

132 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

XTO Energy Inc. and
Cross Timbers Energy Services, Inc.

v.

Docket No. RP10-569-000

Midcontinent Express Pipeline LLC

ORDER DENYING COMPLAINT

(Issued September 3, 2010)

1. On April 1, 2010, XTO Energy Inc. (XTO) and Cross Timbers Energy Services (Cross Timbers) filed a complaint, pursuant to Rule 206 of the Commission's Rules of Practice and Procedure,¹ alleging that Midcontinent Express Pipeline LLC (Midcontinent): (1) improperly described a new pipeline system as ready to be placed in service when the facilities were unable to operate at their full design capacity; and (2) charged improper rates for firm service during the first three months the new pipeline system was in service. Midcontinent denies the allegations and requests the Commission dismiss the complaint.
2. For the reasons described below, we deny the complaint.

¹ 18 C.F.R. § 385.206 (2010). XTO is a gas producer active in numerous southwest, southeast, Rockies, and mid-continent basins, including the Arkoma Basin, the Barnett Shale in Texas and the Haynesville Shale in East Texas and Louisiana. XTO has been acquired by Exxon Mobil Corporation. Cross Timbers, an XTO affiliate, is a gas marketer.

Background

3. In 2008, the Commission granted Midcontinent² certificates pursuant to section 7(c) of the Natural Gas Act (NGA) to construct and operate a 506-mile long pipeline system and to provide open-access transportation services.³ The Midcontinent pipeline has two transportation zones: Zone 1 extends 308 miles, from Bennington, Oklahoma, to a connection with Columbia Gulf Transmission near Delhi, Louisiana; Zone 2 extends 198 miles further, ending at a connection with Transcontinental Gas Pipe Line Corporation near Butler, Alabama.

4. Midcontinent was authorized to construct its project in two phases. The “initial phase” included the pipeline and two mainline compressor stations. The “expansion phase” included two additional mainline compressor stations. In addition, Midcontinent was authorized to construct its 506-mile long pipeline in four segments, which permitted Midcontinent to offer service over these shorter segments as each was completed. Midcontinent has now placed the entire 506 miles of pipeline into service.

5. The Commission approved initial section 7 cost-based recourse rates reflecting Midcontinent’s phased construction schedule. Specifically, the Commission authorized different rates applicable to different periods of the project’s development: (1) interim rates for each of the four segments, to be applied, additively, to each segment if and when a segment went into service in advance of all the initial phase facilities going into service; (2) base rates, to be applied when all the initial phase facilities go into service; and (3) expansion rates, to be applied when the two additional mainline compression stations go into service.⁴

6. Midcontinent began to offer service over completed segments of its pipeline under interim rates on April 10, 2009. The initial phase of Midcontinent’s project was completed when Midcontinent placed the last segment of the initial phase facilities into

² Midcontinent is a Delaware limited liability company, owned 50 percent by Kinder Morgan Energy Partners, L.P. and 50 percent by ETC Midcontinent Express Pipeline, L.L.C., which is a subsidiary of Energy Transfer Partners, L.P.

³ *Midcontinent*, 124 FERC ¶ 61,089 (2008) (Certificate Order), *order denying reh’g and granting clarification*, 127 FERC ¶ 61,164 (2009). In September 2009, the Commission authorized Midcontinent to increase the capacity of its system by installing additional compression facilities on its pipeline. 128 FERC ¶ 61,253 (2009), *order on reh’g*, 131 FERC ¶ 61,118 (2010) (granting rehearing to allow accrual of Allowance for Funds Used During Construction (AFUDC) prior to the filing of its certificate application and requiring that Midcontinent remove improperly accrued AFUDC from the costs of the project).

⁴ Certificate Order, 124 FERC ¶ 61,089 at PP 84-91.

service on August 1, 2009.⁵ At that time, Midcontinent ceased to charge shippers the interim period rates which had been approved for transportation service over segments of the pipeline provided prior to completion of the initial phase of construction. Midcontinent is still engaged in the expansion phase of construction, adding compression facilities to increase the pipeline system's capacity.

