130 FERC ¶ 61,189
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. RP99-480-026
RP99-480-027
RP09-143-001
RP09-143-002

ORDER ON COMPLIANCE FILING AND REQUEST FOR CLARIFICATION, OR ALTERNATIVELY, REHEARING

(Issued March 18, 2010)

1. On December 30, 2008, the Commission accepted and suspended revised negotiated rate tariff sheets filed by Texas Eastern Transmission, LP (Texas Eastern) to modify two previously filed and accepted negotiated rate agreements, to be effective December 1, 2008, subject to further Commission review.[1] The modified negotiated rate agreement included a negotiated fuel rate and a provision stating that the negotiated fuel rate would apply to any replacement shipper pursuant to a capacity release.

2. On October 15, 2009, the Commission issued an order conditionally accepting the negotiated rate agreements and revised tariff sheets.[2] The Commission found, among other things, that while a pipeline could use its negotiated rate authority to negotiate usage and fuel charges with replacement shippers, the provision allowing the negotiated fuel rate to apply to any replacement shipper was an impermissible material deviation that presented a significant risk of undue discrimination among shippers and required Texas Eastern to either remove the provision from the negotiated rate agreements or file

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

[2] *Texas Eastern Transmission, LP*, 129 FERC ¶ 61,025 (2009) (October 2009 Order).

generally applicable tariff provisions to offer a similar provision to other firm shippers. The Commission also required Texas Eastern to file with the Commission individual negotiated rate sheets with each replacement shipper receiving the negotiated fuel rate.

3. On November 13, 2009, Texas Eastern filed a request for clarification, or alternatively, rehearing of the October 2009 Order regarding the timing for filing with the Commission negotiated rate tariff sheets containing negotiated usage and fuel rates with replacement shippers (Request for Clarification). Also on November 13, 2009, Texas Eastern filed revised tariff sheets to comply with the Commission's October 2009 Order.

4. As discussed below, the Commission grants Texas Eastern's request for clarification and accepts Texas Eastern's revised tariff sheets, effective on the dates requested.

I. <u>Background</u>

5. On December 3, 2008, in Docket No. RP99-480-024, Texas Eastern filed two letter agreements and revised tariff sheets to modify two previously filed and accepted negotiated rate agreements with two of its shippers, New Jersey Natural Gas Company (New Jersey) and PSEG Power, LLC (PSEG) (as modified, Negotiated Rate Agreements). The Negotiated Rate Agreements included negotiated caps on the Applicable Shrinkage[3] 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.

6. Subsequently, on December 5, 2008, in Docket No. RP09-143-000, 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 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.

[3] 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).

7. On December 30, 2008, the Commission 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.[4]

8. On October 15, 2009, the Commission conditioned its acceptance of the negotiated rate agreements and tariff sheets filed in Docket No. RP99-480-024 and granted in part and denied in part Texas Eastern's request filed in Docket No. RP09-143-000.[5] The Commission found in the October 2009 Order that pipelines may use their negotiated rate authority to negotiate usage and fuel charges with replacement shippers.[6] However, the Commission found that Texas Eastern's inclusion of a provision in the Negotiated Rate Agreements that gave any shippers to whom they released their capacity the same negotiated fuel rate given to New Jersey and PSEG was an impermissible material deviation from Texas Eastern's form of service agreement and that the material deviation presented a significant risk of undue discrimination among shippers.[7] Accordingly, the Commission required Texas Eastern to either remove those provisions from the Negotiated Rate Agreements or file generally applicable tariff provisions to offer a similar provision to other firm shippers pursuant to not unduly discriminatory conditions.[8]

9. With regard to Texas Eastern's requests in Docket No. RP09-143-000, the Commission agreed with Texas Eastern that the posting and competitive bidding requirements of the Commission's capacity release regulations will not apply to the negotiated fuel rate caps if New Jersey or PSEG release their capacity under the Negotiated Rate Agreements.[9] However, the Commission did 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.[10] The Commission explained that, consistent with Commission policy, section 29.7 of the General Terms and

[4] December 2008 Order, 125 FERC ¶ 61,379.

