

145 FERC ¶ 61,179
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Rockies Express Pipeline LLC

Docket No. RP13-969-000

ORDER ON PETITION FOR DECLARATORY ORDER

(November 26, 2013)

1. On June 6, 2013, Rockies Express Pipeline LLC (Rockies) filed a petition for declaratory order (Petition) pursuant to Rule 207(a)(2)¹ of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission or FERC). Rockies seeks a ruling that the Most Favored Nations rights of its Foundation and Anchor Shippers will not be triggered by potential transactions with other shippers for firm transportation which have (1) an east to west primary path, (2) a term of one year or longer, and (3) service in only one rate zone. As discussed below, the Commission grants Rockies' Petition and finds that the potential transactions do not trigger the Most Favored Nations rights of Rockies' Foundation and Anchor Shippers.

I. Background

2. Rockies is a 1,679-mile-long natural gas pipeline extending from Colorado and Wyoming to Clarington, Ohio. Rockies' system was constructed in stages and became fully operational in November 2009, providing a total capacity of 1.8 billion cubic feet (Bcf) per day. It spans eight states and has three rate zones (Zones 1, 2, and 3). Zone 1 rates apply to movements between the Opal Hub and the Wamsutter Hub in Wyoming and the Cheyenne Hub in Wyoming. Zone 2 rates apply to movements between the Cheyenne Hub and an interconnection with Panhandle Eastern Pipe Line Company (Panhandle) in Audrain, Missouri. Zone 3 rates apply to movements between the Panhandle interconnection and Clarington, Ohio.

¹ 18 C.F.R. § 385.207(a)(2) (2013).

3. Prior to beginning service, Rockies entered into negotiated rate agreements with Anchor Shippers and Foundation Shippers. An Anchor Shipper is a shipper that contracted for capacity of at least 200,000 Dth/day prior to Rockies' construction. Rockies has four anchor shippers on its system: Sempra Rockies Marketing, LLC; BP Energy Company (BP); Ultra Resources, Inc. (Ultra); and ConocoPhillips Company (ConocoPhillips). In the Anchor Shipper negotiated rate agreements, all primary receipt points are in Zone 1 and all primary delivery points are in Zone 3.

4. The Anchor Shipper negotiated rate agreements include a Most Favored Nations clause in Article 1.5, which provides in relevant part:

Shipper's rate shall be no higher than the lowest rate applicable to any other shipper under a Firm Transportation Service Agreement for service on the Project, excluding rates applicable to Foundation Shippers, short-term transactions (i.e., 12 or fewer consecutive months) or seasonal transactions....²

5. Section 17.5(A) of Rockies' GT&C also includes a provision providing for Most Favored Nations treatment for Anchor Shippers:

An Anchor Shipper's Negotiated reservation rate applicable to the Capacity awarded prior to the Rockies Express 2006 expansion certificate application shall be no higher than the lowest Negotiated reservation rate applicable to any other Shipper under a Firm Transportation Service Agreement covering the same rate zones and/or facilities, excluding Negotiated reservation rates applicable to Foundation Shippers and rates applicable to short-term transactions (i.e., twelve or fewer consecutive Months) or seasonal transactions.

6. There is one foundation shipper, Encana Marketing (USA), Inc. (Encana), on Rockies' system. A Foundation Shipper is a shipper that prior to Rockies' certification was awarded capacity of 500,000 Dth/Day or greater. Encana's negotiated rate agreement lists primary receipt points in Zone 2 and primary delivery points in Zone 3. The Foundation Shipper negotiated rate agreement with Encana includes a Most Favored Nation provision, which is similar to the Most Favored Nations clause in the Anchor Shipper contracts:

Shipper's rate shall be no higher than the lowest rate applicable to any other shipper under a Firm Transportation Service Agreement for service on the

² Rockies June 6, 2013 Petition, Appendix A at 22, 40, 57, 73.

Project, excluding rates applicable to short-term transactions (i.e., less than 12 consecutive months).³

Section 17.5(B) of Rockies' GT&C also addresses the Most Favored Nations rights of Foundation Shippers, providing:

A Foundation Shipper's Negotiated reservation rate applicable to the Capacity awarded prior to the Rockies Express 2006 expansion certificate application shall be the lowest Negotiated reservation rate contained in any Firm Transportation Service Agreement applicable to the same rate zones and/or facilities, excluding rates applicable to short-term transactions (i.e., twelve or fewer consecutive Months) or seasonal transactions.

II. Petition for Declaratory Order

7. Rockies' Petition seeks a ruling that the Most Favored Nations provisions in the Foundation and Anchor Shipper agreements and its tariff will not be triggered by potential agreements with other shippers for firm transportation service that (1) has an east to west primary path, (2) is for a term of one year or longer, and (3) is limited to service in one rate zone. Rockies states that it filed the Petition following increased demand to transport natural gas in a westward direction within Zone 3 from the Marcellus and Utica Shale to markets such as Chicago and St. Louis.