7. Until August 1, 2009, XTO had an agreement with Midcontinent for firm transportation service (FTS) of 350,000 dekatherms per day (Dth/d) of gas, which was provided at negotiated interim period rates on the segments of pipeline in service up to that time. Once all of Midcontinent's initial phase facilities were in service, XTO was to become subject to monthly Zone 1 and Zone 2 reservation demand charges based on its maximum daily quantity (MDQ) of 350,000 Dth/d.

8. On August 1, 2009, XTO temporarily released all of its capacity to its affiliate Cross Timbers. This temporary release continued until August 6, 2009. Effective August 7, 2009, XTO permanently released its FTS capacity to Cross Timbers.

9. On that same date, in Docket No. RP09-874-000, Midcontinent filed its negotiated rate Transportation Rate Schedule FTS Agreement with Cross Timbers. Midcontinent also filed revised tariff sheets to add the Agreement to the lists of negotiated rate agreements and non-conforming agreements identified in its tariff. Exhibit C the Agreement, entitled "Negotiated Rate Agreement," sets forth the negotiated monthly Zone 1 and Zone 2 reservation demand charges based on Cross Timbers' MDQ of 350,000 Dth/d. The Zone 1 negotiated monthly base reservation rate was \$7.6042/Dth of MDQ. The Zone 2 negotiated monthly base reservation rate was \$5.1708/Dth of MDQ. Section 1.1 of the Negotiated Rate Agreement provided that the "Negotiated Rate Term" was "From August 7, 2009 through July 31, 2019, and thereafter during any extensions of the Primary Term" Midcontinent requested that the Commission accept both the Transportation Agreement and the accompanying tariff sheets effective August 7, 2009, consistent with the effective date of the Agreement. No party protested Midcontinent's filing. By letter order dated September 4, 2009, the Commission accepted Midcontinent's revised tariff sheets effective August 7, 2009, as requested by Midcontinent.

10. Service to Cross Timbers under an FTS Agreement between Midcontinent and Cross Timbers commenced August 7, 2009. Since the specified service commencement date was after August 1, 2009, the date the final initial phase facilities were placed into

⁵ On July 31, 2009, the Director of the Division of Gas – Environment and Engineering within the Commission's Office of Energy Projects issued a letter order (Director's Letter Order) authorizing Midcontinent to place the final segment of its pipeline in service. Previously, the Director had authorized Midcontinent to place in service other completed portions of its pipeline in letter orders dated April 8, April 21, May 11, June 3, and June 30, 2009.

service, the Agreement did not set forth separate rates for interim period services, as Midcontinent was no longer offering such services. However, for the reasons discussed below, XTO and Cross Timbers argue that the Commission should find that Midcontinent was contractually required to charge Cross Timbers the interim rates specified in XTO's earlier service agreement until November 1, 2009.

Notice of Complaint and Responsive Pleadings

11. Notice of the XTO and Cross Timbers complaint was published in the *Federal Register* on April 12, 2010.⁶ As required by Rule 385.213(a)(1) of the Commission's Rules of Practice and Procedure,⁷ Midcontinent filed an answer to the complaint on April 21, 2010.

12. On May 6, 2010, XTO and Cross Timbers filed a response to Midcontinent's answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁸ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Complainants' answer in this case, as it provides information that assists us in our decision making process, and will not will not delay, disrupt, or otherwise prejudice this proceeding, or place an unfair burden on Midcontinent. No motions to intervene or other pleadings were filed.

Complaint

13. XTO and Cross Timbers state that at the time Midcontinent placed its final initial phase facilities into service, Midcontinent was not capable of utilizing more than 88 percent of its certificated capacity for shippers with Zone 1 receipt points. Complainants explain this inability to provide full certificated services was due to Midcontinent's not yet having obtained approval from the Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) to operate the pipeline at the contemplated maximum allowable operating pressure (MAOP).⁹ Although XTO had

⁶ 75 Fed. Reg. 18,495.