[5] October 2009 Order, 129 FERC ¶ 61,025.

[6] *Id.* P 11.

[7] *Id.* P 17-18.

[8] *Id.* P 18.

[9] *Id.* P 20.

[10] *Id.* P 21.

Conditions (GT&C) of Texas Eastern's tariff requires that it file tariff sheets describing each negotiated rate agreement it enters into with a shipper. The Commission stated that it did 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.[11] Thus, the Commission denied 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.

10. On November 13, 2009, in Docket Nos. RP99-480-026 and RP09-143-001, Texas Eastern filed its Request for Clarification. Also, on November 13, 2009, in Docket Nos. RP99-480-027 and RP09-143-002, Texas Eastern filed revised tariff sheets to comply with the Commission's October 2009 Order (Compliance Filing).

II. <u>Description of Filings and Procedural Matters</u>

A. <u>Request for Clarification, or Alternatively, Rehearing</u>

11. In its Request for Clarification, Texas Eastern states that, given the Commission's requirement that Texas Eastern file a negotiated rate tariff sheet reflecting any agreed-upon negotiated usage or fuel charge with a replacement shipper, the Commission should clarify that, to the extent Texas Eastern negotiates new usage and fuel charges with a replacement shipper, Texas Eastern will have the necessary authorizations to implement any such agreements by: (a) filing the applicable negotiated rate tariff sheet to take effect on a retroactive basis; or (b) lengthening the capacity release timeline for releases of negotiated rates and filing a tariff sheet for the new negotiated rate after the parties reach agreement but before the release begins. If the Commission denies its Request for Clarification, Texas Eastern requests rehearing of the October 2009 Order on the basis that it is sufficiently vague in describing how Texas Eastern should comply as to be arbitrary and capricious.

12. Section 29.7 of Texas Eastern's tariff requires Texas Eastern to file a negotiated rate tariff sheet prior to the commencement of service under a negotiated rate agreement. Texas Eastern states that under the capacity release provisions of its tariff, bidding on a capacity release transaction ends at 1 p.m. Central Time on the business day before timely nominations for the effective date of the capacity release transaction are due, with winning bids posted at either 2 p.m. or 3 p.m. on the day the bid period ends. This scenario, Texas Eastern states, leaves it and the replacement shipper less than twenty-four hours to reach a negotiated agreement on usage or fuel charges if such an agreement is to be in place before the replacement shipper begins to nominate and flow gas.

[11] *Id.*

13. Texas Eastern states that, while it will make its best effort to reach an agreement with the replacement shipper during this period, it will be difficult for Texas Eastern to reach such an agreement prior to the start of the release transaction. Moreover, Texas Eastern states that even if the parties were able to reach an agreement on a negotiated usage or fuel rate prior to the start of the release transaction, it is highly unlikely it could file the negotiated rate tariff sheet any sooner than the day the replacement shipper begins to nominate gas.

14. Texas Eastern states that for pre-arranged releases at the maximum rate that are not subject to bidding, the timeline to negotiate usage or fuel charges can be even shorter. Texas Eastern states that these releases can be done on an intraday basis and the replacement shipper receives its contract within one hour of when it confirms the deal and can nominate gas at the next nomination opportunity. Texas Eastern states that no matter how quickly the replacement shipper and Texas Eastern agree to a negotiated usage or fuel rate in this situation, Texas Eastern would not be able to file the negotiated rate tariff sheet before gas begins to flow under the replacement contract, although Texas Eastern will file the tariff sheet as early as practicable.

