130 FERC ¶ 61,111
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Texas Eastern Transmission LP	Docket Nos.	RP09-70-004
Columbia Gas Transmission Company		RP09-275-003
Tennessee Gas Pipeline Company		RP09-282-004
Columbia Gas Transmission, LLC		RP09-294-003

ORDER DENYING CLARIFICATION

(Issued February 18, 2010)

1. On November 16, 2009, Hess Corporation (Hess) filed a request for clarification of the Commission's October 15, 2009 "Order on Flow-Through of Discounted or Negotiated Usage and Fuel Charges" in the captioned proceedings.[1] That order addressed issues regarding the usage and fuel charges to be paid by an asset manager replacement shipper under the Commission's capacity release program as revised by Order No. 712.[2] For the reasons discussed below, the Commission denies clarification.

Background

2. In Order No. 712, the Commission modified its capacity release regulations to remove the maximum rate price ceiling on short term capacity releases and to facilitate AMAs by relaxing the prohibition on tying capacity releases to extraneous conditions and by eliminating bidding requirements for capacity releases meant to implement AMAs. The Commission required pipelines to submit tariff filings to comply with Order No. 712 and to remove any tariff provisions that were inconsistent with the new regulations. One

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[1] *Texas Eastern Transmission LP, et al.*, 129 FERC ¶ 61,031 (2009) (Flow-Through Order).

[2] *Promotion of a More Efficient Capacity Release Market*, 73 Fed. Reg. 37058 (June 30, 2008), *FERC Statutes and Regulations* ¶ 31,271 (2008) (Order No. 712), *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 29, 2009), 127 FERC ¶ 61,051 (2009) (collectively, Order No. 712).

issue that arose in many of the individual pipeline compliance proceedings was whether a pipeline should be required to permit a releasing shipper's asset manager to pay the same discounted or negotiated usage and fuel rates as the pipeline had provided to the releasing shipper.[3] Those supporting such a requirement suggested that interstate pipelines should be required to include in their tariffs a policy allowing the asset manager/replacement shipper to receive the same discounted/negotiated usage and fuel rates applicable to the releasing shipper, arguing that a general refusal to allow "pass-through" of such discounts would impede asset management transactions in contradiction to Order Nos. 712 and 712-A. The interstate pipelines generally responded that the issue of passing through such discounted or negotiated rates was outside the scope of the Order No. 712 compliance proceedings and that such a requirement would be inconsistent with existing Commission policy.

3. In the Flow-Through Order, the Commission declined to establish a blanket requirement that pipelines must always provide the same discounted or negotiated usage or fuel charges to an asset manager replacement shipper that it has provided to the primary firm shipper. Instead, the Commission determined that pipelines should apply the Commission's existing selective discounting policy on a case-by-case basis in deciding whether to grant a discounted or negotiated usage or fuel charge to an asset manager replacement shipper, subject to a general requirement of no undue discrimination.[4] The Commission explained that pursuant to the existing selective discounting policy, pipelines may grant discounts or negotiated rates based on the varying demand elasticities of their customers, and thus, pipelines may give discounts to some shippers but not others, including at the same point, if the shippers have differing

[3] *See e.g.*, Comments and Request for Technical Conference of Atmos Energy Corporation (Atmos), filed November 26, 2008 in Docket No. RP09-70, at 2-3. In an order issued contemporaneously with the Flow-Through Order, the Commission clarified that pipelines may use their negotiated rate authority to negotiate usage and fuel charges with replacement shippers. *See Texas Eastern Transmission, LP*, 129 FERC ¶ 61,025 (2009).

[4] Flow-Through Order, P 19. The Commission noted that the same determination to apply its existing selective discounting policy to releases to implement AMAs also applied to releases relating to retail access programs as defined under Order No. 712. Flow-Through Order P 25 & n.42.

demand characteristics.[5] The Commission also cautioned that pipelines are, and remain, subject to the general policy that selective discounts and negotiated rates must be given on a not unduly discriminatory basis to similarly situated shippers.[6] The Commission determined that application of the Commission's existing policy will protect asset manager replacement shippers from undue discrimination with regard to receiving the benefit of discounts or negotiated rates provided to a releasing shipper while also protecting pipelines against the unintended expansion of the rights originally provided to the releasing shipper.[7]

4. The Commission noted that it had previously held that pipelines should not be required to give replacement shippers the same usage charge discount as the pipeline had given the releasing shipper, because the replacement shipper could have different demand characteristics.[8] The Commission also recognized, however, that a release to an asset manager is fundamentally different than a standard capacity release because in the AMA context, releasing shippers are transferring their capacity to an asset manager who will use the capacity to continue to serve the releasing shipper's needs, while maximizing the value of the capacity when it is not needed to meet the releasing shipper's supply needs.[9] Accordingly, the Commission stated that it appears more likely that an asset manager would be similarly situated to the releasing shipper than in the standard type of capacity release.[10]

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[5] *Williston*, 85 FERC at 62,029. *See Policy for Selective Discounting by Natural Gas Pipelines*, 111 FERC ¶ 61,309 (2005); *see also*, *El Paso Natural Gas Co.*, 62 FERC ¶ 61,311, at 62,990-1 (1993).