8. Rockies' Petition claims that the unambiguous terms of the Anchor and Foundation Shipper agreements support its Petition. Rockies asserts that the preamble of each Anchor Shipper and Foundation Shipper agreement defines "Project" in terms of transportation across multiple zones "from" points on the western part of the system "to" points on the eastern part of the system. Thus, Rockies asserts that "service on the Project" as it appears in the Most Favored Nations provisions of the Foundation and Anchor Shipper agreements refers only to service across multiple rate zones in a west to east direction. Rockies further emphasizes that all Anchor and Foundation Shipper agreements specify primary receipt points that are west of, and in a different rate zone than, the specified primary delivery points.

³ *Id.* at 6.

9. Rockies asserts that the Most Favored Nations clauses in the Foundation and Anchor Shipper agreements, not its tariff, control the relationship between Rockies and each of its Foundation and Anchor Shippers.⁴ However, Rockies also seeks confirmation that section 17.5 of its GT&C, which also sets forth Most Favored Nation provisions applicable to Anchor and Foundation Shippers, is not triggered by the one-zone, east to west transactions described in Rockies' Petition. Noting that section 17.5 of Rockies GT&C provides that Foundation and Anchor Shippers shall have the lowest firm reservation rate applicable to "the same rate zones and/or facilities,"⁵ Rockies emphasizes that every Anchor Shipper's primary receipt points are in Zone 1 and every Anchor Shipper's delivery points are in Zone 3. For Encana, the sole Foundation Shipper, Rockies states the primary receipt points are in Zone 2 and the delivery points are in Zone 3. Thus, Rockies contends that the Anchor and Foundation Shippers do not have firm service through the "same rate zones and/or facilities" as the one-zone, east to west transportation transactions described by Rockies in its Petition.

10. Rockies argues that extrinsic evidence supports its interpretation of the Foundation and Anchor Shipper agreements. Rockies contends that statements made during its open seasons and its certificate proceedings contemplated service with receipt points in the west and delivery points in the east.⁶ Along similar lines, Rockies states that the precedent agreements with Foundation and Anchor Shippers, which were entered into prior to construction of the Rockies system, further describe various segments of the Rockies System as providing transportation from western locations to eastern locations.⁷ Rockies states that the precedent agreements with Anchor Shippers include a Most Favored Nation clause which states that the Anchor Shipper rates shall be no higher than "the lowest rate applicable to any other shipper under a Firm Transportation Service Agreement for all three Certificate Segments of the Project..."⁸ Rockies states that this

⁴ Rockies Petition at 21 n.50 (citing *Southern LNG, Inc.*, 130 FERC ¶ 61,146, at P 23 (2010)).

⁵ Rockies Petition at 28 (quoting Sections 17.5(A) and 17.5(B) of Rockies' GT&C).

⁶ *Id.* at 8 (citing Rockies Petition, Appendix B; *Entrega Gas Pipeline Inc.*, 112 FERC ¶ 61,177, *order on reh'g*, 113 FERC ¶ 61,327 (2005); *Rockies Express Pipeline LLC*, 119 FERC ¶ 61,069, at P 1 (2007); *Rockies Express Pipeline LLC*, 116 FERC ¶ 61, 272, at PP 1, 8 n.8, 38, & 40 (2006)).

⁷ *Id.* at 26 (citing Rockies Petition, Appendix B).

⁸ *Id.* (citing Rockies Petition, Appendix C).

extrinsic evidence supports its assertion that one-zone, east to west transactions do not trigger the Most Favored Nation provisions in the Foundation and Anchor negotiated rate agreements.

11. Rockies also argues that the history of its system supports its Petition. Rockies states that the Most Favored Nations clauses do not contemplate east to west movements because its pipeline was designed with single-direction compressors for west to east flow. Rockies states that in 2011 it implemented a new backhaul service (Rate Schedule BHS), in order to provide day-to-day backhaul service which was not contemplated when the system was constructed.⁹ Rockies further argues that the Commission has held that the primary rights in a transportation contract are defined by the direction of contract flow,¹⁰ and, from this principle, Rockies deduces that the west to east movements in the Anchor and Foundation Shipper agreements are fundamentally different from the east to west movement described in Rockies' Petition.

12. Rockies also argues that public interest and public policy support its position. Rockies asserts that unless it can be certain the Most Favored Nations rights of Anchor and Foundation Shippers will not be triggered by the potential transactions, it will not enter into these potential transactions. Rockies states that denial of its Petition will inhibit the full utilization of the Rockies system, increase consumer costs, lower netbacks to Appalachian natural gas producers, reduce competition in the marketplace, and potentially require the construction of duplicative pipeline facilities.