15. Texas Eastern states that several possible approaches exist in terms of the implementation of the negotiated usage or fuel rate as part of a capacity release transactions in the likely event that the parties have been unable to reach an agreement quickly. Texas Eastern states that one possibility is that it and the replacement shipper may continue to negotiate after the release transaction commences, then file the negotiated rate tariff sheet with the Commission and request a waiver of the Commission’s regulations to permit the tariff sheet to be effective retroactively. Texas Eastern states that under this approach, the release transaction can take effect immediately, but the parties would be operating without an established usage or fuel rate in place, which would lead to cost uncertainty for the replacement shipper.

16. Another possibility, Texas Eastern states, is that the release transaction does not become effective until the parties agree to the new usage and fuel rates and Texas Eastern files a negotiated rate tariff sheet. Texas Eastern states that under this second possibility, the replacement shipper cannot make use of the released capacity until a deal is in place. A separate issue that may be raised by this scenario, Texas Eastern states, is responsibility for the reservation charges during the negotiation period. Texas Eastern states that if the replacement shipper cannot use the released capacity because the fuel and usage charges are under negotiation, but the releasing shipper has already completed the release transaction, neither shipper would want to pay the reservation charges. Texas Eastern states that the potential for lost pipeline revenues or uncertainty as to which shipper is responsible for reservation charges is another reason that the Commission should clarify how pipelines should implement negotiated usage and fuel charges for replacement shippers.

B. Compliance Filing

17. In its Compliance Filing, Texas Eastern proposes two changes to its GT&C. First, Texas Eastern states that, in compliance with the October 2009 Order, it is submitting a revised tariff sheet[12] to reflect the addition of GT&C section 29.5(B), which addresses Texas Eastern's ability to agree, on a not unduly discriminatory basis, with a shipper on the terms and conditions under which a negotiated usage or fuel rate will also be available to a replacement shipper if the replacement shipper elects to pay this rate. Under proposed section 29.5(B), a replacement shipper also can elect to pay the recourse rates as an alternative to the offered negotiated rate.

18. Second, Texas Eastern states that, given the Commission's holding that Texas Eastern must file an individual negotiated rate tariff sheet for a replacement shipper with a negotiated usage or fuel rate, Texas Eastern is proposing to revise section 29.7 of the GT&C.[13] Texas Eastern states that, currently, section 29.7 requires Texas Eastern to file a negotiated rate tariff sheet prior to the commencement of service under a negotiated rate. Texas Eastern states that it may be unable to file a negotiated rate tariff sheet prior to the commencement of service for those negotiated rate agreements between Texas Eastern and a replacement shipper that incorporate a negotiated fuel or usage rate flowed through pursuant to the proposed section 29.5(B). Texas Eastern states that proposed section 29.7 would permit Texas Eastern to file the negotiated rate tariff sheet as soon as reasonably practicable after the execution of the negotiated rate agreement in those instances.

19. Texas Eastern requests that the proposed changes to section 29 of the GT&C be made effective on November 13, 2009.

20. Texas Eastern states that, in accordance with the October 2009 Order, it is also submitting negotiated rate tariff sheets reflecting five negotiated rate transactions with three replacement shippers that acquired capacity released by New Jersey Natural and PSEG. Texas Eastern requests that these tariff sheets be made effective on the first day of the negotiated rate term for each respective agreement.[14] As required by section 29.8

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[12] First Revised Fifth Revised Sheet No. 645 to FERC Gas Tariff, Seventh Revised Volume No. 1.

[13] First Revised Original Sheet No. 645A to FERC Gas Tariff, Seventh Revised Volume No. 1.

[14] Texas Eastern states that: (a) Original Sheet Nos. 121F, 121G, and 121I would be effective December l, 2008, (b) Original Sheet No. 121H would be effective November 1, 2009; and (c) Original Sheet No. 121J would be effective October 1, 2009.

of the GT&C, Texas Eastern states that it is also filing the letter agreements between Texas Eastern and the replacement shippers that correspond to the new negotiated rate tariff sheets.