⁷ 18 C.F.R § 385.213(a)(1) (2010).

⁸ 18 C.F.R. § 385.213(a)(2) (2010).

⁹ The Commission's Certificate Order approved Midcontinent's proposed MAOPs for various portions of its pipeline, which were higher than the standard pressures allowed by DOT's regulations. However, Midcontinent's authority to operate at these pressure levels was also subject to PHMSA's approval, and section 157.14(a)(9)(vi) of the Commission's regulations requires that Midcontinent comply with all applicable federal safety standards. DOT regulations impose safety standards under section 3(e) of the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. 60101 *et seq.* (2005), which describe design criteria, including constraints on operating pressure specific to pipe

(continued...)

permanently released its capacity to Cross Timbers, and Cross Timbers had entered into a separate service agreement with Midcontinent, XTO and Cross Timbers claim that Midcontinent should have provided service for Cross Timbers at interim period rates until November 1, 2009, the first day of the month after Midcontinent received approval from PHMSA to boost MAOPs to levels necessary to support full service. Complainants point to the Midcontinent and Cross Timbers FTS Agreement's statement that service and reservation charges under that Agreement do not commence until the capacity to provide service was available on Midcontinent's pipeline.¹⁰ Since PHMSA did not approve Midcontinent's special permit and waiver request until October 7, 2009, Complainants contend interim period rates should have continued to be charged until November 1, 2009.

14. Instead, on August 1, 2009, the day after the Director's Letter Order authorizing Midcontinent to place the final segment of its pipeline in service, Midcontinent ceased service under interim rates and initiated service under base rates. In a July 31, 2009 posting on its web site, Midcontinent acknowledged that absent PHMSA approval of its request to employ pipeline operating pressures above the regulatory standard, it was not capable of utilizing more than 88 percent of its pipeline's full capacity for Zone 1 receipts. Accordingly, Midcontinent stated that until PHMSA issued a favorable decision on its pending request for a special permit and waiver, shippers would not incur base period rate reservation charges for any MDQ volumes reduced as a result of the regulatory constraint precluding Midcontinent from increasing its pipeline's operating pressures. Midcontinent applied this reservation charge reduction to service provided between August 1 and October 8, 2009.

15. XTO and Cross Timbers were not appeased by this reservation charge reduction. They ask the Commission to find that for as long as Midcontinent was unable to provide

located in each of four class locations. The different class location designations indicate, generally, population density proximate to the pipeline. For Class 1 locations, the regulations state that the design factor to be used is 0.72. Midcontinent applied to PHMSA for a permit and waiver to boost its MAOP to 1,480 psig and 1,440 psig on certain sections of pipe in Class 1 locations. As stated, at the time Midcontinent placed the final segment of its pipeline into service, PHMSA had not yet approved Midcontinent's request. Consequently, Midcontinent was compelled to restrict operating pressures to ensure compliance with the 49 C.F.R. § 192.111(a) (2010) requirements for Class 1 facilities. This MAOP constraint caused Midcontinent's inability to use employ its full capacity for Zone 1 receipts delivered to Zone 1 or 2 until the waiver was granted by PHMSA (Zone 2 receipts delivered to Zone 2 were unaffected).

¹⁰ See section 6 of Cross Timbers' and Midcontinent's August 5, 2009 FTS Agreement (Exhibit B of the Complaint) which reads: "Service and reservation charges commence the later of: (a) August 7, 2009, and [sic] (b) the date capacity to provide the service hereinunder is available on [Midcontinent's] System."

full service, it should have maintained interim rates, rather than switching to base rates. XTO and Cross Timbers contend they have paid Midcontinent more than the amount that would be due under such rates for service rendered during August, September, and October, 2009. They ask the Commission to state that this constitutes payment in full for service provided during these three months and to require Midcontinent to refund, with interest, all payments it received that exceed what it would have charged under interim rates for service during this time.¹¹

16. Alternatively, XTO and Cross Timbers ask the Commission to find that Midcontinent should not have applied its base period reservation charges to service provided between October 9, 2009 (the date it received PHMSA approval to increase its MAOPs) and October 31, 2009. Complainants contend that Midcontinent cannot implement such a billing change mid-month, but can only do so on the first day of the succeeding calendar month.