⁹ Although not acknowledged by Rockies Petition, east to west backhaul service has always been available under Rockies' standard Rate Schedule FTS. Rockies FERC Gas THIRD REVISED VOLUME NO. 1, Currently Effective Rates - FTS, 0.0.0. *See also* Rockies, Request for Rehearing, Docket No. RP11-2096-001, at 6-8 (filed July 18, 2011). The Rate Schedule BHS filed by Rockies in 2011 merely provides a more limited backhaul service at a lower rate than the Rate Schedule FTS recourse rate.

¹⁰ Rockies Petition at 27 (citing *Rockies Express Pipeline LLC*, 135 FERC ¶ 61,253, at P 14 (2011); *Tennessee Gas Pipeline Co.*, 99 FERC ¶ 61,017, at P 91 (2002); *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, 101 FERC ¶ 61,127, at P 48 (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)).

III. Notice, Protests, Answers, and Motions to Lodge

13. Notice of Rockies' Petition was published in the Federal Register,¹¹ with comments, protests, and interventions due July 12, 2013. Protests were filed by Encana Marketing (USA) Inc. (Encana); Ultra Resources, Inc. (Ultra); and Indicated Shippers.¹² Pursuant to Rule 214 (18 C.F.R. § 385.214 (2013)), all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

14. On July 29, 2013, Rockies filed an answer to the protests. On August 6, 2013, Indicated Shippers filed an answer to Rockies' answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹³ prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept the answers filed by Rockies and Indicated Shippers because they have provided information that assisted our decision-making process.

15. On September 20, 2013, Indicated Shippers filed a motion to lodge Rockies' Advance Notification of Construction of Facilities of its Seneca Lateral Project in Docket No. CP13-539-000.¹⁴ On September 17, 2013, Ultra filed a motion to lodge its September 13, 2013 protest in Docket No. CP13-539-000 relating to Rockies' Advance Notification of Construction of Facilities filing. On October 2, 2013, Rockies filed an answer to both motions. The Commission grants Indicated Shippers Motion to the extent that Indicated Shippers are using Rockies' statements and actions in Docket No. CP13-539-000 to challenge the veracity of Rockies' representations in this proceeding. However, we deny Ultra's motion. Ultra seeks to raise broader concerns regarding Rockies' construction of the Seneca Lateral. Ultra's arguments go beyond the scope of this proceeding, which relates solely to the proper interpretation of the Most

¹¹ 78 Fed. Reg. 36,769 (2013).

¹² The Indicated Shippers include BP Energy Company, ConocoPhillips Company, and WPX Energy Marketing, LLC.

¹³ 18 C.F.R. § 385.213(a)(2) (2013).

¹⁴ The filing, pursuant to section 284.11(b) of Commission regulations, (18 C.F.R. § 284.11(b) (2013)), was to give Commission staff time to ensure environmental compliance of significant construction activities for facilities which Rockies claims will be used solely for service under section 311 of the NGPA.

Favored Nation's provisions in Rockies tariff and its Foundation and Anchor Shipper agreements.

A. Protests

16. Encana asserts that the Commission should deny Rockies' Petition because it raises contract interpretation issues more appropriately addressed in a judicial as opposed to an administrative forum. Encana explains that the Commission and the courts have concurrent jurisdiction over contract interpretation issues. Encana states that this contractual dispute lacks the characteristics which would prompt the Commission to exercise its jurisdiction. Encana states that the Commission will exercise its jurisdiction if (1) the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) the case is important in relation to the regulatory responsibilities of the Commission.¹⁵ Encana argues that none of these factors are present in the instant proceeding, and, thus, that the Commission should deny the Petition and defer to the judicial interpretation of the contracts.

17. Encana, Indicated Shippers, and Ultra also state that the negotiated rate agreements and the tariff unambiguously provide that the Most Favored Nations clauses are triggered by the one-zone, east to west firm service described by Rockies' Petition. Accordingly they assert that the Petition should be denied.

18. Encana, Indicated Shippers, and Ultra state that had the parties intended to preclude one-zone or east to west transactions from triggering the Most Favored Nations clause, the parties would have included such a specification in the agreements. They contend that the Foundation and Anchor Shipper agreements explicitly exclude certain transactions (e.g. transactions for a term of less than 12 consecutive months), but they note that the agreements do not mention an exclusion for one-zone or for east to west transactions. Encana, Indicated Shippers, and Ultra also dispute Rockies construction of the phrase "service on the Project." They assert that there is nothing in the preamble of the Anchor and Foundation Shipper agreements that defines "service on the Project" as requiring service to be from west to the east. Rather, they state that the term "Project" is defined with a simple description of Rockies' facilities.

19. On the contrary, Indicated Shippers and Ultra state that the Foundation and Anchor Shipper agreements contemplate "service on the Project" to include both (a) forward haul and backhaul movements and (b) service in any and all zones. Indicated

¹⁵ Encana Protest at 6 (citing *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979)).