C. Public Notice and Comments

21. Public notice of Texas Eastern's Compliance Filing was issued on November 20, 2009 in Docket No. RP99-480-027.[15] Protests were due as provided in Rule 211 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.211 (2009). On November 25, 2009, Hess Corporation (Hess) filed an untimely motion for leave to intervene and comments, as well as a motion for leave to answer and answer to Texas Eastern's Request for Clarification.

22. As noted, Hess' motion to intervene is late. The Commission only provides for timely interventions at the start of a proceeding and does not provide a new opportunity to intervene when a compliance filing is made, as evidenced by the November 20, 2009 notice. Further, the Commission ordinarily does not grant late intervention at the compliance stage of a proceeding absent a showing of good cause on the part of the movant. However, given the policy considerations raised by the compliance filing and the fact that no party opposed Hess' filing, we will grant Hess' unopposed motion to intervene, subject to Hess' acceptance of the record as it stands at the time of intervention.

23. Hess supports the tariff provision proposed by Texas Eastern in its Compliance Filing. However, Hess objects to Texas Eastern's alternative proposal in its Request for Clarification to delay implementation of a capacity release involving negotiated usage or fuel rates. Hess argues that such a proposal would significantly undermine capacity releases. Hess also argues that the Commission should require Texas Eastern to clarify proposed section 29.7 of the GT&C to also apply to negotiated usage or fuel rates passed through to asset managers or state retail marketers deemed to be similarly situated to the releasing shipper.[16] Finally, Hess argues that Texas Eastern's proposed tariff revisions

[15] A similar notice was subsequently issued on January 7, 2010 in Docket No. RP10-143-002.

[16] In *Texas Eastern Transmission LP, et al.,* 129 FERC ¶ 61,031, at P 19 (2009), 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. The Commission also noted that the same determination to apply its existing selective discounting policy to releases to implement asset management agreements also applied to releases relating to retail access programs as defined under Order No. 712. *Id.* P 25 & n.42

should be clarified to require that negotiated usage or fuel rate agreements with replacement shippers be executed as soon as reasonably practicable. Hess contends that the pipeline should not have the discretion to determine how long it will take to finalize and execute a negotiated usage and fuel rate agreement with a replacement shipper. Otherwise, it claims, there will be unnecessary uncertainty in the natural gas markets.

III. Commission Determination

24. For the reasons discussed below, the Commission grants Texas Eastern's request for clarification and accepts Texas Eastern's revised tariff sheets and individual negotiated rate sheets filed in compliance with the Commission's October 2009 Order, to be effective as requested.

25. In the October 2009 Order, the Commission found that pipelines could use their negotiated rate authority to negotiate usage and fuel charges with replacement shippers but clarified that pipelines must still file with the Commission negotiated rate tariff sheets with each replacement shipper. In its Request for Clarification, Texas Eastern claims that logistically, should it agree to a negotiated rate with a replacement shipper, it may not be able to file the negotiated rate tariff sheet with the replacement shipper prior to the start of the release transaction. Accordingly, Texas Eastern proposes two alternate approaches for filing negotiated rate tariff sheets with replacement shippers: (a) filing the negotiated rate tariff sheets after the start of the release to be effective retroactive to the start of the release, or (b) delaying the start of the release until an agreement is in place and Texas Eastern files the negotiated rate tariff sheet. Similarly, in its Compliance Filing, Texas Eastern proposes to file as soon as reasonably practicable negotiated rate agreements with replacement shippers that include negotiated usage or fuel rates flowed through to the replacement shipper pursuant to an agreement between Texas Eastern and the releasing shipper.