17. XTO and Cross Timbers emphasize that in Midcontinent's request to the Commission to place the final segment of its pipeline into service, Midcontinent stated that the "pipeline is complete, has met all DOT safety requirements, and will be ready for operation on July 30, 2009."¹² Complainants characterize this statement as a misrepresentation, since as of July 30, 2009, PHMSA had yet to approve Midcontinent's special permit and waiver request, leaving Midcontinent incapable of operating at pressures necessary to provide full service to firm shippers. XTO and Cross Timbers contend that by relying on this misrepresentation that the pipeline had met DOT's safety requirements, the Commission became "a pawn in a pipeline scheme to prematurely collect reservation fees from shippers expecting, but not able to receive, full firm service levels."¹³

Midcontinent's Answer

18. Midcontinent filed a timely answer and a motion to dismiss the complaint. Midcontinent insists that the provisions of its service agreement with XTO are irrelevant to its service to Cross Timbers, since "[a]t no point in time was [Cross Timbers] a party to either the XTO Precedent Agreement or the XTO FTS Agreement and no party claims otherwise."¹⁴ Midcontinent states it properly billed Cross Timbers for service rendered under Cross Timbers' FTS agreement as XTO's replacement shipper. Moreover,

¹¹ XTO and Cross Timbers ask this on behalf of all other affected shippers. We note that no other shipper has sought such relief or submitted comments on the complaint.

¹² Midcontinent's *Letter to the Commission*, dated July 29, 2009, at 4.

¹³ XTO's and Cross Timbers' *Complaint*, at 23.

¹⁴ Midcontinent's *Answer to Complaint*, at 3.

Midcontinent maintains that issues regarding the interpretation of the terms of the Midcontinent and Cross Timbers FTS agreement should not be considered by the Commission, but by the appropriate judicial authority. Midcontinent explains it has acted to resolve such matters by filing a breach of contract claim against Cross Timbers and XTO (Cross Timbers' guarantor) on February 12, 2010, seeking to recover what it maintains are amounts owed for services performed under its FTS Agreement with Cross Timbers.¹⁵ Midcontinent contends that because issues of contract interpretation are not within the Commission's primary jurisdiction, and are not pending in any existing Commission proceeding, and are presently before a Texas state court, there is no cause for the Commission to take up consideration of these matters here.

19. Midcontinent argues it was accurate in asserting that it was in compliance with all safety regulations in its request to the Commission to place the last segment of its new pipeline system into service, thereby completing the initial phase of project construction. Midcontinent comments that the then-pending PHMSA request for a special permit and waiver to enable it to operate at higher pressures affected only the amount of firm service it could provide. Midcontinent insists that absent PHMSA's approval, it was nevertheless capable of providing service – albeit at a reduced MAOP, resulting in a reduced capacity – in compliance with all safety regulations.

20. Midcontinent characterizes the complaint as an unfounded collateral attack on the Commission's authorization of its pipeline project and declares that the appropriate time for XTO and Cross Timbers to have raised these issues would have been during the 30-day period for filing rehearing requests following the issuance of the July 31, 2009 Director's Letter Order in Docket No. CP08-6-000 authorizing Midcontinent to place the final segment of its new pipeline into service.

21. Midcontinent speculates that XTO and Cross Timbers have filed a complaint to gain leverage in the pending Texas state court proceeding. Midcontinent insists: (1) none of its actions described in the complaint are alleged to contravene or violate any statute, rule, order or other law administered by the Commission, or any other law over which the Commission may have jurisdiction; (2) the issues presented are not within the Commission's primary jurisdiction, are not pending in any existing Commission proceeding, are presently pending in Texas state court; and (3) the complaint does not present a genuine issue of material fact in dispute. Midcontinent concludes that the complaint does not meet the requirements of Rule 206 and so moves for summary dismissal of the complaint in its entirety on an expedited basis.

