

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Texas Gas Transmission, LLC)
)
) Docket No. RP09-1051-___

**TEXAS GAS TRANSMISSION, LLC
EXPLANATION OF NON-CONFORMING NATURE OF AGREEMENT**

I. Background

On September 18, 2009, Texas Gas Transmission, LLC (“Texas Gas”) filed with the Federal Energy Regulatory Commission (“Commission”) a non-conforming no-notice transportation service agreement No. 13646 (“Agreement”) between Texas Gas and ProLiance Energy, LLC (“ProLiance”), as well as a revised tariff sheet adding such Agreement to the list of non-conforming agreements in Texas Gas’ tariff. Texas Gas explained that the Agreement contained a non-conforming provision that allowed varying contract demands (with both increases and decreases) on a monthly basis throughout the summer season in order to respond to market demand. Texas Gas further explained that this change applied only to the Agreement and had no impact on the rights of any other Texas Gas customer.

On September 30, 2009, the Western Tennessee Municipal Group,¹ the Jackson Energy Authority, City of Jackson, Tennessee, and the Kentucky Cities² (together, “Cities”) filed a protest (“Protest”). The Cities asserted that, under the Commission’s policy, the ability to vary contract demand “is a valuable right since it allows shippers to pay reduced reservation charges during times of the year when they have less need for service.”³ The Cities argued that the Commission should condition any acceptance of the Agreement on a requirement that Texas Gas revise its tariff to expressly provide all customers, on a not unduly discriminatory basis, the option of monthly varying contract demand and nominated daily quantity.

On October 6, 2009, Texas Gas filed an Answer to the Cities’ Protest, arguing that the Agreement is long-standing, in place since 1998, and that the Commission has a well-established policy of allowing the continuance of existing contracts that have been ongoing and relied upon by the parties for many years, particularly if such agreements were entered into prior to the Commission’s clarification of the standards governing materially non-conforming provisions in 2001.⁴ Texas Gas explained that it had allowed ProLiance to vary its contract demands during the summer season since, in total, ProLiance’s summer season capacity is equal to the summer season capacity in its then-

¹ The Western Tennessee Municipal Group consists of the following municipal distributor-customers of Texas Gas: City of Bells, Gas & Water, Bells, Tennessee; Brownsville Utility Department, City of Brownsville, Brownsville, Tennessee; City of Covington Natural Gas Department, Covington, Tennessee; Crockett Public Utility District, Alamo, Tennessee; City of Dyersburg, Dyersburg, Tennessee; First Utility District of Tipton County, Covington, Tennessee; City of Friendship, Friendship, Tennessee; Gibson County Utility District, Trenton, Tennessee; Town of Halls Gas System, Halls, Tennessee; Humboldt Gas Utility, Humboldt, Tennessee; Martin Gas Department, Martin, Tennessee; Town of Maury City, Maury City, Tennessee; City of Munford, Munford, Tennessee; City of Ripley Natural Gas Department, Ripley, Tennessee.

² The Kentucky Cities are the Cities of Carrollton and Henderson, Kentucky. They are municipal distributor-customers of Texas Gas.

³ Protest at p. 3 (quoting *Texas Eastern Transmission, LP*, 102 FERC ¶ 61,028, at P 5 (2003), *reh’g denied*, 106 FERC ¶ 61,066 (2004)).

⁴ See *Texas Eastern Transmission, LP*, 119 FERC ¶ 61,337 at P 11 (2007); *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 at p. 62,010 (2001).

existing agreement and resulted in no reduction in firm capacity rights or firm demand charges. In addition, Texas Gas pointed out that no shippers have suffered discrimination or harm from the provision.

Alternatively, Texas Gas argued that, should the Commission find that this non-conforming provision is impermissible, the Commission should resolve the nonconformity by ordering Texas Gas to strike the provision from the Agreement. Such action would be necessary because Texas Gas is not willing to include a generally available provision in its NNS rate schedule that allows a customer to contract for varying contract demands during a season.

