20091015-3006 FERC PDF (Unofficial) 10/15/2009

129 FERC ¶ 61,031

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

	Docket Nos.
Texas Eastern Transmission LP	RP09-70-000
Saltville Gas Storage Company L.L.C.	RP09-71-000
East Tennessee Natural Gas, L.L.C.	RP09-76-000
Egan Hub Storage, L.L.C.	RP09-77-000
ANR Pipeline Company	RP09-222-000
Northwest Pipeline GP	RP09-227-000
Natural Gas Pipeline Co. of America	RP09-240-000
Transcontinental Gas Pipeline Co., L.L.C.	RP09-245-000
Panhandle Eastern Pipeline Co., LP	RP09-256-000
Quest Pipelines (KPC)	RP09-258-000
Tres Palacios Gas Storage, LLC	RP09-260-000
CenterPoint Energy Gas Transmission Company	RP09-261-000
CenterPoint Energy-Mississippi River Transmission Company	RP09-262-000
Kinder Morgan Interstate Gas Transmission LLC	RP09-265-000
Rockies Express Pipeline LLC	RP09-266-000
National Fuel Supply Corporation	RP09-269-000
Questar Pipeline Company	RP09-270-000
Columbia Gulf Transmission Company	RP09-275-000
Dominion Transmission, Inc.	RP09-277-000
Tennessee Gas Pipeline Company	RP09-282-000
El Paso Natural Gas Company	RP09-284-000
Southern Natural Gas Company	RP09-288-000
Columbia Gas Transmission, LLC	RP09-294-000
Colorado Interstate Gas Company	RP09-295-000
Wyoming Interstate Co., Ltd.	RP09-299-000
Cheyenne Plains Gas Pipeline Company, LLC	RP09-300-000
Gulf South Pipeline Company, LP	RP09-301-000
Texas Gas Transmission, LLC	RP09-304-000
Enbridge Pipelines (Midla), LLC	RP09-332-000

20091015-3006 FERC PDF (Unofficial) 10/15/2009

ORDER ON FLOW-THROUGH OF DISCOUNTED OR NEGOTIATED USAGE AND FUEL CHARGES

(Issued October 15, 2009)

1. This Order addresses issues raised in the captioned proceedings 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.[1] Several parties to the Order No. 712 compliance proceedings questioned whether pipeline tariffs should include provisions allowing asset manager replacement shippers to receive the same discounts provided to the primary firm shipper for the purpose of facilitating an asset management agreement (AMA). As described more fully below, the Commission will not 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 determines 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.

Background

Order No. 712 and compliance proceeding orders

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 its bidding requirements for capacity releases meant to implement AMAs. In defining AMAs, the Commission explained that AMAs were distinguishable from standard capacity releases because the fundamental purpose of an AMA was to use the capacity as it was originally intended, that is, to serve the supply needs of the original shipper. Accordingly, in order to ensure that only *bona fide* AMAs that met this goal would qualify for the bidding and tying exemptions, the Commission placed a significant delivery or purchase obligation on the asset manager that must be satisfied for the release

[1] *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).

20091015-3006 FERC PDF (Unofficial) 10/15/2009

to qualify as an AMA.[2] 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.

3. One 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 in favor of such a requirement stated that it was unclear from the pipelines' compliance filings whether and to what extent the pipeline would permit a releasing shipper's asset manager to pay the same discounted/negotiated usage and fuel rates as the pipeline has provided to the releasing shipper and suggested that the pipelines should 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. Those parties argued that a general refusal to allow "pass-through" of such discounts would impede asset management transactions, contradicting Order Nos. 712 and 712-A. Interstate pipelines generally responded to

---

[2] Order No. 712 at P139; Order No. 712-A at P 77-79. To satisfy the delivery/purchase obligation a pre-arranged release must contain a condition that the releasing shipper may call upon the replacement shipper to deliver to, or purchase from, the releasing shipper a volume of gas up to 100 percent of the daily contract demand of the released transportation or storage capacity for a minimum period. That period is generally the greater of five months or five twelfths of the term of the release. *See* 18 C.F.R. section 284.8(h)(3).

