tariff sheets, to be effective December 1, 2009, subject to refund and further Commission review in conjunction with review of Texas Eastern's December 5, 2008 request in Docket No. RP09-143-000.[1]

3. As discussed below, the Commission's acceptance of the negotiated rate agreements and tariff sheets filed in Docket No. RP99-480-024 is subject to conditions and Texas Eastern's request filed in Docket No. RP09-143-000 is granted in part and denied in part.

[1] *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,379 (2008) (December 30 Order).

I. Background

4. On December 3, 2008, Texas Eastern filed two letter agreements and revised tariff sheets to modify two previously filed and accepted negotiated rate agreements with two of its customers, New Jersey Natural Gas Company (New Jersey) and PSEG Power, LLC (PSEG). Texas Eastern stated that these customers were anchor shippers in Texas Eastern's TIME II Project. The modified negotiated rate agreements included negotiated caps on the Applicable Shrinkage[2] Adjustment charge for a specified time period. The agreements also included a provision that those negotiated fuel rate caps would apply to any replacement shipper if New Jersey or PSEG released their capacity. Texas Eastern did not identify the latter provision as a material deviation from its form of service agreement.

5. On December 5, 2008, Texas Eastern filed a separate request that the Commission acknowledge (a) that the capacity release posting and bidding requirements will not apply to the negotiated fuel rate caps if the shippers release their capacity and (b) that Texas Eastern is not required to file individual negotiated rate sheets with each replacement shipper on the basis of the negotiated fuel rate cap. Texas Eastern argued that because it and its two customers, New Jersey and PSEG, agreed that the negotiated fuel rate caps will automatically apply to all replacement shippers, the agreements effectively remove the element of competitive bidding for the fuel rate. Texas Eastern asserted that competitive bidding is unnecessary in this instance and that confirmation to that effect from the Commission will enhance the ability of the shippers to release the capacity and improve the time frame in which the release could be effective. Texas Eastern also stated that because any agreement with a replacement shipper will reflect negotiated fuel rate caps identical to those filed with the releasing shippers' negotiated rate agreements, Texas Eastern was not proposing to file individual negotiated rate sheets. Texas Eastern asserted that such filings would result in unnecessary cost and burden to Texas Eastern and the Commission.

6. The December 30 Order, finding that the proposed tariff sheets were not shown to be just and reasonable, accepted and suspended the proposed tariff sheets for a minimal period, subject to refund and further Commission review in conjunction with review of Texas Eastern's December 5, 2008 request in Docket No. RP09-143.

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[2] Under Texas Eastern's tariff, Applicable Shrinkage is the quantity of gas payable in-kind by customers and retained by Texas Eastern as compensation for Texas Eastern's fuel requirements and lost and unaccounted for gas (LAUF).

II. Notice of Filing, Interventions and Protests

7. Public notice of Texas Eastern's filing in Docket No. RP09-143-000 was issued on December 10, 2008. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2009), all timely filed 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 this proceeding or place additional burdens on existing parties.

8. New Jersey filed comments in support of Texas Eastern's December 5, 2009 request. New Jersey states that it will be able to more quickly and efficiently release TIME II capacity by not having to post the negotiated fuel rate cap for bidding, which will benefit New Jersey as well as all potential replacement shippers.

III. Discussion

9. Texas Eastern's filings raise several threshold issues that the pipeline does not identify in either of its filings. These are (1) whether Commission policy permits a pipeline to offer negotiated usage and fuel charges to replacement shippers in capacity release transactions, (2) whether the specific contractual provisions at issue here are material deviations from Texas Eastern's form of service agreement, and (3) if so, whether the deviations are permissible. The Commission will address these issues before reaching Texas Eastern's questions in its December 5 filing concerning the procedures it would use to implement any negotiated fuel charges it may grant to replacement shippers pursuant to the relevant provisions in New Jersey and PSEG's negotiated rate agreements.

