

108 FERC ¶ 61,135
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

East Tennessee Natural Gas Company Docket No. CP01-415-016

East Tennessee Natural Gas Company Docket No. RP04-398-000

ORDER ON COMPLIANCE FILING AND INITIATING A
SECTION 5 PROCEEDING UNDER THE NATURAL GAS ACT

(Issued August 4, 2004)

1. On September 30, 2003, East Tennessee Natural Gas Company (East Tennessee) filed two tariff sheets¹ to implement recourse rates for its Patriot Project in compliance with Ordering Paragraph (D) of the Commission's November 20, 2002 Order in Docket No. CP01-415-000, *et al.*,² with a proposed effective date of November 1, 2003. For the reasons discussed below, the tariff sheets are accepted as in compliance with the November 20, 2002 Order, effective November 21, 2003. In addition, the Commission is initiating a proceeding under section 5 of the Natural Gas Act, 15 U.S.C. § 717d (2000) concerning East Tennessee's recovery of lost-and-unaccounted-for gas. East Tennessee is directed to submit a filing only in Docket No. RP04-398-000, as discussed below, within 30 days of the date of this order. This order benefits East Tennessee's customers because it ensures an appropriate assignment of costs associated with the Patriot Project.

Background

2. On November 20, 2002, the Commission issued an order in Docket No. CP01-415-000, *et al.*, that approved East Tennessee's amended application for a certificate of public convenience and necessity to construct, own, and operate certain pipeline expansion facilities known as the Patriot Project. In that order, the Commission approved incremental maximum lawful recourse rates for Patriot Project expansion shippers,

¹ Twenty-Sixth Revised Sheet No. 4 and Fourth Revised Sheet No. 4A to FERC Gas Tariff, Second Revised Volume No. 1.

² East Tennessee Natural Gas Co., 101 FERC ¶ 61,188 (2002) (November 20, 2002 Order).

including a 1.51 percent incremental "Fuel and Loss Retention Percentage" for both summer and winter service based on incremental compression horsepower that East Tennessee proposed to install as part of the Patriot Project, as reflected on *pro forma* tariff rate sheets in its application.³ Of relevance to the issues raised with respect to the instant compliance filing, *pro forma* tariff Sheet No. 4A in East Tennessee's application included a footnote (footnote 5) to the 1.51 percent Patriot Project "Fuel and Loss Percentage" which stated that "Transportation entirely by Backhaul will incur 0% Fuel and Loss Retention Percentage." The Commission directed East Tennessee to file tariff sheets consistent with the *pro forma* tariff rate sheets reflecting the approved rates not less than 30 days, nor more than 60 days, prior to their proposed effective date. In the instant September 30, 2003 compliance filing, East Tennessee submitted actual tariff sheets that were duplicates of the *pro forma* sheets to comply with the Commission's directive, with a proposed effective date of November 1, 2003.

Notice, Interventions, and Protests

3. Notice of East Tennessee's September 30, 2003 compliance filing was issued on October 9, 2003, with protests due on or before October 15, 2003, as provided in section 154.210 of the Commission's regulations, 18 C.F.R §154.210 (2003). NUI Energy Brokers, Inc. (NUIEB) filed a motion to intervene on October 14, 2003. NUIEB, however, is already a party to this proceeding.⁴

4. On October 15, 2003, East Tennessee Group (ETG) filed a protest to the compliance filing. ETG argues that there is no justification for exempting backhauls under the Patriot Project from the same charge for the lost-and-unaccounted-for gas that other shippers pay. ETG claims that this is contrary to the Commission's recent orders requiring that all shippers, including the expansion shippers, pay for the lost-and-

³ 101 FERC ¶ 61,188 at P 23-25. Pursuant to Section 5 East Tennessee's Rate Schedule FT-A under which Patriot Project firm service is provided, East Tennessee is permitted to adjust its fuel charges once each calendar year. *See* Eighth Revised Sheet No. 11 to East Tennessee's FERC Gas Tariff, Second Revised Volume No. 1. However, East Tennessee has not filed to adjust its fuel charges for a number of years and the current system fuel and loss percentage for the existing shippers remains unchanged.