Shippers and Ultra cite to article 2 of the Anchor Shipper agreements, which they state defines service under the contract to be the initial primary receipt and delivery points set forth in the FTSA, “as well as at all other existing and future primary [and secondary] receipt and delivery points on the Project that are located in Zones 1, 2, and 3 of the Rockies system...”¹⁶ Thus, they contend that the contracts are not limited to service only across multiple zones and in a west to east direction as claimed by Rockies.

20. Encana, Indicated Shippers, and Ultra also contend that Rockies’ tariff is contrary to the request in Rockies’ Petition. Noting that the tariff language states that the Most Favored Nations rights are triggered by service over “same rate zones and/or facilities,” Encana argues that the potential transactions trigger the Most Favored Nations rights in GT&C Section 17.5 because the transactions use the same facilities, i.e. Rockies’ pipeline, needed to provide firm transportation service to Rockies’ Foundation and Anchor Shippers. Indicated Shippers argue that GT&C section 17.5 is contrary to Rockies’ Petition because the tariff language does not impose any geographic limitations on the types of transactions which trigger the Most Favored Nations rights.

21. Encana, Ultra and Indicated Shippers also assert that the extrinsic evidence in the case supports the conclusion that the potential transactions would trigger the Most Favored Nation provision. Encana contends that its precedent agreement demonstrates that Rockies’ Petition is inconsistent with the parties’ intent. Encana’s Foundation Shipper precedent agreement states:

Transporter shall provide Shipper a most-favored nation rate guarantee that the rate for Shipper under the FTSA (for any Segment and for any Interim Service and excluding any Service Bonuses, if applicable) shall be equal to the lowest rate provided to any shipper for Comparable Service on the Project for the term of the FTSA’s ... “Comparable Service” shall mean service for a term greater than or equal to one year”¹⁷

As with the Foundation Shipper agreement, Encana argues that if the parties had intended to limit the scope of the Most Favored Nations provision so that it only applied to west to east movements or movements across more than one rate zone – they would have described such a limitation in the precedent agreement.

¹⁶ Indicated Shippers Protest at 5-6 (citing Rockies’ Petition, Appendix A, at 23, 40).

¹⁷ Encana Protest at 11-13 (citing Rockies Petition, Appendix C at 4-5).

22. Indicated Shippers and Ultra assert that statements by Rockies and the Commission in the course of Rockies' certificate proceeding undermine the claims made in Rockies' Petition. Indicated Shippers state that Rockies' 2006 application described the proposed Most Favored Nation provision as follows: "Anchor Shippers were afforded Most Favored Nation rights with respect to the negotiated reservation rates afforded to all long-term firm shippers except Foundation Shippers."¹⁸ Indicated Shippers and Ultra note that the Commission used the same language in its order approving the certificate.¹⁹ They contend that the use of the term "all" is facially inconsistent with Rockies' contentions in its Petition. Ultra adds that in its certificate proceedings, Rockies specifically addressed other circumstances in which the Most Favored Nations would not apply, such as noting that the proposed rate treatment associated with the U.S. Minerals Management Service of the Department of Interior's Royalty In Kind program would not trigger the Most Favored Nations rights. Yet, Ultra states Rockies never specified that the Most Favored Nations rights would not be triggered by a one-zone, backhaul movement.

23. Ultra also states that Rockies' position is undercut by the open season materials it distributed to its shippers. Ultra quotes the Open Season materials distributed by Rockies, which provide that "[a]ll Anchor Shippers will be afforded Most Favored Nations rights, with respect to the rates afforded to *all shippers* except for Foundation Shippers."²⁰

24. Encana disputes Rockies' assertion that the design of its facilities supports its interpretation of the contract. Encana argues that delivery points on Rockies were over-sized relative to the original firm shippers' primary delivery point rights and Encana states that the over-sized delivery points provided flexibility for secondary delivery points along the Rockies mainline. Encana states that the over-sized meters increased the rates paid by the Foundation and Anchor Shippers.

25. Encana, Ultra, and Indicated Shippers claim that Commission approval of Rockies' Petition could lead to unfair results. They emphasize that the Foundation and Anchor Shipper agreements embody a substantial financial commitment underwriting the

¹⁸ Indicated Shipper Protest at 11 (citing Docket No. CP06-354-000, "Application of Rockies Express Pipeline for Section 7(c) Certificate for REX West Project," at 30 (filed May 31, 2006)); Ultra Protest at 17 (same).

¹⁹ Indicated Shippers Protest at 6 (citing *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 24 (2006)); Ultra Protest at 18 (same).

²⁰ Ultra Protest at 17 (citing Petition, Appendix B at 11)

construction of Rockies. As a result, they state that the Commission should not deny Anchor and Foundation Shippers the Most Favored Nations benefits that were negotiated by the parties as an integral part of the negotiated rate agreements. Ultra further argues that because the Foundation and Anchor Shipper agreements had been filed with the Commission and incorporated into Rockies' tariff, Rockies' Petition violates the filed rate doctrine. To the extent the existing record doesn't currently support rejecting Rockies proposal, Encana, Indicated Shippers, and Ultra recommend that the Commission set this matter for an evidentiary hearing.