¹⁵ This lawsuit, *Midcontinent Express Pipeline, LLC v. Cross Timbers Energy Services, Inc. and XTO Energy Inc.*, No. 2010-09674, is pending in the 269th Judicial District Court of Harris County, Texas.

Discussion

Midcontinent's Alleged Misrepresentation to the Commission

22. As an initial matter, we find that Midcontinent, in its letter to the Commission requesting authorization to place its facilities into service, accurately described the new pipeline as complete and in compliance with DOT's safety regulations.¹⁶ When we authorized Midcontinent to place the new pipeline into service, construction of all initial phase facilities was complete and there were no allegations or indications that any portion of the project failed to meet any of the Commission's, or DOT's, or other agency's requirements. In authorizing new facilities to be placed into service, we routinely remind the project sponsor that it must comply with all applicable terms and conditions of our order – which encompass the DOT safety regulations – as well as procedures stipulated in previous filings.¹⁷ In this case, Midcontinent has done so.

23. There is no dispute that when Midcontinent placed the final segment of its pipeline into service on August 1, 2009, it was unable to operate at the pressures stated in the certificate authorization because PHMSA had yet to approve Midcontinent's request to employ a 0.80 design factor for portions of Class 1 pipe. Consequently, Midcontinent operated its pipeline in conformity with DOT's more restrictive 0.72 design factor standard until October 9, 2009, when it received PHMSA approval to increase pressures. We find Midcontinent did not make any false statement in its July 29, 2009 letter seeking authority to put its final segment into service; nevertheless, in the interest of transparency and full disclosure, we would have preferred for Midcontinent to have shared with the Commission – in its July 29, 2009 letter describing its pipeline as complete and in compliance with DOT safety regulations – the same information that it posted on its website two days later, i.e., the fact that it had not yet received the PHMSA approval it needed to operate its new pipeline at its full certificated level. In addition, we find no fault with Midcontinent's decision to initiate service at pressures consistent with DOT's more restrictive default regulatory standards, and then raise MAOPs to the certificated levels after PHMSA's October 9, 2009 determination that it would be safe to do so. At no time was Midcontinent operating its pipeline in violation of DOT regulations; thus, at no time was Midcontinent in violation of its certificate's condition that it comply with DOT regulations.

24. Further, in a July 31, 2009 posting on its website, Midcontinent notified its then-current and prospective shippers that pending approval from PHMSA to operate at higher

¹⁶ See Midcontinent's letter to the Commission dated July 7, 2009, as supplemented on July 27 and July 29, 2009.

¹⁷ We did so in this proceeding, in orders dated April 8, April 21, May 11, June 3, June 30, 2009, and July 31, 2009, authorizing Midcontinent to place in service portions of its project as they were completed.

MAOPs, it was not capable of utilizing the full capacity of its pipeline and that it would adjust its shippers' reservation charges accordingly. Based on this response by Midcontinent, we do not share the Complainants' purported view that Midcontinent's actions were calculated to prematurely collect reservation fees from shippers expecting, but not able to receive, full firm service levels.

25. Finally, we do not agree with the Complainants' assertion that the Midcontinent pipeline system was not fully and properly in service for purposes of terminating the interim period of its service, during its first three months of operation. While Midcontinent was not able to provide the full level of contracted-for service to shippers with receipt points in Zone 1 until PHMSA authorized the pipeline to operate at full design pressure, Midcontinent nevertheless was able to substantially satisfy its shippers' MDQs. We therefore affirm the Director's July 31, 2009 decision to grant Midcontinent's request to place the entire pipeline into service. Had Complainants considered that July 31, 2009 in-service determination to be erroneous, they could have sought rehearing, or alternatively, raised the issue in response Commission's notice of Midcontinent's August 7, 2009 filing in Docket No. RP09-874-000 seeking acceptance of tariff sheets reflecting the terms of the Midcontinent and Cross Timbers non-conforming, negotiated-rate FTS Agreement and proposing an August 7, 2009 effective date.¹⁸