[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 being issued contemporaneously with this order, the Commission clarifies that pipelines may use their negotiated rate authority to negotiate usage and fuel charges with replacement shippers. *See Texas Eastern Transmission, LP,* Docket Nos. RP99-480-024 and RP09-143-000 at P 11. The Commission's negotiated rate policy permits pipelines to use negotiated rates as an alternative to cost-of-service rates in circumstances where the pipeline has not shown that it lacks market power and thus market-based rates are not appropriate. Under the negotiated rate program, the pipeline and a shipper may negotiate rates that vary from the maximum and minimum rates in the pipeline's tariff. However, a cost-based tariff 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. *See Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services,* 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).

20091015-3006 FERC PDF (Unofficial) 10/15/2009

those comments by stating that the issue was outside the scope of the Order No. 712 compliance proceedings and that such a requirement would be inconsistent with existing Commission policy. Parties also disagreed as to whether the issue should be addressed in a generic proceeding or in individual cases.

4. The Commission first addressed the discount flow-through issue in Texas Eastern Transmission, LP's (Texas Eastern) Order No. 712 compliance proceeding.[4] There, and in subsequent compliance orders, the Commission stated that under its existing policy, established in *El Paso Natural Gas Co.,*[5] *a* pipeline need not give the replacement shipper the same usage charge discount that it gave the releasing shipper.[6] The Commission noted that it has held that the usage charge to be paid by the replacement shipper is a matter between the replacement shipper and the pipeline, and the releasing shipper cannot bind the pipeline to accept any particular usage charge from the replacement shipper. Therefore, under current Commission policy, the pipeline "generally should not be required to give the replacement shipper the same discount of the usage charge as it gave the releasing shipper."[7] *El Paso* explained that "the discount in the usage charge negotiated between the releasing shipper and [the pipeline] is related only to the contract between the releasing shipper and the pipeline and to the transportation services actually performed by [the pipeline] for the releasing shipper under that contract and is not relevant to other contracts and services to other shippers, including replacement shippers."[8] The Commission also explained that while pipelines are not subject to a blanket requirement always to give replacement shippers the same usage charge discounts as to the releasing shipper, in determining whether to grant a discount to a replacement shipper pipelines are subject to the Commission's general policy that selective discounts must be given on a not unduly discriminatory basis to similarly situated shippers.[9]

5. In the compliance orders addressing the flow-through issue, the Commission agreed that Order No. 712 did not modify the Commission's existing policy regarding the pipeline's offering of usage charge discounts to replacement shippers and that Order No.

---

[4] *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396 (2008)(*Texas Eastern).*

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

[6] *Texas Eastern* at P 20.

[7] *El Paso* at 62,309.

[8] *Id.* at 62,309-10.

[9] *See Williston Basin Interstate Pipeline Co*., 85 FERC ¶ 61, 247, at 62,028-30 (1998).

712 did not address any issues relating to the offering of such charges to replacement shippers.[10] The Commission also noted, however, that Order No. 712's revisions to facilitate AMAs did raise several issues along these lines, namely, (1) whether the Commission should find that it would be unduly discriminatory for a pipeline to deny an asset manager replacement shipper the same discount of its usage charge as provided to the releasing shipper, at least during those periods when the asset manager is using the released capacity to satisfy the delivery or purchase obligation contained in the release to the asset manager,[11] and (2) if so, whether a pipeline should be required to include in its tariff a provision concerning the circumstances under which it would provide similar usage charge discounts to an asset manager replacement shipper, or (3) whether the circumstances of individual releases to asset managers are sufficiently case-specific that pipelines should be allowed to decide whether to grant a usage charge discount to the asset manager/replacement shipper on a case-by-case basis, subject to a general requirement of no undue discrimination.[12] The Commission gave parties an opportunity to file comments on these questions. The parties' comments are discussed below.