[6] *See e.g*., *Policy Statement Providing Guidance With Respect to the Designing of Rates*, 47 FERC ¶ 61, 295, at 62,057 (1989); *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines;* 74 FERC ¶ 61,076, at 61,241 (1996); *NorAm Gas Transmission Company*, 75 FERC ¶ 61,091, at 61,311 (1996).

[7] Flow-Through Order, P 20.

[8] *Id*., at P 21 (*citing El Paso Natural Gas Co*., 61 FERC ¶ 61,333 (1992) at 62,309-62,310.

[9] *Id*., (*citing* Order No. 712, at P 120-121). In a standard capacity release, releasing shippers generally only release capacity when they are not using it to serve their own needs. Therefore, the replacement shipper could be expected to use the capacity in a different manner than the releasing shipper.

[10] *Id*.

5. The Commission also provided guidance on application of its selective discounting policy in the context of AMAs. Specifically, the Commission noted that in the AMA situation where a pipeline granted the releasing shipper a discount at its delivery point and the asset manager replacement shipper uses that capacity to provide deliveries to the releasing shipper, the asset manager was stepping into the shoes of the releasing shipper and thus it would be extremely difficult to support a claim that such asset manager was not similarly situated to the releasing shipper.[11] The Commission further stated that generally in situations where the pipeline granted the releasing shipper a discounted/negotiated usage or fuel charge limited to specific points, the replacement shipper was likely to be similarly situated to the releasing shipper for purposes of service at that point even if it was not using the capacity to fulfill its delivery or purchase obligation under an AMA.[12] We also determined, however, that asset managers are not necessarily similarly situated to releasing shippers in every AMA situation, which is why the application of the Commission's existing selective discounting policy is appropriate in the AMA context.[13]

Request for Clarification

6. Hess requests that the Commission clarify that "when applied in the context of a capacity release under an [AMA] or as part of a State retail access program, its existing selective discounting policies require pipelines to treat releasing shippers and replacement shippers as similarly situated when the shippers use (1) the same individually-identified primary and/or secondary points that are included as specifically eligible for the negotiated/discounted rate in the releasing shipper's original agreement; or (2) the same secondary points that are not individually-identified but are included as specifically eligible for the negotiated/discounted rate in the releasing shipper's original agreement."[14] Thus, Hess essentially requests that we clarify that where the releasing shipper's service agreement expressly limits a discounted/negotiated usage or fuel charge to particular primary or secondary points, the pipeline must always treat the asset manager as similarly situated at those points, regardless of whether the asset manager uses those points to make deliveries to the releasing shipper. Hess asserts that the requested clarification is necessary to provide greater certainty to the industry and to ensure cost savings to consumers because "not all pipelines appear to agree that the specific AMA capacity release examples and conditions" set forth in the Flow-Through

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[11] *Id*. P 22.

[12] *Id*. P 23.

[13] *Id*. P 24-25.

[14] Hess clarification request at 1-2.

Order entitle the replacement shipper to the same discounted/negotiated rate as the releasing shipper.[15] Hess claims that certain pipelines have not been applying, and that "at least one pipeline continues to refuse to apply," the Commission's selective discounting policy as discussed in the Flow-Through Order.[16] Hess states that its clarification request is in response to an actual recent AMA related transaction where it acted as an asset manager using various points that it asserts were identified in the underlying negotiated rate agreement as eligible for a negotiated usage rate but the pipeline determined it was not similarly situated to the releasing shipper.[17] Hess contends that it and the releasing shipper were detrimentally affected by the pipeline's decision, "even though the release appeared to have met all of the conditions" of the Pass-Through Order.[18]

7. Hess refers to the Flow-Through Order's statement that in the situation where a pipeline has given a releasing shipper a discount at its delivery point and the asset manager replacement shipper uses that capacity to make deliveries to the releasing shipper at that point, the Commission cannot envision a scenario where the asset manager replacement shipper is not similarly situated to the releasing shipper as support for its clarification request. Hess also points out that one of the reasons the Commission did not require a blanket pass-through rule is that record evidence indicated that the majority of discounted/negotiated rate usage or fuel rate agreements are limited to specific points. Hess contends that in such a situation the preferred rate should be passed through. Hess implies that the Commission's guiding statements impose conditions on the application of the selective discounting policy in the AMA and State retail access contexts, and presents two hypothetical examples that it requests the Commission clarify qualify as similarly situated transactions under the existing selective discounting policy.[19] Those hypotheticals further illustrate Hess' clarification contention that discounted or negotiated fuel or usage charges that are limited to specified points must be passed through to asset manager replacement shippers that utilize those points.