26. As discussed above, Midcontinent announced on July 31, 2009 that firm shippers would not incur reservation charges for any MDQs reduced as a result of its inability to operate at full design pressure.¹⁹ We view this as a reasonable accommodation by Midcontinent to its shippers when it had not obtained PHMSA's waiver as soon as it had anticipated. We observe that based on the information filed by the Complainants, Cross Timbers never nominated more volumes of gas than Midcontinent was able to deliver during the period at issue.

¹⁸ 74 Fed. Reg. 41,425 (Aug. 17, 2009). As noted above, the Commission issued a letter order on September 4, 2009 accepting Midcontinent's revised tariff sheets effective August 7, 2009.

¹⁹ See XTO's and Cross Timbers' *Complaint*, at 7-8 and Appendix H, reproducing Midcontinent's July 31, 2009 posting on its website. Midcontinent's response is consistent with its tariff's General Terms and Conditions, Reductions in Firm Service, section 2.2(d)(2), which states that if Midcontinent fails to deliver on any day under any firm contract all of a shipper's firm daily volume for that day, then the applicable reservation charges and any related reservation-based surcharges shall be eliminated for the quantity of gas not delivered by Midcontinent within the shipper's firm daily volume under the contract.

Midcontinent's Service Agreements

27. XTO and Cross Timbers assert that Midcontinent submitted improper bills for service provided during August, September, and October, 2009.²⁰ They argue that Midcontinent should have provided service during these months under the interim period rates specified in its agreement with XTO because Midcontinent was not able to operate the new pipeline at its full design capacity until PHMSA's October 9, 2009 approval allowing it to boost operating pressures.

28. We disagree. Under the terms of its certificate, Midcontinent was only authorized to charge interim period rates as initial section 7 rates until it completed construction of, and placed into service, all of its initial phase facilities.²¹ As stated above, that occurred on August 1, 2009, in accordance with the Director's July 31, 2009 Letter Order. The same day the Director's Letter Order was issued, Midcontinent announced on its website that it would place the fourth and final segment of its 506-mile long pipeline's initial phase facilities into service on August 1, 2009, and explained that because it could not operate its new system at full capacity until it received PHMSA's authorization, it would reduce firm shippers reservation charges for any resulting reduction in MDQ volumes. Thus, as of August 1, 2009, the Commission-approved rates for service on Midcontinent's pipeline were the initial section 7 cost-based recourse rates (i.e., base rates) set forth in the Commission's Certificate Order. Despite notice that interim period rates were being displaced by base rates as of August 1, 2009, Cross Timbers nevertheless sought service from Midcontinent after this date.²²

²⁰ Given our determination that Midcontinent properly placed its pipeline in service on August 1, 2009, we find that XTO is not an aggrieved shipper, since on the date the new pipeline was placed into service, XTO released its full capacity to Cross Timbers; first on a temporary basis from August 1 to August 6, 2009, and then permanently thereafter. Thus, since placing its pipeline into service, Midcontinent has not provided service to XTO under the parties' FTS agreement.

²¹ See Midcontinent's tariff's General Terms and Conditions, Interim Period Service, section 1.22, which states that the interim period ends when all the facilities for which certificate authority has been requested (except for preapproved capacity facilities, i.e., expansion phase facilities to add compression) have been completed and placed in service.

²² Unlike Midcontinent's service agreements with XTO and other shippers, the Cross Timbers FTS Agreement contains a single set of negotiated rates applicable across the full term of the Agreement; there is no reference to variable rates targeted to separate periods of time, such as an interim period, an initial phase period, and an expansion phase period.