6. The Commission also noted in its compliance orders that the issue of whether a pipeline must provide an asset manager replacement shipper the same discounted or negotiated usage and fuel rates as the releasing shipper only arises to the extent that the pipeline has provided such discounts or negotiated rates to the releasing shipper. The Commission does not permit pipelines to offer discounts below their minimum rates, which are based on the variable costs allocated to the service to which the rate applies.[13] Therefore, only pipelines using a non-Straight-Fixed Variable (SFV) rate design that includes some fixed costs in their usage charges can discount their usage charges. The Commission also pointed out that it does not allow pipelines to discount their fuel retention rates, because fuel and lost and unaccounted for (LAUF) gas are variable costs.[14] The Commission also explained that pipelines with negotiated rate authority may enter into negotiated rate agreements that are not bound by their tariff maximum and minimum rates.

---

[10] *See e.g.*, *Texas Eastern* at P 21; *Tennessee Gas Pipeline Co*., 126 FERC ¶ 61,171 (2009) at P 17 (*Tennessee)*.

[11] *See* § 284.8(h)(3) of the Commission's regulations defining a release to an asset manager.

[12] *See e.g.*, *Texas Eastern* at P 21; *Tennessee* at P 17.

[13] *See* 18 C.F.R. § 284.10(c)(4)(ii) and (5)(ii)(A) (2009).

[14] *Mississippi River Transmission Corp*., 98 FERC ¶ 61,119, at 61,352 (2002).

20091015-3006 FERC PDF (Unofficial) 10/15/2009

7. Given this analysis, the Commission decided that it would be prudent to assess the scope of the discount/negotiated rate flow-through issue before making a determination as to the procedural vehicle for resolving the issue and the merits of the issue itself. Accordingly, the Commission expanded the scope of the inquiry to include questions to each pipeline as to its discounted or negotiated usage charge contracts and required the pipelines to provide the following information: (1) how many of the pipeline's existing firm shipper contracts include discounted or negotiated usage and fuel rates, (2) how many of any such contracts limit the discount or negotiated rate to specific points, (3) a general description of how the pipeline intends to determine whether to grant usage charge discounts or negotiated usage and fuel and LAUF charges to asset manager/replacement shippers, and (4) what factors the pipeline will consider in determining whether to grant such discounts or negotiated rates.[15] The Commission required the pipelines to file the requested information within 30 days and provided that parties could file supplemental comments 20 days later.

8. The Interstate Natural Gas Association of America (INGAA) submitted comments in numerous compliance proceedings arguing that the Commission should not decide the issue of an asset manager's right to the same discounted or negotiated usage or fuel charge as the releasing shipper in the individual Order No. 712 compliance proceedings. Rather, INGAA asserts that the Commission should address these issues in a generic proceeding because they are of industry-wide scope and have been raised in numerous Order No. 712 compliance filings.

9. The American Gas Association (AGA) responded to INGAA's filing and urged the Commission to act expeditiously to resolve these issues, regardless of whether it proceeds through a generic rulemaking or case-by-case adjudication. AGA contends that the Commission should require pipelines to pass through discounted or negotiated usage and fuel charges to asset managers or retail choice marketers, consistent with the goal of facilitating AMAs and retail choice programs.

10. According to the responses submitted by the 25 pipelines questioned, these pipelines have a total of 302 contracts with discounted or negotiated usage and/or fuel retention rates, including 12 discounted rate contracts and 290 negotiated rate contracts. Six pipelines account for 258 of those agreements. In addition, all 12 of the discounted usage charges are limited to specific points. 186 of the 290 negotiated usage or fuel

---

[15] *See e.g.*, *Natural Gas Pipeline Company of America,* 126 FERC ¶ 61,156 (2009)(*NGPL)* at P 15.; *Tennessee at* P 18. The Commission requested this information from all the pipelines in the caption of this order, except Texas Eastern, Saltville Gas Storage Company, LLC, Egan Hub Storage LLC., and East Tennessee Natural Gas, LLC. The Commission did not request contract data from these pipelines because the initial compliance orders in their respective proceedings were issued prior to our decision to expand the scope of the inquiry.

charges are limited to specific points. Thus, according to the information provided by the responding pipelines, there are only 104 contracts with negotiated usage or fuel charges that are not limited to specific points, and two pipelines have 99 of those contracts.