B. Answers

26. In its answer, Rockies maintains that the Commission should act on its Petition instead of deferring to the courts. Rockies argues that failure to act by the Commission could lead to conflicting decisions by different courts regarding the meaning of the Most Favored Nation provisions. Rockies also reiterates its position that the Most Favored Nations rights are not triggered by the potential transactions.

27. Responding to Rockies' answer, Indicated Shippers assert that Rockies' tariff sets forth rates for firm backhaul service and firm Zone 3 to Zone 3 service, and that Rockies has always contemplated providing service, including backhaul service, over any portion of its system. Also countering Rockies' arguments, Indicated Shippers further emphasize that a contract interpretation question is based upon the intent of the parties to the contract, not what Rockies (or any other entity) claims is in the public interest.

C. Motion to Lodge and Rockies' Answer

28. In the Motion to Lodge, Indicated Shippers state that Rockies' September 20, 2013, Advance Notification of Construction of Facilities represents that Rockies is constructing the "Seneca Lateral" from the Markwest Energy Partners L.P., Seneca Processing Plant, in Noble County, Ohio, to the Rockies mainline. Indicated Shippers note that the Advanced Notification of Construction represents that once constructed, this line will be used to transport natural gas from the eastern edge of the Rockies' system to markets in the West. Indicated Shippers state that Rockies' actions in constructing the Seneca Lateral undermine Rockies claim that Commission approval of its Petition are essential for Rockies to provide the potential east-to-west movements within Zone 3.

29. In its answer to the Motion to Lodge, Rockies states that although it filed the notice, it has yet to begin construction. Rockies reiterates it has not and will not enter into any potential transactions that Rockies believes could be used to argue that the Most Favored Nations rights of Foundation and Anchor Shippers have been triggered.

IV. Discussion

A. The Commission's Exercise of Jurisdiction

30. The Commission will exercise its jurisdiction over this dispute regarding the Anchor and Foundation Shipper Most Favored Nations provisions. In cases of contract interpretation, the Commission has concurrent jurisdiction with the courts.²¹ In determining whether to assert its primary jurisdiction over disputes concerning jurisdictional contracts, the Commission considers three factors: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.²² Whether to exercise primary jurisdiction is a matter solely within the Commission's discretion.²³

31. Based upon these factors, we exercise our discretion to exert primary jurisdiction over the contractual dispute raised by Rockies' Petition. The Commission has special expertise to interpret the terms of Rockies' FERC tariff, which was incorporated by reference into the Anchor and Foundation Shipper agreements and which is part of the dispute in this proceeding. Because the Most Favored Nations clause affects FERC regulated rates, the Petition raises issues that are central to the regulatory responsibilities of the Commission. Finally, there is a need for uniformity because the dispute relates to a term in Rockies' FERC tariff and because this particular dispute affects multiple shippers on Rockies' system which are subject to either the same or very similar contractual Most Favored Nation terms.

B. The Most Favored Nations Provisions

32. The Commission grants Rockies' Petition. The potential transactions do not trigger the Anchor and Foundation Shipper Most Favored Nations rights because the potential transactions are for transportation entirely within Zone 3, and, thus do not apply to the same rate zones or facilities as the Anchor and Foundation Shipper agreements.

33. Rockies' Petition requests Commission clarification of the Most Favored Nations rights which apply to Anchor and Foundation Shippers pursuant to their respective

²¹ *Bay Gas Storage Company, Ltd.*, 131 FERC ¶ 61,034, at P 21 (2010).

²² *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC at 61,322.

²³ *Bay Gas*, 131 FERC ¶ 61,034 at P 21.

negotiated rate agreements. The Commission interprets the Anchor and Foundation Shipper agreements pursuant to traditional rules of contract interpretation. A contract “is ambiguous when it is ‘reasonably susceptible to different constructions or interpretations.’”²⁴ To determine whether a contract is ambiguous, the Commission looks to the four corners of the agreement and considers the entire instrument as a whole.²⁵ The Commission considers extrinsic evidence if the terms of the contract are ambiguous.²⁶ As discussed below, the Most Favored Nations provisions are ambiguous due to differences between (a) the Most Favored Nations provision in section 17.5 of Rockies’ GT&C and (b) the description of the Most Favored Nations rights in article 1.5 of the Anchor Shipper agreements and article 1.4 of the Foundation Shipper agreement. However, based upon a consideration of all the evidence, the Commission finds that the Anchor Shipper and Foundation Shipper Most Favored Nations rights are not triggered by the potential transactions.