⁴ *See* Motion of NUI Energy Brokers, Inc., for Leave to Intervene in Support of Certificate Application, Docket No. CP01-415-000, filed August 24, 2001, granted in East Tennessee Natural Gas Co., 98 FERC ¶ 61,331 (2002).

unaccounted-for gas.⁵ ETG claims that Commission precedent makes clear that even a justified waiver of fuel costs does not carry with it any justification for an exemption from the charges for lost-and-unaccounted-for gas. Accordingly, ETG requests that the Commission reject footnote 5 of proposed Fourth Revised Sheet No. 4A.

5. On November 6, 2003, East Tennessee filed an answer to ETG's protest. East Tennessee claims ETG's protest is a collateral attack on the Commission's order approving East Tennessee's fuel charge treatment for the Patriot Project. Additionally, East Tennessee argues that the purpose of its compliance filing is to implement the *pro forma* tariff sheets approved in the certificate order. In addition, East Tennessee states that the provision in footnote 5 was filed on July 26, 2001, and has not changed since then. Further, East Tennessee claims that ETG raised the identical issue in that proceeding and the Commission rejected all protests related to East Tennessee's fuel charge treatment in its Preliminary Determination Order, stating that "East Tennessee's proposed fuel charge treatment is permissible."⁶ Furthermore, East Tennessee argues that ETG failed to seek rehearing of the Commission's ruling and, for that reason, is now barred from seeking rehearing on the same issue.⁷ Accordingly, East Tennessee argues that ETG should not be allowed to repeat its claims in this proceeding.

6. Finally, on December 10, 2003, ETG filed an answer to East Tennessee's answer. ETG claims that the Commission never addressed this issue in its orders; therefore, its protest is not a collateral attack on the final Commission orders. In addition, ETG claims that all of the Commission precedent cited and relied on in its October 15 protest was issued after ETG filed its August 24, 2001 protest. Therefore, ETG claims that it is entitled to bring these newer decisions to the Commission's attention in its current protest.

7. Because the answers by East Tennessee and ETG may aid the Commission in resolving the issues raised in this proceeding, the Commission will waive Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2004), and will permit the answers.

⁵ *Citing* Columbia Gas Transmission Corp., 101 FERC ¶ 61,378 (2002); Texas Eastern Transmission, LP, 101 FERC ¶ 61,120, P33 (2002); Reliant Energy Gas Transmission Co., 100 FERC ¶ 61,290 (2002); ANR Pipeline Co., 99 FERC ¶ 61,240 (2002); and Mississippi River Transmission Corp., 98 FERC ¶ 61,119 (2002).

⁶ East Tennessee Natural Gas Co., 98 FERC ¶ 61,331 at 62,397 (2002).

⁷ *Citing* Transcontinental Gas Pipe Line Corp., 97 FERC ¶ 61,034 at 61,179 (2001); Gulfstream Natural Gas System, L.L.C., 105 FERC ¶ 61,052 (2003); and City of College Station, Texas, 101 FERC ¶ 61,052 at 61,185 (2002).

Discussion

8. The Commission finds that East Tennessee has complied with the directive of Ordering Paragraph (D) of the November 20, 2002 Order to file actual tariff sheets consistent with the *pro forma* tariff sheets of the amended certificate application. However, the effective date of the tariff sheets must coincide with the in-service date of the facilities, the earliest date being November 21, 2003.⁸ Accordingly, the tariff sheets are accepted effective November 21, 2003.