Parties' Comments

11. Several parties filed comments on the Commission's initial questions raised in *Texas Eastern*. Atmos, who originally raised the pass through issue, filed Initial Comments arguing that pass through of discounted usage or fuel charges should be automatic and mandated by the Commission in the AMA context.[16] According to Atmos, pipelines should be required to include provisions in their tariffs allowing an asset manager to receive the same discounted or negotiated usage, fuel, and LAUF charges provided to the primary firm shipper when the underlying capacity is released as part of an AMA. Atmos argues that the Commission found in Order No. 712 that releases to implement AMAs are fundamentally different from standard capacity releases because in the AMA context the releasing shipper is not releasing unneeded capacity but is instead transferring capacity to entities that it perceives have greater skill in managing capacity assets to both meet the releasing shipper's supply needs and to maximize the value of that capacity when it is not needed. Atmos notes that the Commission imposed a significant delivery obligation on asset manager replacement shippers for the benefit of the releasing shipper and contends that by accepting this obligation, the asset manager accepts a potential risk that does not apply to the traditional replacement shipper. Atmos argues that because of the delivery/purchase obligation imposed on the asset manager replacement shipper by Order No. 712's definition of AMAs, capacity releases to asset managers are by definition "similarly situated" to the releasing shipper.[17]

12. Atmos also argues that this risk imposed on asset managers is mitigated by the fact that in the AMA context, the replacement shipper steps into the shoes of the releasing shipper. Atmos contends that without a guarantee that the asset manager replacement shipper will receive the benefit of any discounted fuel or usage rate granted to the releasing shipper, however, the asset manager will be disadvantaged relative to its ability to provide deliveries to the releasing shipper, to third parties, and with respect to other non-AMA replacement shippers. Atmos asserts that because asset manager replacement shippers "step into the shoes" of the releasing shipper, pipelines will not be prejudiced by providing the same discounted or negotiated rate to the replacement shipper that it gave to the releasing shipper.

[16] Initial Comments of Atmos, dated January 21, 2009, in Docket No. RP09-70-000 (Atmos Comments).

[17] Atmos comments at 13-14.

20091015-3006 FERC PDF (Unofficial) 10/15/2009

13. AGA,[18] the Natural Gas Supply Association (NGSA)[19] and their respective members generally agree with Atmos' arguments. AGA contends that the Commission should require pipelines to allow the pass through of discounted or negotiated fuel or usage rates in the AMA context because there the asset manager replacement shipper steps into the shoes of the releasing shipper. AGA further contends that the Commission should permit the pass through of discounted or negotiated usage and fuel charges to retail choice marketers.[20] AGA asserts that allowing such flow through will preserve the economic value of the capacity for the asset manager when the asset manger uses that capacity to serve the releasing shipper's supply needs. AGA also notes that allowing pass through would be consistent with the Commission's allocative efficiency goals. The NGSA agrees and adds that in the AMA context, because the asset manager replacement shipper is using the capacity to provide service to the releasing shipper, the initial relationship and basis for the original discount or negotiated rate still exist. The NGSA contends that to not require pass through would diminish the benefit provided by an AMA by voiding the AMA agreement or by creating uncertainty that would diminish parties' incentive to enter into AMAs.

14. Many LDCs and other pipeline customers also filed comments making arguments similar to those made by Atmos. These commenters include the Marketer Petitioners, Con Ed, New Jersey Natural, National Grid and the Indicated Shippers.[21] These parties all advocate a requirement that pipelines place provisions in their tariffs requiring the pass through of negotiated or discounted usage or fuel charges to at least asset manager replacement shippers and retail choice marketers. They contend that based on the differences between AMAs and traditional capacity releases and the definition of AMAs as established by the Commission in Order No. 712, such replacement shippers are

[18] Motion for Intervention Out-Of-Time and Comments of the American Gas Association, dated January 21, 2009.

[19] Motion for Leave to Intervene Out-Of-Time and Comments of the Natural Gas Supply Association (NGSA Comments).