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[15] *Id*. at 2.

[16] *Id*. at 4.

[17] *Id*. at 5.

[18] *Id*. at 6.

[19] *Id*. at 9-11.

Answers

8. National Grid Gas Delivery Companies (National Grid) filed an answer in support of Hess' request. Texas Eastern and Tennessee Gas Pipeline Company (Tennessee) filed answers (collectively Pipeline answers) in response to Hess' clarification request. On December 16, 2009, Hess filed a motion for leave to answer and answer to the Pipeline answers. 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 answers are not accepted unless otherwise ordered by the decisional authority. The Commission will accept Hess' answer because it will lead to a more accurate and complete record and provided information that assisted us in our decision-making process.[20]

9. The Pipeline answers generally assert that the Commission should deny Hess' clarification request because it essentially seeks a reversal of the Commission's determination in the Flow-Through Order that asset managers are not always similarly situated to releasing shippers and thus there should not be a blanket requirement for pipelines to give asset manager replacement shippers the same discounted/negotiated usage or fuel charge as the releasing shipper. The Pipeline answers note that the hypothetical situations posed by Hess fail to take into account many of the factors that the Commission listed as possibly relevant to the similarly situated analysis that pipelines undergo in deciding whether to pass through such negotiated/discounted rates. They contend that Hess and National Grid provide no information to justify the imposition of a blanket pass-though requirement, as the Commission considered and rejected in the Flow-Through Order.

10. In its answer, Hess argues that it is not requesting rehearing or reversal of the Flow-Through Order but is only requesting clarification of the "guidance" provided in that order as to how to apply the selective discounting policy in the AMA and State retail access situations. Hess reiterates its argument that without clarification, the existing selective discounting policy will continue to be applied inconsistently and in an unduly discriminatory manner across pipelines. Hess contends that the Pipeline answers illustrate the inconsistent application of that policy and that replacement shippers will be left at the mercy of the pipeline's discretion to take into account what it contends are irrelevant factors in making pass-through decisions. Hess also asserts that the Pipeline answers indicate that "at least some pipelines either disagree with, or plan to wholly disregard, the Commission's examples of when an asset manager/State retail marketer replacement shipper should be considered similarly situated to the releasing shipper."[21]

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[20] The answers to the request for clarification are permitted by 18 C.F.R. § 385.213(a)(3).

[21] Hess answer at 6.

Discussion

11. The Commission denies Hess' request for clarification. As noted by Hess, in the Flow-Through Order, the Commission provided examples for guidance as to how the Commission would expect pipelines to apply the existing selective discounting policy in the AMA context. Specifically, we stated that in the situation where an asset manager replacement shipper uses a point at which the releasing shipper had granted a discounted or negotiated usage or fuel rate to make deliveries to the releasing shipper, we could not envision a scenario where the asset manager would not be similarly situated to the releasing shipper. We also stated that in the situation where the asset manager replacement shipper used such a point for reasons other than to make deliveries to the releasing shipper, while it seems likely that the asset manager would be similarly situated to the releasing shipper, there may be circumstances where the asset manager is not similarly situated. Thus we concluded that AMA replacement shippers are not always similarly situated to releasing shippers and that pipelines should apply the existing policy on a case-by case basis to determine whether to grant a pass-through, subject to a general non-discrimination condition.[22]

12. Accordingly, the Commission does not deem it appropriate here to go beyond the guidance provided in the Flow-Through Order and make a blanket determination that an asset manager replacement shipper is always similarly situated to the releasing shipper if the asset manager uses points that the releasing shipper's contract specifies as eligible for a discounted or negotiated usage or fuel charge. As we noted in the Flow-Through Order, there are too many potential factual variables in such a situation for the Commission to make a blanket ruling as requested by Hess. The examples in the Flow-Through Order were meant to provide guidance and not to be a predetermination of whether two shippers were similarly situated. To the extent that any further guidance is required, the Commission will provide it on a base-by-case basis when presented in that manner.

13. It is further clear, and Hess acknowledges, that its clarification request emanates from a specific dispute between Hess and a pipeline. This proceeding, where the Commission has made policy determinations to be applied uniformly across all jurisdictional interstate pipelines, is not the appropriate forum to resolve Hess' specific issues. To the extent Hess believes that a 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.

[22] Flow-Through Order at P 19.

<u>The Commission orders</u>:

Hess' request for clarification is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.