9. Turning to ETG's protest, at the outset, the Commission agrees with East Tennessee that ETG would generally now be barred from raising its objection to the zero percent lost-and-unaccounted-for gas factor for the Patriot Project backhaul service. It did not seek rehearing on this issue and it is generally inappropriate to seek a change in the Commission's prior order in a protest to a compliance filing. The only issue in a compliance filing proceeding is whether the company has complied with the directives of the Commission's prior order. Therefore, protests to a compliance filing seeking changes in the rulings of a prior order generally are disfavored. On the other hand, as discussed below, as a result of ETG's protest, the Commission has reviewed the retainage percentages in East Tennessee's tariff through which it recovers fuel and lost-and-unaccounted-for gas and believes that the percentages for certain expansion projects may improperly exempt shippers from charges for lost-and-unaccounted-for gas. In this circumstance, while the Commission accepts East Tennessee's compliance filing in this proceeding as in compliance with the November 20, 2002 Order,⁹ the Commission is also instituting a section 5 proceeding in Docket No. RP04-398-000 to ensure that East Tennessee's tariff provisions concerning lost-and-unaccounted-for gas are consistent with Commission policy.

⁸ See Letter from Steven E. Tillman, General Manager, Regulatory Affairs, of East Tennessee, in Docket No. CP01-415-000, *et al.*, stating that certain portions of the Patriot project were placed in service on November 21, 2003.

⁹ East Tennessee cites to *City of College Station, Texas*, 101 FERC ¶ 61,052 (2002), in footnote 11 of its answer in support of its argument that ETG is barred from protesting due to its failure to seek rehearing. In this order, the Commission proceeded to address the issues raised by a proposal despite having found that the proposal constituted a collateral attack on earlier, final orders.

10. While the Commission has approved rates that exempt shippers from fuel charges for backhauls on the basis that backhauls do not require compression, the Commission has required pipelines to charge all shippers at least the lost-and-unaccounted-for gas component of the fuel charge, even in cases where no fuel component is charged.¹⁰ In *MRT*, the Commission rejected the pipeline's proposal to exempt shippers from charges for lost-and-unaccounted-for gas in certain transactions ("Clay County transactions") that did not require compression. The Commission found that the Commission's regulations do not permit pipelines to discount variable costs,¹¹ and since the charge for lost-and-unaccounted-for gas was a variable cost it could not be discounted.¹² According to *MRT*, the charge for lost-and-unaccounted-for gas was variable because "the greater the amount of gas that is transported, the greater the chance that some of the gas may be lost."¹³ However, the Commission stated that:

A pipeline may exempt a customer from such a charge only by showing that no gas is lost or unaccounted for in connection with service to that customer. However, by the very nature of lost and unaccounted-for-gas, it is virtually impossible to detect with any certainty which customers account for the quantities of lost and unaccounted-for-gas. Therefore, we agree . . . that it cannot be shown that there is no gas loss with respect to the Clay County transactions.¹⁴

¹⁰ Mississippi River Transmission Corp., 98 FERC ¶ 61,119 (2002) (*MRT*). See also Columbia Gas Transmission Corp., 101 FERC ¶ 61,378 (2002); Texas Eastern Transmission, LP, 101 FERC ¶ 61,120, P33 (2002); Reliant Energy Gas Transmission Co., 100 FERC ¶ 61,290 (2002); ANR Pipeline Co., 99 FERC ¶ 61,240 (2002).

¹¹ 98 FERC at 61,352 n.6 (stating "In Order No. 436, the Commission announced that it was impermissible for a pipeline to provide service at a rate that would not allow it to recover the variable costs of the service. Section 284.10 of the Commission's regulations now codifies this policy, stating that the minimum rate 'must be based on the average variable costs which are properly allocated to the service to which the rate applies.' See 18 C.F.R. §284.10 (c)(4) and (5) (2001). See generally, NorAm Gas Transmission Company, 84 FERC ¶ 61,006, at p. 61,021 (1998); Florida Gas Transmission Company, 68 FERC ¶ 61,270 (1994); Koch Gateway Pipeline Company, 81 FERC ¶ 61,313, at p. 62,444 (1997); and Williams Natural Gas Company, 75 FERC ¶ 61,023, at p. 61,075 (1996).").