[20] Several other parties also argue that the Commission should require pipelines to pass through usage and fuel charge discounts or negotiated rates to marketers receiving capacity as part of a state approved retail choice program. *See e.g.,* Initial Comments of National Grid at 3; Comments of Consolidated Edison Company of New York, Inc., (Con Ed) at 3-5; Joint Initial Comments of New Jersey Natural Gas Company and NJR Services Company (New Jersey Natural) at 5; and Comments of the Indicated Shippers at 7-8.

[21] Indicated Shippers for the purposes of the comments filed in Docket No. RP09-70, include BP America Production Company, BP Energy Company, ConocoPhillips Company and Hess Corporation.

20091015-3006 FERC PDF (Unofficial) 10/15/2009

similarly situated to the releasing shipper (the "stepping in the shoes" argument). They also assert that in the AMA and retail choice situations, the individual releases are not sufficiently case specific that pipelines should be allowed to decide on a case-by-case basis whether to pass through negotiated or discounted usage and fuel rates. These parties also argue generally that not requiring pass through for AMAs would create a disincentive to enter into AMAs and thus undermine the goals of Order No. 712. National Grid would have the Commission go even further and require pipelines to pass through usage charge discounts to all replacement shippers as long as the replacement shippers continue to meet the conditions tied to the issuance of the original grant of discount.[22]

15. Pipelines filing comments generally disagreed with Atmos' and the LDCs' position.[23] In responding to the Commission's inquiries, Texas Eastern for example, argued that the Commission should not necessarily require pass through for all AMAs, and particularly when the volumes are being used by an asset manager for the account of an entity other than the releasing shipper.[24] Texas Eastern contends that in that situation the asset manager is not utilizing the capacity to serve the releasing shipper's supply needs, the very reason that the Commission granted exemptions for AMAs in Order No. 712. Texas Eastern further contends that when an asset manager replacement shipper is not using the capacity to serve the AMA delivery/purchase obligation, there may be many reasons that the asset manager is not similarly situated to the releasing shipper, including the volumes analyzed when granting the initial discount, differences in elasticity of demand and differences in markets served. Texas Eastern asserts that, if at all, pipelines should only be required to provide asset managers with the same usage discount as the releasing customers only when transporting gas to meet the asset managers' obligations to releasing customers. Texas Eastern contends that the Commission should only require such pass through if it makes two clarifications, one that pipelines could wait until the Northern American Energy Standards Board issues revised standards for modifications to pipelines' interactive websites necessary to implement the pass through requirement, and two, that for rate case purposes the usage charge discounts will be presumed to be given under the same market conditions as the discount given the releasing shipper so that the pipeline will not be disadvantaged in future rate cases by a requirement to pass through discounts originally granted to meet competition.

---

[22] National Grid Comments at 2.

[23] INGAA and the pipelines in general uniformly contend that the Commission should address the flow through issue in a generic industry wide proceeding and not in individual compliance proceedings.

[24] Comments of Texas Eastern Transmission, LP at 8-9.

20091015-3006 FERC PDF (Unofficial) 10/15/2009

16. El Paso Natural Gas Company (El Paso) filed similar comments. Noting that Commission policy recognizes that a releasing shipper cannot bind the pipeline to any particular usage charge from the replacement shipper, and that the pipeline is not generally required to give a replacement shipper the same discount of the usage charge as it gave the releasing shipper, El Paso argues that pipelines should not be required to flow through negotiated or discounted usage charges to asset managers at all. El Paso states that if the Commission does require pass through, it should not do so for volumes and points not being used to serve the releasing customer. Like Texas Eastern, El Paso argues that in that situation the asset manager may not be similarly situated to the releasing shipper. El Paso also contends that asset manager replacement shippers remain protected by the Commission's current selective discount policy and the requirement for a pipeline to provide the same discount to similarly situated shippers. Texas Gas filed comments generally advocating an approach similar to that of El Paso and Texas Eastern. Texas Gas even goes a step further in acknowledging that "to the extent a releasing shipper releases its entire contract to an asset manager, the asset manager is truly stepping into the shoes of the releasing shipper…" and "would be considered similarly situated to the releasing shipper and …the asset manager would pay the same rate that the releasing shipper would have paid under the circumstances."[25]