34. The Anchor and Foundation Shipper agreements incorporate Rockies’ tariff by reference.²⁷ The Most Favored Nations provision in section 17.5(A) of Rockies GT&C states that the Anchor Shipper rates “shall be no higher than the lowest Negotiated reservation rate applicable to any other Shipper under a Firm Transportation Service Agreement covering the same rate zones and/or facilities ...”²⁸ All Anchor Shippers have primary receipt points in Zone 1 and primary delivery points in Zone 3. If an Anchor Shipper is moving volumes from a receipt point in Wyoming (Zone 1) to a delivery point in Ohio (Zone 3), that shipper’s transportation is not “covering the same rate zones and/or facilities” as the potential transactions, which are for service entirely within Zone 3.²⁹ Thus, under section 17.5(A) of Rockies GT&C, the potential transactions do not trigger Anchor Shipper Most Favored Nations rights.

²⁴ *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (citations omitted).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *E.g.* Rockies Petition, Appendix A at p. 30 (“This Agreement includes all other terms and conditions of Transporter’s FERC Gas Tariff, Volume No. 1....”).

²⁸ Rockies GT&C, Sections 17(A) and 17(B).

²⁹ Indicated Shippers and Ultra assert that article 2 of the Anchor Shipper agreements allows them to acquire new primary point rights which could be used for a backhaul movement within Zone 3. Indicated Shippers Protest at 5-6 (citing Rockies’ Petition,

(continued...)

35. Similarly, the Most Favored Nations provision in section 17.5(B) Rockies GT&C states that Foundation Shipper rates, “shall be the lowest Negotiated reservation rate contained in any Firm Transportation Service Agreement applicable to the same rate zones and/or facilities....” Encana, the sole Foundation Shipper, has primary receipt points in Zone 2 and primary delivery points in Zone 3. If the Foundation Shipper is transporting gas from a receipt point in Zone 2 to a delivery point in Zone 3, the Foundation Shipper’s rate is not “applicable to the same rate zones and/or facilities” as the rate paid in the potential transactions for movements entirely within Zone 3. Thus, under section 17.5(B) of Rockies GT&C, the potential transactions do not trigger the Foundation Shipper’s Most Favored Nations rights.

36. The dispute arises because article 1.5 of the Anchor Shipper agreement and article 1.4 of the Foundation Shipper agreements contain different language than section 17.5 of Rockies’ GT&C. Specifically, article 1.4 of the Foundation Shipper agreement and article 1.5 of the Anchor Shipper agreements do not include the language from Rockies’ GT&C that Most Favored Nations rights are only triggered by a transaction covering the “same rate zones and/or facilities.” Rather, the Most Favored Nations provision in the negotiated rate contracts states that Foundation and Anchor Shippers transportation rates shall be lower than any other shipper receiving “firm transportation service on the Project....”³⁰ Indicated Shippers, Encana, and Ultra seize upon this distinction to argue that the one-zone potential transactions are “service on the Project,” and thus, trigger the Most Favored Nations rights of the Anchor and Foundation Shippers.

37. Accordingly, the Commission must reconcile the Most Favored Nations provision in section 17.5 of Rockies’ GT&C with the Most Favored Nations Provisions in section 1.5 of the Anchor Shipper agreements and section 1.4 of the Foundation Shipper agreement. Based upon our analysis of the evidence, we conclude that the Anchor and Foundation Shipper Most Favored Nations rights are not triggered by the potential transactions, which are entirely within Zone 3.

38. The canons of contract interpretation support the position that the Anchor Shipper and Foundation Shipper Most Favored Nations rights are not invoked by the one-zone

Appendix A, at 23, 40). However, based upon the record in this proceeding, no Anchor Shippers has switched primary points to make such a one-zone movement. We thus need not address such a hypothetical circumstance here.

³⁰ Like section 17.5 of Rockies GT&C, these provisions only specify that the Most Favored Nations rights won’t be triggered by short term transactions, and, in the case of Anchor Shippers, seasonal transactions and the Foundation Shipper rates.

potential transactions. Canons of contract interpretation require that (1) a contract should be interpreted as an integrated whole which gives meaning and effect to all contractual terms; (2) provisions of a contract should normally not be interpreted as being in conflict; and (3) a more particular and specific clause of a contract should prevail over a more general clause.³¹

39. Understood using these principles, section 17.5 of Rockies' GT&C merely adds additional detail to the more generic Most Favored Nations provisions in article 1.5 of the Anchor Shipper agreements and article 1.4 of the Foundation Shipper agreement. Section 17.5 of Rockies GT&C clarifies that the Anchor and Foundation Shipper Most Favored Nations rights are only activated by "service on the Project" applicable to the "same rate zones/facilities" as the service of the Anchor and Foundation Shippers. Such an interpretation gives full effect to all the terms of the agreements, including those tariff terms incorporated by reference, and interprets all the terms of agreements as consistent. Furthermore, under this interpretation, the specific term in section 17.5 of Rockies GT&C, which requires that service cover "the same rate zones and/or facilities," prevails over the more general language referring to "service on the Project" in article 1.4 of the Foundation Shipper agreement and article 1.5 of the Anchor Shipper agreements.