A. Can Pipelines Negotiate Usage and Fuel Charges with Replacement Shippers?

10. In 1996, the Commission adopted a policy permitting pipelines the opportunity to use negotiated rates as an alternative to cost-of-service ratemaking in circumstances where the pipeline has not shown that it lacks market power and thus market-based rates are not appropriate.[3] Under the negotiated rate program, the pipeline and a shipper may

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[3] The Commission's negotiated rate policies were originally established in *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services of Natural Gas Pipelines,* 74 FERC ¶ 61,076, *order on clarification,* 74 FERC ¶ 61,194, *order on reh'g,* 75 FERC ¶ 61,024 (1996). *Natural Gas Pipeline Negotiated Rates Policies and Practices,* 104 FERC ¶ 61,134 (2003).

negotiate rates that vary from a pipeline's otherwise applicable cost-of-service tariff rate. However, a cost-based recourse rate must be maintained by the pipeline for customers that prefer traditional cost-of-service rates and to mitigate market power if the pipeline unilaterally demands excess prices or withholds service.[4] In order to participate in the negotiated rate program, a pipeline must include in its tariff a provision authorizing it to negotiate rates that vary from its tariff rates.[5] In addition, in order to implement each negotiated rate transaction it enters into, the pipeline must file either the negotiated rate agreement itself or a tariff sheet describing the agreement.[6]

11. For the reasons discussed below, the Commission finds that, while the negotiated rate program is inapplicable to the reservation component of the replacement shipper's rate, pipelines may use their negotiated rate authority to negotiate usage and fuel charges with replacement shippers.

12. Under the capacity release program, the reservation and usage charge components of a replacement shipper's rate are determined through separate processes subject to different rules.[7] Section 284.8(h) of the Commission's capacity release regulations requires that the reservation rate be determined either through a bidding process initiated by the releasing shipper or by negotiation between the releasing shipper and the replacement shipper if the release is exempt from bidding. Section 284.8(b)(2) provides that the replacement shipper's reservation rate may not exceed the pipeline's maximum reservation rate if the release is for more than one year.[8] As modified by Order No. 712,[9]

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[4] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services of Natural Gas Pipelines,* 74 FERC at 61,238-242.

[5] *Id*. at 61,241.

[6] *NorAm Gas Transmission Co.,* 75 FERC ¶ 61,091, at 61,309, *order on reh'g,* 77 FERC ¶ 61,011, at 61,037 (1996).

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

[8] *Tennessee Gas Pipeline Co*., 126 FERC ¶ 61,171, at P 24-25 (2009).

[9] *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37058 (June 30, 2008), FERC Stats & Regs. ¶ 31,271 (2008), *order on reh'g*, Order No. 712-A, 73 Fed. Reg. 72692 (December 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008), *order on reh'g,* Order No. 712-B, 74 Fed. Reg. 18127 (April 21, 2009), FERC Stats. & Regs. ¶ 61, 051 (collectively, Order No. 712).

that regulation permits the releasing and replacement shippers to agree to a market-based reservation charge for short-term releases of one year or less. The pipeline plays no role in determining the reservation rate paid by the replacement shipper.

13. These rules render the pipeline's negotiated rate authority inapplicable to the determination of the replacement shipper's reservation rate.[10] For example, the cap on a replacement shipper's reservation rate in long-term releases prohibits the negotiation of a reservation rate in excess of the pipeline's maximum reservation rate, as would be permitted under the negotiated rate program.[11] Moreover, these rules allow market-based reservation rates for short-term releases. Therefore, the releasing shipper need not offer a replacement shipper in a short-term release the option of taking service at the maximum cost-based reservation rate, as would be required under the negotiated rate program. Similarly, there is no requirement that the pipeline file the agreed-upon market based reservation rate in a short-term release with the Commission as a negotiated rate.