29. Complainants insist that as provided in section 6 of the Midcontinent and Cross Timbers FTS Agreement, Midcontinent was not permitted to charge Cross Timbers reservation charges until November 1, 2009. To reach this conclusion, Complainants rely on section 1.1 of the Midcontinent and XTO Precedent Agreement, which specifies that the effective date for base period rates in the Midcontinent and XTO FTS Agreement shall be the first day of the calendar month following notice from Midcontinent to XTO that Midcontinent was ready to provide firm service along the full 506-mile length of its new pipeline. However, while section 6 of the Midcontinent and Cross Timbers FTS Agreement provides for the parties to specify whether their Agreement supersedes and cancels a prior agreement, the parties do not so specify. XTO is referenced in the Midcontinent and Cross Timbers FTS Agreement exclusively in its capacity as Cross Timbers' guarantor.

30. In any event, as authorized by the Director's July 31, 2009 letter order, Midcontinent's entire 506-mile-long pipeline and all its other initial phase facilities were in service on August 1, 2009, notwithstanding that Midcontinent had not yet received approval from PHMSA to operate at its requested higher pressures. As discussed above, our Certificate Order authorized interim, base, and expansion period rates.²³ The interim period rates were approved as the initial section 7 rates only until all of the initial phase facilities were in service.²⁴ As of that date, August 1, 2009, Midcontinent was required by the terms of its certificate to cease charging interim rates and to begin to bill for service under base rates. We reach our conclusion consistent with the criteria, as described in *Arkansas Louisiana Gas Co. v. Hall*,²⁵ for determining the appropriate forum for dispute resolution. This is a matter within our expertise, for which there is a need for uniformity of interpretation, as it is important to ensure that an initial rate regime, as put in place by the Commission in authorizing a new project, is applied as described in the NGA section 7 certificate proceeding.

²³ Certificate Order, 124 FERC ¶ 61,089 at P 91.

²⁴ *Id.* at P 91 and Ordering Paragraph (E).

²⁵ 7 FERC ¶ 61,175, at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*). On the issue of when the Commission should assert primary jurisdiction in resolving contractual issues, we stated in *Arkla*:

Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (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 by the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.

31. Although we reject the Complainant's claim that Midcontinent erred in not continuing to apply interim period rates for service provided on and after the August 1, 2009 in-service date, we see no need to take up the calculation of the amount due for services rendered under the negotiated rates specified in the Cross Timbers and Midcontinent FTS Agreement. This calculation is among the matters at issue in the pending breach-of-contract court case, and we expect the court will prove fully capable of reaching a determination of what sums, if any, may be owed by the parties in that proceeding.²⁶ Finally, while it appears that Midcontinent was able to deliver all of the volumes of gas actually nominated by Cross Timbers during August, September, and October 2009, we note that if the court finds that Midcontinent's prorating of reservation charges is not adequate to make Complainants whole, the court will have more flexibility than the Commission to fashion an equitable remedy.

Summary

32. For the reasons set forth above, we deny Complainants' request that we find: (1) Midcontinent could not place its pipeline into service until October 9, 2009; (2) Midcontinent should refund alleged overcharges for services rendered from August 1 to October 31, 2009; (3) the Midcontinent and Cross Timbers negotiated rate FTS Agreement does not permit Midcontinent to charge Cross Timbers reservation charges until November 1, 2009; and (4) that the Complainants have paid in full for services provided between August 1 and October 31, 2009. We defer to the ongoing court proceeding to determine the amount due and the amount paid for services provided between August 1 and October 31, 2009.

The Commission orders:

The XTO and Cross Timbers complaint is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁶ See, e.g., *Shell Pipeline Corp. v. Coastal States Trading, Inc.*, 788 S.W.2d 837, 842 (Tex. App. 1990), *writ denied* (Jan. 9, 1991), accepting the legitimacy of a state court assertion of jurisdiction, commenting that the "court's judgment makes it abundantly clear that its decision was based upon a contract and the negligence of the parties involved" and "[a]lthough there was a [transportation] tariff involved ... neither that tariff nor any FERC regulatory scheme, rule, or regulation was the basis for the trial court's judgment."