On October 16, 2009, the Commission issued a letter order (“Order”)⁵ in this matter in which it found that the Agreement filed by Texas Gas appeared to conform to Texas Gas’ currently effective NNS *pro forma* service agreement. The basis for this finding was that Texas Gas’ currently effective NNS *pro forma* service agreement provides blanks to insert different daily contract demand quantities to be effective during certain date ranges.⁶ The Commission noted that the NNS *pro forma* service agreement contains a notation that additional blanks may be added for additional time periods and posited that the blanks appear to permit the monthly variations contained within the agreement filed by Texas Gas in this proceeding. Accordingly the Commission found that it was not clear why the parties viewed this provision as non-conforming and ordered Texas Gas to provide an explanation.

⁵ *Texas Gas Transmission, LLC*, 129 FERC ¶ 61,046 (2009).

⁶ Texas Gas, FERC Gas Tariff, Third Revised Volume No. 1, Second Revised Sheet No. 4200, First Revised Sheet No. 4201, and Original Sheet No. 4202.

II. Explanation

When the NNS *pro forma* service agreement is viewed alone, without considering the language of the tariff or the context of how and why the blanks were added, the blanks appear to be open-ended and available for any period. However, when one reads the applicable tariff language and considers the reasons the blanks were added to the NNS *pro forma* service agreement(s), it becomes clear that the blanks are not included for the purpose of allowing increases and decreases in contract demand (“CD”) and nominated daily quantity (“NDQ”) on a monthly basis.

The additional blanks on the NNS *pro forma* service agreement are provided, instead, solely to permit a contract’s CD and NDQ to increase (but not decrease) by specified amounts on specific dates in order to give customers who plan expansions or future growth, such as the addition of new markets, the certainty that transportation capacity will be available to meet future needs, without requiring such customers to reserve and pay for unneeded capacity in the near term. The blanks were included in the NNS *pro forma* service agreement to address increases in CD and NDQ in this situation alone, and under no circumstances were the multiple blanks intended to permit decreases in CD or NDQ. The additional blanks were added for the first time in *pro forma* tariff sheets Nos. 4200, 4201, and 4202⁷ on January 1, 2009, as part of Docket No. RP09-130-000 (“Ramp Up Filing”).⁸ Prior to January 1, 2009, the *pro forma* service agreements contained only a single blank for “Daily Contract Demand: Winter”; a single blank for “Daily Contract Demand: Summer”; a single blank for “Daily Contract

⁷ Texas Gas, FERC Gas Tariff, Third Revised Volume No. 1, Second Revised Sheet No. 4200, First Revised Sheet No. 4201, and Original Sheet No. 4202.

⁸ *Texas Gas Transmission, LLC*, 125 FERC ¶ 61,381 (2008). Attached as Exhibit A is a copy of Texas Gas’ original filing in RP09-130-000.

Demand: Shoulder Month (April)”; and a single blank for “Daily Contract Demand: Shoulder Month (October)”.⁹ The same is true for NDQ.

As noted above, the Ramp Up Filing was made specifically for the purpose of permitting increases (and increases only) to a customers’ CD or NDQ, and it was approved on that basis alone. The Commission stated: “The Commission finds that the subject filing will enhance customers’ flexibility to *increase contract demand* to meet future needs and relieve customers of the burden of reserving and paying for excess capacity in the near term.”¹⁰ Neither the Ramp Up Filing nor the Commission’s Order in that proceeding, contemplated monthly swings (which would involve increases *and* decreases) in CD or NDQ.¹¹ The blanks in the NNS *pro forma* service agreement were added for the sole purpose of showing any increases in contract demand to meet a customer’s future needs in accordance with the Ramp Up Filing.

Further, the language of the tariff itself indicates that only *increases* in CD and NDQ were contemplated by the Ramp Up Filing and, thus, the additional blanks in the NNS *pro forma* service agreement were included to accommodate such increases. Section 2.3 of the NNS Rate Schedule, which was added to the Tariff as part of the Ramp Up Filing, provides as follows: “Notwithstanding anything else to the contrary in this Rate Schedule or Section 6.3 of the General Terms and Conditions of Texas Gas’ FERC

⁹ See Texas Gas, FERC Gas Tariff, Third Revised Volume No. 1, Original Sheet No. 4200. See also, Texas Gas, FERC Gas Tariff, Third Revised Volume No. 1, First Revised Sheet No. 4200 (which never took effect, as it was replaced by Second Revised Sheet No. 4200 prior to taking effect. Section 12 of Rate Schedule NNS of Texas Gas’ tariff provides that Texas Gas and its customer may agree to different CD’s for the Shoulder Months, April and October. (Texas Gas, FERC Gas Tariff, Third Revised Volume No. 1, Original Sheet No. 408.) That is why these months are listed separately on the *pro forma* service agreement, rather than as part of winter or summer.