14. Unlike the process for determining a replacement shipper's reservation rate, the replacement shipper's usage charge is a matter solely between the replacement shipper and the pipeline.[12] None of the provisions of the capacity release regulations which prevent use of the negotiated rate program in the context of a replacement shipper's reservation charge apply to the replacement shipper's usage and fuel charges. The bidding requirements, the price cap for long-term releases, and the authorization of market-based reservation rates for short-term releases are all limited to the reservation component of the releasing shipper's rate. The replacement shipper's usage and fuel charges are subject to the maximum usage and fuel charges in each pipeline's tariff in the same manner as the pipeline's own direct sales of capacity, whether the release is short or long-term.[13]

15. The Commission has never expressly addressed the question of whether a pipeline may use its negotiated rate authority to negotiate a usage or fuel charge with a

[10] *NorAm*, 75 FERC at 61,309, *order on reh'g*, 77 FERC at 61,037.

[11] *See, e.g*., *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 114 FERC ¶ 61,304, at P 4 (2006). *See also*, *Texas Gas Transmission, LLC*, 110 FERC ¶ 61,407, at P 9-10 (2005). *See* Order No. 712, FERC Stats. & Regs. ¶ 31,271 at P 30 (elimination of the rate ceiling on short term capacity releases provides releasing shippers with the same authority the pipelines already had – the ability to sell capacity at a price above the pipeline's maximum rate).

[12] *El Paso*, 61 FERC at 62,309.

[13] *Tennessee*, 126 FERC ¶ 61,171 at P 25.

replacement shipper. However, given the requirement that a replacement shipper negotiate usage and fuel charges directly with the pipeline without any participation by the releasing shipper, the Commission finds it reasonable to give the pipeline the same flexibility to negotiate those components of the replacement shipper's rates as when the pipeline negotiates rates with its primary shippers. As required by the negotiated rate program, the pipeline's cost based maximum recourse usage and fuel charges are available to the replacement shipper as a protection against the pipeline's exercise of market power.[14] Accordingly, the Commission sees no reason to deprive replacement shippers of the option, available to primary shippers on a pipeline with negotiated rate authority, to seek negotiated usage and fuel charges.

B. Whether Filed Negotiated Rate Agreements Contain Material Deviations; Permissibility of Deviations

16. As discussed above, Texas Eastern seeks to modify the original negotiated rate agreements to include a provision that it will give any replacement shipper the same negotiated fuel rate cap granted to New Jersey and PSEG. The Commission finds that this provision is an impermissible material deviation from Texas Eastern's form of service agreement.

17. The Commission has held that a material deviation is "any provision of a service agreement which goes beyond filling in the spaces in the form of service agreement with the appropriate information provided for in the tariff and that affects the substantive rights of the parties."[15] Texas Eastern's tariff contains no provision offering to include in a shipper's service agreement a clause guaranteeing a particular usage or fuel charge to that shipper's replacement shipper, nor does its form of service agreement include a blank for such a clause. Texas Eastern's form of service agreement provides that the shipper's "Negotiated Rate" shall be specified in a tariff sheet filed with the Commission. Texas Eastern's agreement to give certain other shippers, who are not parties to the service agreement, the same negotiated rate cannot be considered to be part of the first shipper's negotiated rate.[16] Thus, the provision in New Jersey and PSEG's service agreements concerning negotiated fuel rates for their replacement shippers goes beyond filling in the spaces of Texas Eastern's form of service agreement with the information provided for in

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[14] The only exception would be if the Commission has found the pipeline lacks market power and has accordingly approved market-based rates for the pipeline.

[15] *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001).

[16] *See Transcontinental Gas Pipe Line Co*., 127 FERC ¶ 61,193 (2009) (finding that NGA section 5 waiver provision is a non-conforming clause that constitutes a material deviation from pipeline's form of service agreement).

the tariff. That provision also affects the substantive rights of the parties, since it requires Texas Eastern to offer a particular fuel charge to certain other shippers and enables New Jersey and PSEG to guarantee their replacement shippers the benefits of the negotiated fuel cap. The Commission concludes that New Jersey's and PSEG's service agreements are non-conforming.