40. In contrast, the protestors' interpretation, which allows the one-zone potential transactions to trigger the Most Favored Nations rights, renders meaningless the provision in Section 17.5 of Rockies GT&C providing that the Most Favored Nations rights are only triggered by transactions covering the "same rate zones and/or facilities." The protestors' interpretation also permits general language relating to "service on the Project" to prevail over the more specific term providing that only transactions applicable to the "same rate zones and/or facilities" trigger the Most Favored Nations rights. Citing another canon of contract interpretation, the protestors also argue that if the parties intended for only service covering the same rate zones to trigger the Most Favored Nations rights, then this term would have been included in section 1.5 of the Anchor Shipper agreement and section 1.4 of the Foundation Shipper agreement. However, because Rockies' tariff was incorporated by reference, verbatim repetition of section 17.5 of Rockies' GT&C was not necessary.

41. The subsequent conduct of the parties further confirms that only transactions covering "the same rate zones and/or facilities," as specified by section 17.5 of Rockies tariff, trigger the Most Favored Nations rights. Commission regulations require pipelines to file for Commission approval of contracts that include material deviations from the pipeline's form of service agreement.³² Rockies filed the Anchor and Foundation

³¹ *E.g. Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at P 25 (2004).

³² 18 C.F.R. 154.1(d) (2013).

Shipper agreements with the Commission in Docket No. RP06-200-051. In that filing, Rockies characterized the Anchor and Foundation Shipper agreements' Most Favored Nations provisions as consistent with the Most Favored Nations provision in section 17.5 of Rockies GT&C.³³ No party filed a protest objecting to Rockies characterization. In accepting the Anchor and Foundation Shipper agreements, the Commission did not contradict Rockies assertions that the tariff and the contract were consistent.³⁴

42. In addition, section 17.5 of Rockies GT&C specifically relates to the limited class of Anchor and Foundation Shippers, not to shippers generally. It would be highly unusual for Rockies to include a tariff provision relating to such a narrow class of shippers and then for Rockies and every one of those same shippers to negotiate contracts which depart from the meaning of the tariff term. Given that the Most Favored Nation provision in section 17.5 of Rockies GT&C specifically references the narrow class of

³³ Rockies, Transmittal, Docket No. RP06-200-051, at p. 7-8 (filed February 20, 2009) (stating "The language in the Negotiated Rate Agreements is consistent with the Most Favored Nations rights referenced in Section 17.5 of the Tariff, and does not otherwise expand such rights. As such, Rockies believes that the Most Favored Nations provisions in the Negotiated Rate Agreements should not be considered as non-conforming provisions.").

³⁴ Relying upon *Southern LNG, Inc.*, 130 FERC ¶ 61,146 (2010), Rockies states that Article 1.4 of the Foundation Shipper agreement and Article 1.5 of the Anchor Shipper agreement prevail over the Most Favored Nations provisions in Section 17.5 of Rockies' GT&C. However, the facts of this proceeding differ from the circumstances described by the Commission in *Southern LNG*. In *Southern LNG*, the Commission addressed a situation in which the parties (a) filed a service agreement as non-conforming with the Commission, (b) identified in the service agreement a specific material deviation from the pipeline's tariff, and (c) the Commission approved this non-conforming provision as permissible. Under those circumstances, "[w]hen the Commission has approved an individual service agreement with such material deviations or negotiated rates, it is reasonable that the approved material deviation or negotiated rate control over any conflict with the rate schedule." *Id.* P 23. In contrast, as noted above, when Rockies filed the Anchor and Foundation Shipper agreements with the Commission, Rockies represented to the Commission (without any objection from any party) that the Most Favored Nations provisions did not deviate from section 17.5 of Rockies' GT&C. Accordingly, the Commission's approval of the filed agreements was not a Commission finding that the Anchor and Foundation Shipper agreements established different Most Favored Nations rights from those in section 17.5 of Rockies' GT&C.

Anchor and Foundation Shippers, it is reasonable to presume that the negotiated rate agreement was intended to be consistent with section 17.5 of Rockies' GT&C.

43. The Commission is not persuaded to a contrary view by protestors' arguments based upon certain extrinsic evidence in this proceeding. The Indicated Shippers and Ultra rely upon generic statements in Rockies' open season documentation,³⁵ Rockies' filings with the Commission,³⁶ and the Commission orders approving Rockies' certificate.³⁷ These documents make general statements that Anchor Shippers have Most Favored Nations rights with respect to rates afforded to all long-term firm shippers except Foundation Shippers. It is true that these statements do not specify that Anchor Shipper Most Favored Nations rights are only invoked by transactions in the same rate zone as the Anchor Shipper's contracted service. However, these general statements also do not state that the parties intend to depart from the terms of section 17.5 of Rockies' GT&C, which provide that the Most Favored Nations rights are only triggered by service applicable to the same "rate zones and/or facilities" as the Anchor Shipper's service. To the extent that these general statements provide any insight into the parties' intentions, such general statements are not as persuasive as the (a) specific terms of Rockies' tariff, which was incorporated by reference into the negotiated rate agreements, (b) the canons of contract interpretation, (c) the actions of the parties when the Anchor Shipper and Foundation Shipper agreements were filed with the Commission and (d) the specific reference in section 17.5 of the tariff to the narrow class of Anchor and Foundation shippers.