17. The pipelines' responses to the Commission's question regarding the method they would use to determine whether to grant discounted or negotiated usage and fuel charges to asset manager replacement shippers fell into several broad categories.[26] Several pipelines stated they would pass through the discounted or negotiated rates to the extent that the replacement shipper used the capacity in precisely the same manner as the releasing shipper, noting specific receipt and delivery points and volumes as criteria to consider.[27] Another group agreed they would pass through the rates if the asset manager replacement shipper agreed in its replacement contract with the pipeline to be bound by the same terms and conditions as the releasing shipper's contract, unless otherwise agreed by the pipeline.[28] A third group stated they would determine on a case-by-case basis

---

[25] *"Motion to file Reply Comments and Reply Comments of Texas Gas Transmission, LLC"* filed April 24, 2009 in Docket No. RP09-304, at 2 (Texas Gas Reply Comments).

[26] The pipelines proposed no tariff changes on this issue and stated that the proposed methodologies could be implemented pursuant to their currently effective tariffs.

[27] *See e.g.*, Texas Gas Reply Comments. Dominion Transmission, Inc., and Tres Palacios Gas Storage, LLC, both advocated a similar approach.

[28] This approach was reflected in comments filed by ANR Pipeline Co., NGPL, Kinder Morgan Interstate Gas Transmission LLC and Rockies Express Pipeline LLC.

20091015-3006 FERC PDF (Unofficial) 10/15/2009

whether to pass through any discounted or negotiated usage or fuel charges based on an analysis of whether the replacement shipper is similarly situated.[29] Those pipelines asserted that such a determination can only be made after an inquiry into the specific facts of each release. Several pipelines stated they had no proposal and would rely on existing tariff provisions stating that all replacement shippers will pay the applicable maximum rate.[30] Finally, Egan Hub Storage, LLC (Egan Hub), a storage company authorized to charge market based rates, stated that it would provide the same usage charge to any replacement shipper that it charged the releasing shipper, absent an agreement to the contrary.[31]

18. A few entities filed comments in particular pipeline proceedings subsequent to the pipelines' filings of their contract and methodology information.[32] National Grid filed in Transcontinental Gas Pipeline Company's proceeding and reiterated its position that the Commission should require pass through of discounted or negotiated usage charges, and that failure to do so would facilitate undue discrimination, devalue capacity, and increase releasing shippers' costs. National Grid also proposes that if pipelines retain the ability to deny pass through of discounted or negotiated usage rates to replacement shippers, pipelines should be required to make available the terms that are required to be met in order to obtain pass through of a usage discount.[33] BP America Production and BP Energy Company (BP) make similar comments in Gulf South Pipeline Company, LP's compliance proceeding, arguing the Gulf South's proposed criteria for determining similarly situated shippers is vague and that the Commission should clarify the criteria that would be used to determine whether to pass through to an asset manager or retail access marketer.[34] Sequent Energy Management LP and the Dominion LDCs[35] filed in

[29] Pipelines in this category include Tennessee, National Fuel Gas Supply Corp., and Northwest Pipeline GP.

[30] For example, El Paso, Wyoming Interstate Co., Ltd., and Colorado Interstate Gas Co.

[31] *See* Reply Comments of Egan Hub, dated January 30, 2009.

[32] Atmos filed a letter in numerous dockets referencing its initial comments advocating that pipelines be required to pass through negotiated or discounted usage and/or fuel charges to asset manager replacement shippers.

[33] *See* National Grid's June 9, 2009 comments in Docket No. RP09-245.

[34] *See* BP's April 20 comments in Docket No. RP09-301.

[35] The Dominion LDCs are The East Ohio Gas Company d/b/a/ Dominion East Ohio and The Peoples Natural Gas Company d/b/a/ Dominion Peoples.

20091015-3006 FERC PDF (Unofficial) 10/15/2009

several dockets generally advocating pass through in the AMA context and making arguments akin to the "stepping in the shoes" argument discussed above. None of the above referenced parties commented directly on the contract data provided by the pipelines.