18. When presented with non-conforming agreements, the Commission must determine whether the material deviation presents a significant risk of undue discrimination among shippers. If so, the pipeline may only apply the provision pursuant to a generally applicable tariff provision setting forth the conditions under which the provision will be offered. Such a situation exists here with regard to the instant non-conforming agreements. The Commission has previously held that where a non-conforming provision grants a shipper a "valuable right," that right must be "granted in a not unduly discriminatory manner."[17] The agreement by Texas Eastern to provide any replacement shipper for the capacity associated with the negotiated rate agreements the same negotiated fuel rate cap that it provided to the releasing shipper provides those releasing shippers with a valuable right in terms of a competitive advantage should they release that capacity. Accordingly, the Commission requires that Texas Eastern, within 30 days, either remove these provisions from New Jersey and PSEG's service agreements or file generally applicable tariff provisions to offer a similar provision to other firm shippers pursuant to not unduly discriminatory conditions.

C. Texas Eastern's Requested Clarifications

19. With regard to Texas Eastern's request for acknowledgement that the posting and competitive bidding requirements of the Commission's capacity release regulations are not necessary for the negotiated fuel rate caps associated with the negotiated rate agreements with New Jersey and PSEG, the Commission agrees with Texas Eastern. As described above, under the Commission's capacity release program, a releasing shipper chooses its replacement shipper either through a competitive bidding process or through the negotiation of a prearranged deal that may qualify for an exemption from bidding. Whichever process is used, the releasing shipper selects its replacement shipper based on an agreement as to the reservation charge component of the rate to be paid by the replacement shipper, and the pipeline has no control over the releasing shipper's choice of a replacement shipper.

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[17] *Tennessee Gas Pipeline Co*., 97 FERC ¶ 61,225, at 62,029-30 (2001) (finding that a shipper's right to reduce or terminate its contract demand before the expiration of its contract constitutes a "valuable right" to that shipper).

20. Once the releasing shipper has chosen the replacement shipper through one of these processes, that replacement shipper must agree with the pipeline on usage and fuel charges. However, because the chosen replacement shipper is the only shipper eligible for that capacity, no third party would be eligible to bid on the usage or fuel charge to be paid for that capacity. The Commission concludes that the capacity release posting and bidding requirements will not apply to the negotiated fuel rate caps if New Jersey or PSEG release their capacity under the negotiated rate agreements. Of course, in making the release, New Jersey and PSEG will have to comply with all applicable bidding requirements concerning the reserve charge component of the rate.

21. The Commission does not agree with Texas Eastern's assertion that it is not required to file individual negotiated rate sheets with each replacement shipper receiving the negotiated fuel rate cap. Consistent with Commission policy, section 29.7 of Texas Eastern's GT&C requires that it file tariff sheets describing each negotiated rate agreement it enters into with a shipper. Although Texas Eastern has agreed to provide any replacement shipper to whom New Jersey and PSEG may release their capacity the identical negotiated fuel rate cap that it is providing the releasing shippers, the rate is not the only item that must be identified on the tariff sheet filed with the Commission. The Commission's negotiated rate policy requires a pipeline to "file a numbered tariff rate sheet stating the exact legal name of the customer and the negotiated rate for the service."[18] Thus, it is also critical that the identity of the replacement shipper is made known. The Commission does not agree that any cost or administrative burden that Texas Eastern may incur by filing the sheets for each replacement shipper is a compelling reason for overriding the longstanding negotiated rate policy. Thus, the Commission denies Texas Eastern's request for an acknowledgement that it does not need to file with the Commission individual negotiated rate sheets with each replacement shipper.

The Commission orders:

(A) The Commission acceptance of the negotiated rate agreements and tariff sheets filed by Texas Eastern in Docket No. RP99-480-024 is conditioned upon, within 30 days of the date of this order, Texas Eastern either revising the subject service agreements as discussed in the body of this order or filing generally applicable tariff provisions to offer similar provisions to other firm shippers pursuant to not unduly discriminatory conditions.

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[18] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC at 61,241.

(B) Texas Eastern's request filed in Docket No. RP09-143-000 is granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.