44. Encana relies heavily upon its precedent agreement which states that the Foundation Shipper rate shall be "equal to the lowest rate provided to any shipper for

³⁵ Ultra Protest at 17 (citing Rockies Open Season Materials, Petition, Appendix B at 11, which states provided "[a]ll Anchor Shippers will be afforded Most Favored Nations rights, with respect to the rates afforded to *all shippers* except for Foundation Shippers."); Indicated Shippers Protest at 11 (same).

³⁶ Ultra Protest at 17 (citing Rockies' 2006 Application, Docket No. CP06-354-000, which states "Anchor Shippers were afforded Most Favored Nations rights with respect to the negotiated reservation rates afforded to all long-term firm shippers except Foundation Shippers."); Indicated Shippers Protest at 11 (same).

³⁷ Indicated Shippers (citing Rockies Express Pipeline LLC, 116 FERC ¶ 61,272, at P 24 (2006), which states "Anchor Shippers are afforded most favored nations rights with respect to the negotiated reservation rates afforded to all long-term firm shippers except Foundation Shippers, as well as annual contractual rollover rights and ROFR identical to those afforded to Foundation Shippers); Ultra Protest at 18 (same).

comparable service.” The precedent agreement defines “comparable service” merely as “service for a term greater than or equal to one year,”³⁸ and the precedent agreement does not include a provision resembling section 17.5 of Rockies GT&C which states that the Most Favored Nations provision is only triggered by an agreement for service applicable to the “same rate zones and/or facilities....” However, the other evidence in this proceeding suggests that section 17.5 of Rockies’ GT&C more properly reflects the intentions of the parties. Particularly, Encana is the only Foundation Shipper. Section 17.5(B) of Rockies’ GT&C, which applies solely to Encana, states that the Foundation Shipper’s (i.e. Encana’s) Most Favored Nations rights are only invoked by service applicable to the “same rate zones and/or facilities.”³⁹ Given the weight of the evidence, we conclude that the reasonable interpretation is that for the Anchor and Foundation Shipper Most Favored Nations clauses to be triggered, the transaction must cover the “same rate zones and/or facilities” as the applicable Anchor Shipper and Foundation Shipper agreement.

45. Because this holding is merely interpreting the Most Favored Nations rights which have been on file with the Commission, Ultra’s argument that Rockies’ Petition violates the filed rate doctrine is not applicable. Moreover, Ultra has made no showing that this decision will enable Rockies to charge a rate to either Anchor or Foundation Shippers that differs from the tariff and other negotiated agreements on file with the Commission.

46. Accordingly, the Commission grants Rockies’ Petition, and finds that the one-zone potential transactions are for service using different “rate zones and/or facilities,” than the Anchor and Foundation Shipper service, and thus, do not trigger the Most Favored Nations rights of the Foundation and Anchor Shippers.⁴⁰

³⁸ Encana Protest at 11-12 (citing Rockies Petition, Appendix C at 4-5. The precedent agreements with Anchor Shippers provided that their rates “shall be no higher than the lowest rate applicable to any other shipper under a Firm Transportation Service Agreement for all three Certificate Segments of the Project.”³⁸ This term provides no support for the proposition that the parties intended the Anchor Shipper Most Favored Nations rights to be triggered by movement in only one zone.

³⁹ Section 17.5 of Rockies’ GT&C.

⁴⁰ In its filings, Rockies states emphatically that it has not and will not enter into potential transactions if there is a chance these potential transactions could trigger the Anchor and Foundation Shipper Most Favored Nations rights. Rockies’ Petition at 1; Rockies, October 2 Answer to Motion to Lodge at 10. We note that Rockies’ existing Rate Schedule FTS currently allows for transactions that appear to be the same or resemble the potential transactions, i.e. transactions for west to east movements wholly

(continued...)

The Commission orders:

Rockies' Petition for Declaratory Order is granted as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

within Zone 3. Rockies FERC Gas THIRD REVISED VOLUME NO. 1, Currently Effective Rates - FTS, 0.0.0. *See also* Rockies, Request for Rehearing, Docket No. RP11-2096-001, at 6-8 (filed July 18, 2011). Given Rockies' statements about not entering into potential transactions in its pleadings, we emphasize that Commission policy prohibits Rockies from refusing to provide an operationally available tariff service to a shipper willing to pay the appropriate rate.