140 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kern River Gas Transmission Company — Docket Nos. RP10-1410-001, RP10-1410-002, RP10-1410-004

ORDER ON COMPLIANCE FILING

(Issued August 27, 2012)

1. On May 18, 2012, Kern River Gas Transmission Company (Kern River) filed revised tariff records[1] to comply with the April 19, 2012 order (April 2012 Order)[2] in this proceeding pertaining to the Commission's reservation charge crediting policy. For the reasons set forth below, the Commission accepts the tariff records listed in footnote no. 1 effective December 1, 2010, subject to the revisions required by this order.

I. **Background**

2. In this proceeding, the Commission has sought to bring Kern River's tariff into compliance with the Commission's reservation charge crediting policy as set forth in several recent Commission orders.[3] That policy differentiates between the credits a

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[1] Kern River Gas Transmission Company, FERC NGA Gas Tariff, Gas Tariff, Sheet No. 26, Rate Schedule KRF-1, KR Firm Transportation Service, 3.0.0; Sheet No. 27, Rate Schedule KRF-1, KR Firm Transportation Service, 2.0.0; Sheet No. 28, Rate Schedule KRF-1, KR Firm Transportation Service, 1.0.0; Sheet No. 29, Rate Schedule KRF-1, KR Firm Transportation Service, 1.0.0; Sheet No. 29A, Rate Schedule KRF-1, KR Firm Transportation Service, 1.0.0.

[2] *Kern River Gas Transmission Co.*, 139 FERC ¶ 61,044 (2012).

[3] *See*, *e.g.*, *Natural Gas Supply Ass'n*, 135 FERC ¶ 61,055 (2011) (*NGSA*); *Southern Natural Gas Co.*, 135 FERC ¶ 61,056, *order on reh'g*, 137 FERC ¶ 61,050 (2011) (*Southern*); *Northern Natural Gas Co.*, 135 FERC ¶ 61,250, *order on reh'g*,

(continued…)

pipeline is required to give firm shippers depending upon whether the outage is caused by a *force majeure*[4] event or a non-*force majeure* event. With respect to non-*force majeure* outages the Commission requires the pipeline to provide shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver.[5] Commission policy also requires that the pipeline provide partial reservation charge credits during periods when it cannot provide service because of a *force majeure* event in order to share the risk of an event not in the control of either party. In that event, the Commission allows two different methods for the credit, either full reservation credits after a short grace period (i.e., ten days or less) (Safe Harbor Method) or partial crediting starting on the first day of a *force majeure* event until the curtailment ends (No Profit Method).[6]

3. The Commission issued its April 2012 Order in this proceeding accepting the tariff records filed in Kern River's May 11, 2011 and May 19, 2011 compliance filings to be effective December 1, 2010, subject to revisions. Among other things the Commission specifically required Kern River to revise its tariff records by choosing either the Safe Harbor Method or the No Profit Method for reservation charge crediting during *force majeure* outages.

II. <u>Details of Compliance Filing</u>

4. On May 18, 2012, Kern River filed revised tariff language to comply with the April 2012 Order. In its transmittal letter, Kern River states that the following is a summary of the tariff revisions to comply with the April 2012 Order:

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137 FERC ¶ 61,202 (2011) (*Northern)*; *Midwestern Gas Transmission Co*., 137 FERC ¶ 61,257 (2011) (*Midwestern*).

[4] *Force majeure* events are "unexpected and uncontrollable events." *Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,088 (1996), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997).

[5] *See, e.g.*, Opinion No. 406, 76 FERC ¶ 61,022 at 61,086, *as clarified by*, *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006).

[6] *NGSA*, 135 FERC ¶ 61,055 at P 17; *Midwestern*, 137 FERC ¶ 61,257 at PP 19-20.

1. <u>Credits During *Force Majeure* Outages</u>

Kern River has revised its tariff to reflect the Safe Harbor method for reservation charge crediting for *force majeure* outages, where no credits will be provided for a total of ten days, and full credits will be provided for additional days. [Section 9.4(a)]

2. <u>Volumes Eligible for Credits</u>

All provisions related to Kern River's proposal to limit reservation charge credits to "Required Market Deliveries" have been removed.

A new defined term, "Shipper's Nominated Quantities," which includes the seven-day historic average usage approach approved by the Commission in *Southern*, has been added. [Section 9.3(f)] Shipper's Nominated Quantities will be used in place of Required Market Deliveries in the determination of a shipper's applicable reservation charge credits.