Discussion

19. Having considered the comments filed by the parties and evaluated the contract information submitted by the pipelines, the Commission has determined not to establish a blanket requirement that pipelines 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. As discussed below, while it appears more likely that an asset manager replacement shipper will be similarly situated to the releasing shipper than in the traditional capacity release context, the asset manager is not necessarily similarly situated to the releasing shipper in every situation. Thus, the Commission finds 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. Pursuant to that policy, if an asset manager replacement shipper is similarly situated to the releasing shipper, the pipeline must pass through the discounted or negotiated rate to the asset manager.

20. Pursuant to the Commission's existing selective discounting policy, pipelines may give discounts or negotiated rates based on the varying demand elasticities of their customers.[36] Thus, pipelines may give discounts to some shippers but not others, including at the same point, if the shippers have differing demand characteristics.[37] Pipelines are, and remain, however, subject to the Commission's general policy that selective discounts and negotiated rates must be given on a not unduly discriminatory

[36] As part of Order No. 436, the Commission adopted regulations permitting pipelines to engage in selective discounting based on the varying demand elasticities of the pipeline's customers, reasoning that selective discounts would benefit all customers because the discounts would allow the pipeline to maximize throughput and thus spread its fixed costs across more units of service. The Court upheld the Commission's selective discounting policy in *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987). *See Williston Basin Interstate Pipeline Company*, 85 FERC ¶ 61,247, at p. 62,028-30 (1998) (*Williston*), and cases cited, for a discussion of this policy.

[37] 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).

20091015-3006 FERC PDF (Unofficial) 10/15/2009

basis to similarly situated shippers.[38] Therefore, 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 unintended expansion of the rights originally provided to the releasing shipper.

21. As noted above, the Commission held in *El Paso* 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.[39] The Commission recognizes, however, as many commenters note, that a release to an asset manager is fundamentally different than the releases the Commission considered in *El Paso*. As we stated in Order No. 712, the Commission originally expected releasing shippers only to release capacity when they were not using it to serve their own needs, and therefore the replacement shipper could be expected to use the capacity in a different manner than the releasing shipper. In the AMA context, however, 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.[40] Accordingly, it appears it is more likely that an asset manager would be similarly situated to the releasing shipper than in the standard type of capacity release discussed in *El Paso*. Thus as we noted in *Texas Eastern* and other compliance proceedings, the facilitation of AMAs by Order No. 712 may raise questions about the application of the Commission's selective discount policy, especially in the AMA context.

22. As noted by many commenters, in the situation where the pipeline has given the releasing shipper a discount at its delivery point and the asset manager uses the released capacity to provide deliveries to the releasing shipper at that point, the asset manager really is stepping into the shoes of the releasing shipper. In that situation, the Commission cannot envision a scenario where the asset manager replacement shipper would not be deemed to be similarly situated to the releasing shipper. The asset manager is fulfilling its delivery or purchase obligation to the releasing shipper under the terms of the AMA and thus ensuring that all parties receive the benefits provided by that agreement. Indeed, even some of the pipelines recognize that in such a situation, the asset manager should receive the same discounted or negotiated usage or fuel charge as

---

[38] *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).

[39] *El Paso*, 61 FERC at 62,309-62,310.

[40] Order No. 712, at P 120-121.

20091015-3006 FERC PDF (Unofficial) 10/15/2009

the releasing shipper. Accordingly, in this circumstance, it would be difficult for the pipeline to justify not giving the asset manager the same discounted or negotiated usage or fuel rate as it gave the releasing shipper.

23. Likewise, in the situation where an asset manager replacement shipper may not be using the capacity to fulfill its delivery/purchase obligation under an AMA but uses the same points at which the releasing shipper was granted a discounted or negotiated usage or fuel rate, it seems reasonable that the asset manager would be considered similarly situated to the releasing shipper and entitled to the same rates. In general, in situations where the pipeline granted the releasing shipper a discounted/negotiated usage or fuel charge limited to a particular point, then the replacement shipper is likely to be similarly situated for purposes of service at that point, and the pipeline will not be prejudiced by providing those same terms to the replacement shipper.