26. Texas Eastern's tariff permits it to extend the bidding timeline for releases that contain non-standard conditions.[17] However, we find that Texas Eastern's proposed treatment of these releases is superior to its existing tariff because it provides its releasing shippers with the flexibility to release capacity according to the standard capacity release timelines. Historically, it has been Commission policy to support the efficient release of capacity. For example, in Order No. 637,[18] the Commission amended its regulations to

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[17] *See* section 3.14(B)(3) of the GT&C. *See also* 18 C.F.R. § 284.12(a)(1)(vi) (2009), NAESB Capacity Release Standard 5.3.1 (providing that the standard capacity release timeline may not be applicable if there special terms or conditions of the release).

[18] *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,297, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g*

(continued)

require pipelines to provide purchasers of released capacity the same ability to submit a nomination at the first available opportunity after consummation of the deal as shippers purchasing capacity from the pipeline.[19] This new section also provided that, if the pipeline requires the replacement shipper to enter into a contract, the contract must be issued within one hour after the pipeline has been notified of the release, but the requirement for contracting must not inhibit the ability of the replacement shipper to submit a nomination at the earliest available nomination opportunity. The Commission explained that the then-current regulations put capacity obtained in the release market at a disadvantage compared to capacity obtained directly from the pipeline because nomination and scheduling opportunities for capacity release transactions were significantly circumscribed. The Commission believed that enabling released capacity to compete on a comparable basis with pipeline capacity would foster a more competitive short-term market.

27. Consistent with the aforementioned policy, as well as the Commission's negotiated rate policy statement[20] and numerous Commission orders, we find that, if a pipeline and a replacement shipper agree to a negotiated usage or fuel rate and, for good cause shown, the pipeline is unable to file the negotiated rate sheet with the Commission prior to the start of the capacity release transaction or as otherwise required by its tariff,[21] the pipeline may file the negotiated rate tariff sheet with the Commission as soon as reasonably practicable and request any necessary waivers, including waiver of the

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denied, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

[19] *See* 18 C.F.R. 284.12(b)(1)(ii) (2001).

[20] The Commission's negotiated rate policy requires a pipeline to file the numbered tariff sheet implementing the negotiated rate at the time it intends the rate to go into effect. However, the Commission readily grants requests to waive the 30-day notice requirement. *See Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,241, *order on clarification,* 74 FERC ¶ 61,194, *order on reh'g*, 75 FERC ¶ 61,024 (1996).

[21] Based upon Texas Eastern's Request for Clarification, it appears that Texas Eastern is affording the capacity releases described herein the same capacity release timeline afforded standard releases, which the Commission supports. *See* Texas Eastern Request for Clarification at 3 and section 3.14(B)(3) of the GT&C.

Commission's 30-day notice requirement,[22] to permit the negotiated rate sheet to take effect on a retroactive basis to the start of the release transaction.[23] The Commission would expect to readily grant such a request for waivers. Lengthening the capacity release timeline and as a result, delaying the start of the capacity release transaction, would only serve to frustrate scheduling equality between capacity releases and pipeline transportation capacity and therefore, would be contrary to existing Commission policy.

28. Hess also expresses concern about the timeliness of execution of negotiated usage and fuel rate agreements with replacement shippers and requests that Texas Eastern clarify that it will execute such agreements as soon as reasonably practicable. Texas Eastern states multiple times in its Request for Clarification that it will make its best efforts to reach an agreement with the replacement shipper before the replacement shipper begins to nominate and flow gas.[24] We do not believe any further clarification is warranted.

The Commission orders:

(A) Texas Eastern's Request for Clarification is granted, as discussed in the body of this order.

(B) Texas Eastern's Compliance Filing is accepted, to be effective as requested.

(C) Hess' untimely motion to intervene is granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[22] 18 C.F.R. § 1Deputy Secretary.54.207 requires that all tariff filings be posted for notice for at least 30 days absent a waiver.

[23] This would be applicable whether the negotiated usage or fuel rate was being passed through to a replacement shipper as a result of an agreement between the releasing shipper and the pipeline or to an asset manager or state retail marketer replacement shipper.

[24] Texas Eastern Request for Clarification at 3-4.