¹⁰ *Texas Gas Transmission, LLC*, 125 FERC ¶ 61,381 at P9 (2008). Emphasis added.

¹¹ It is conceivable, under the Commission’s Order in the Ramp Up Filing that an agreement could be entered into in which a CD changed on a monthly basis, but changes could only involve increases to the CD each month. Decreases would not be permitted.

Gas Tariff, the parties may agree at the time of contract execution that the Contract Demand will *increase* by specified amounts at specific point in time.”¹² Neither the NNS Rate Schedule nor Section 6.3 of the General Terms and Conditions of Texas Gas’ FERC Gas Tariff contemplates monthly fluctuations in CD or NDQ under the NNS rate schedule. The NNS rate schedule specifically provides that the customer shall have a winter CD and NDQ, a summer CD and NDQ, and a CD and NDQ for each shoulder month (April and October), each of which may be different than the others. The tariff does not contemplate any changes to CD or NDQ on a monthly basis (other than the shoulder months and the right to ramp up, in accordance with the Ramp Up Filing).¹³

Notwithstanding the fact that the Tariff does not contemplate monthly CD or NDQ swings under NNS service agreements, the Commission should approve the Agreement as it is a long-standing agreement that has been in place since 1998 and, at that time, ProLiance’s total summer season capacity was equal to the summer season capacity in its then existing agreement and the modification of the CD and NDQ to a monthly volume resulted in no reduction in firm capacity rights or firm demand charges. Further, no parties have been harmed by the use of this non-conforming provision, as the only changes to CD and NDQ have occurred during the summer months when firm capacity is available to meet all customers’ needs.

Finally, Texas Gas reiterates its previous request that it not be required to include in its tariff the option of monthly varying contract demand and nominated daily quantity,

¹² Texas Gas, FERC Gas Tariff, Third Revised Volume No. 1, Second Revised Sheet No. 401.

¹³ In fact, the only language in Texas Gas’, FERC Gas Tariff, Third Revised Volume No. 1, which contemplates monthly variations in CD is the language of Section 6.2.2 of Third Revised Sheet No. 1801, and this language applies only to service under Rate Schedule STF. It reads as follows: “For service under Rate Schedule STF, the daily contract demand may vary by month and season within a contract term and must be stated for each month of the requested contract period.” *Id.*

as requested in the Protest. No party has satisfied its burden of proof under Section 5 of the Natural Gas Act (“NGA”).¹⁴ Consistent with Section 5, if the Commission determines that the parties may no longer rely on this non-conforming provision, it must allow Texas Gas to decide whether to incorporate the provision in its tariff or remove the provision from the Agreement.¹⁵ Texas Gas agreed to include the subject provision in the Agreement to meet ProLiance’s specific market needs since it resulted in no reduction in the overall summer season firm capacity rights or firm demand charges. However, Texas Gas is not willing to make this option generally available to all NNS customers by including it in the NNS rate schedule.

¹⁴ *Western Resources Inc. v. FERC*, 9 F.3d 1568, 1579-80 (D.C. Cir. 1993).

¹⁵ *TransColorado Gas Transmission Co.*, 121 FERC ¶61,217, P 8 (2007).

III. Conclusion

Wherefore, for the reasons stated herein, Texas Gas respectfully requests that the Commission promptly approve Texas Gas' Fifth Revised Sheet No. 99A to FERC Gas Tariff, Third Revised Volume No. 1 and the non-conforming service agreement between Texas Gas and ProLiance Energy, LLC, as just and reasonable.

Respectfully submitted,
Texas Gas Transmission, LLC

/s/ Jeffrey R Roper

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November 16, 2009

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2009), I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Owensboro, Kentucky, this 16th day of November, 2009.

/s/ Lisa Neel

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Document Content(s)

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