24. The Commission is not convinced, however, that an asset manager is necessarily similarly situated to the releasing shipper in every AMA situation. As we found in Order No. 712, asset managers have resources and market knowledge not necessarily available to the releasing shippers, and therefore AMAs should result in an overall increase in the use of interstate pipeline capacity.[41] In fact, the knowledge and expertise possessed by asset managers is one of the main reasons for entering into AMAs. Accordingly, it seems reasonable that there may be circumstances in which the pipeline could conclude that the asset manager will use the capacity in a different manner than the releasing shipper used the capacity or in a different manner than the pipeline anticipated the releasing shipper would use the capacity. For example, in a situation where the pipeline gave the releasing shipper a discounted or negotiated usage/fuel charge not limited to particular points, the asset manager would likely make greater use of secondary points than the pipeline anticipated the releasing shipper would. In the same way, if an asset manager replacement shipper is not using the capacity to fulfill its obligation under the AMA and is using points other than those where the pipeline granted the releasing shipper point specific discounts, then the asset manager may not be similarly situated to the releasing shipper. In addition, there may be instances where an asset manager obtains released capacity in a manner that it can aggregate it with other released capacity and thus could potentially expand the rights on the released capacity from what was originally provided to the releasing shipper.

25. For these reasons, the Commission determines that imposing a blanket requirement that pipelines must always give the asset manager the same discounted or negotiated usage/fuel charge as the releasing shipper is not reasonable. Those advocating such a blanket requirement have not provided compelling evidence that such a requirement is just and reasonable or that application of the Commission's existing selective discounting policy would be unjust and unreasonable. Therefore, the

[41] Order No. 712 at P 122.

20091015-3006 FERC PDF (Unofficial) 10/15/2009

Commission will permit pipelines to decide on a case-by-case basis whether to give the asset manager the same discounted or negotiated usage or fuel rate, consistent with the guidelines discussed above.[42] Applying the existing selective discounting policy in the AMA context protects asset manager replacement shippers that are actually using the capacity in the same manner and on the same terms as the releasing shipper, and is thus consistent with Order No. 712. The fact that there is a myriad of ways that AMAs may be constructed makes the issue more amenable to case-by-case resolutions. This approach will also protect pipelines against unintended expansion of the discounted or negotiated rights it provided to primary contracting parties, and maintain incentives for pipelines to offer discounts when necessary to meet competition.

26. In addition, based on the results of the information gathered from the pipelines regarding the number of contracts for which the pass through question would actually arise, it appears that the Commission's determination will not have a significant impact on the incentive to enter into AMAs. As noted above, the Commission's survey of 25 interstate pipelines suggests that the total number of contracts for which pass through of usage and fuel rates could be an issue is only approximately 300 agreements. Further, approximately one-third of those contracts with negotiated or discounted usage or fuel charges do not limit the discounts to specific points. Therefore, the scope of the issue appears limited to approximately 104 contracts among the 25 pipelines surveyed. The Commission finds that because of the limited number of contracts potentially affected by our decision, our determination will not negatively impact the prospective utilization of AMAs.

27. Because the Commission is not changing existing policy or revising our regulations, there is no need to establish a rulemaking or separate generic proceeding. The Commission recognizes that the pass through issue arose in numerous Order No. 712 compliance proceedings, and the instant order provides guidance on how the industry

---

[42] Based on this determination to apply the Commission's existing selective discounting policy to releases to implement AMAs and not to require pipelines to revise their tariffs to allow pass through, the same determination applies to releases relating to retail access programs as defined under Order No. 712. Thus, pipelines are not required to pass through discounted or negotiated usage or fuel rates to a retail access marketer but must follow the Commission's existing selective discounting policy when making determinations regarding such pass through. Likewise, the same analysis and prohibition on undue discrimination applies to storage companies or pipelines authorized to charge market based rates.

20091015-3006 FERC PDF (Unofficial) 10/15/2009

should address this issue in the future, after having considered extensive industry wide comments. The policy determinations made in this order are intended to be applied uniformly across all jurisdictional interstate pipelines.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

RP09-70-000.DOC...1-16