¹² *Id.* at 61,352.

¹³ *Id.*

¹⁴ *Id.* at 61,353.

The November 20, 2002 Order approved incremental rates for the Patriot Project and held that East Tennessee is financially liable for the project costs and should not be able to shift such costs to its existing shippers.¹⁵ In the absence of a showing that Patriot Project shipper gas transported by backhaul will never be lost or unaccounted for, a zero percent lost-and-unaccounted-for gas factor for the Patriot Project backhaul service is contrary to section 284 of the Commission's regulations and thus unjust, unreasonable and unduly discriminatory.¹⁶ Patriot Project shippers should be responsible for any gas lost and unaccounted for the Patriot Project backhaul service. East Tennessee has not demonstrated that providing backhaul service over the Patriot Project facilities will not incur gas losses. Therefore East Tennessee's provision for lost-and-unaccounted-for gas may not be just and reasonable, and may be unjust, unreasonable and unduly discriminatory.

11. Pursuant to section 5 of the Natural Gas Act, East Tennessee is directed to either (a) show that backhaul service over Patriot Project causes East Tennessee to incur no gas losses; or (b) make an alternative proposal for assessing charges for lost-and-unaccounted-for gas for the Patriot Project. It is not clear what, if any, lost-and-unaccounted-for gas percentage is included in the 1.51 percent Patriot Project Fuel and Loss Retention Percentage. Accordingly, East Tennessee must also separately set forth the fuel percentage and lost-and-unaccounted-for gas percentage in its filing for the Patriot Project.

12. Further, it may be also unjust, unreasonable and unduly discriminatory to charge nothing for lost-and-unaccounted-for gas relative to its other expansion project services (Rocky Top, Gateway and Murray). We note that one other project, Gateway Project, reflects a zero Fuel and Loss Retention percentage, *i.e.*, it appears that the lost-and-unaccounted-for gas percentage (a component of the Fuel and Loss Retention percentage) for the Gateway Project is also zero. Therefore, East Tennessee is directed to either (a) show that all services over the Rocky Top, Gateway and Murray Projects cause East Tennessee to incur no gas losses; or (b) make an alternative proposal for assessing lost-and-unaccounted-for gas charges for these expansion projects. Also, it is not clear what,

¹⁵ See 101 FERC ¶ 61,188 at P 24 *citing to* Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement) 88 FERC ¶ 61,227 (1999), *order clarifying statement of policy*, 90 FERC ¶ 61,128 (2000), *order further clarifying statement of policy*, 92 FERC ¶ 61,094 (2000).

¹⁶ See Fourth Revised Sheet No. 4A. Footnote 3 of that sheet, which applies to system-wide service to existing shippers under Rate Schedules FT-A, FT-GS, and IT, states "Transportation Fuel and Loss Retention Percentages are inclusive of 0.6% for Gas Lost and Unaccounted For. Transportation entirely by Backhaul will incur only the 0.6% Gas Lost and Unaccounted For factor."

if any, lost-and-unaccounted-for gas percentage is included in the Fuel and Loss Retention percentages for Rocky Top and Murray Projects. Accordingly, East Tennessee must also separately set forth the fuel percentage and lost-and-unaccounted-for gas percentage in its filing for these expansion projects. East Tennessee is directed to make its filing within 30 days of the date of this order.

The Commission orders:

(A) East Tennessee's tariff sheets are accepted as in compliance with the November 20, 2002 Order, effective November 21, 2003.

(B) East Tennessee is directed to submit its filing only in Docket No. RP04-398-000, as discussed in the body of this order, within 30 days of the date of this order.

(C) Notice of this proceeding will be published in the *Federal Register*. Persons having an interest in the Docket No. RP04-398-000 proceeding will be allowed to intervene, in accordance with the Commission's regulations.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.