3. <u>Incremental Cost Limit on Credits</u>

All provisions related to Kern River's proposed incremental cost limit on reservation charge credits have been removed.

4. <u>Procedure for Obtaining Credits</u>

All provisions related to Kern River's proposed claims procedure have been removed.

5. <u>Wyoming Interstate Gas Company (WIC)</u>

Reservation charge crediting procedures, including those applicable to a shipper whose nomination has been cut during the Timely nomination cycle and who subsequently nominates on another pipeline, have been added, consistent with *WIC*. [Section 9.4(c)]

6. Capacity Release

Reservation charge crediting procedure for capacity releases have been revised to describe how Kern River will provide reservation charge credits to the releasing shipper. [Section 9.5]

7. Hourly Flow Provisions

All references to hourly flow limitations and hourly flow penalties have been removed.

III. Protest, Comments and Answer

5. Public notice of the filing was issued on May 22, 2012. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2012)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2012)), 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.

6. BP Energy Company (BP) protested Kern River's filing. The Rolled-In Customer Group (RCG)[7] filed a motion requesting clarification of Kern River's filing. Nevada Power Company d/b/a NV Energy (NV Energy) filed a comment on Kern River's filing. Kern River filed an answer to the protest and comments. The Commission will accept the answer to the protest and comments since it presents a more complete record.

IV. Discussion

7. The Commission finds that Kern River has generally complied with the April 2012 Order in this proceeding except as addressed below with respect to the following issues raised by parties to this proceeding.

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[7] RCG consists of Aera Energy LLC, Anadarko E&P Company LP and Anadarko Petroleum Corporation, Chevron USA Inc. (on its own behalf and on behalf of Nevada Cogeneration Associates #1 and #2), Occidental Energy Marketing, Inc., Shell Energy North America (US), L.P., and WPX Energy Marketing, LLC.

A. Historical Averages

8. Kern River has included a new defined term in section 9.3(d)(2)[8] titled "Shipper's Nominated Quantities" when Kern River provides notice of a coming service interruption before the deadline for shippers to submit scheduling nominations in the Timely Nomination Cycle. The section provides that credits will be given for the lesser of (1) shipper's Delivery Maximum Daily Quantity (DMDQ) associated with shipper's primary points affected by the event; (2) the average quantities nominated by shipper at shipper's primary points affected by the event during the seven days immediately prior to an event; or (3) the quantities nominated by shipper at shipper's primary points affected by the event for the day of the event; provided, however, if transporter has posted that no service will be available using shipper's primary points affected by the event and shipper does not submit a nomination for the day of the event, shipper's nominated quantities will mean the lesser of (1) or (2).

9. BP states that the April 2012 Order permitted Kern River to propose a historical average of daily quantities as a substitute for actually scheduled amounts to determine reservation charge credits when the outage notifications preceded shipper scheduling nominations.[9] BP states that the Commission suggested that the experience from the week immediately pre-dating the outage, as adopted in *Southern Natural*,[10] might not be the appropriate historical yardstick to use during longer term outages. BP contends that Kern River's proposal does not adequately anticipate an outage occurring across prolonged periods such as forty five days. BP requests that the Commission direct Kern River to include in its tariff, the alternative outlined in the April 2012 Order[11] for outages of more than one week's duration, the historical level of service experienced in comparable periods of a prior year.

10. In its answer Kern River responds that the April 2012 Order did not establish a standard for outages of more than one week in duration. Kern River states that the Commission merely set forth one example of a mechanism the pipeline could propose. Kern River states that the Commission has already considered the argument set forth by BP as to whether the seven day average method is appropriate for outages of longer

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[8] In its transmittal letter Kern River refers to this as section 9.3(f).

[9] BP cites to the April 2012 Order, 139 FERC ¶ 61,044 at PP 45-50.

[10] *Southern*, 135 FERC ¶ 61,056 at P 32.

[11] April 2012 Order, 139 FERC ¶ 61,044 at P 49.

duration and found the seven day historical average acceptable.[12] Kern River concludes that the use of the seven day average has been approved by the Commission and Kern River's proposal conforms to that methodology for purposes of determining any applicable reservation charge credit.

11. In the April 2012 Order, the Commission stated that it has permitted pipelines to use "an appropriate historical average of usage" as a substitute for actual shipper nominations in order to minimize the potential for gaming.[13] The Commission further stated that it has approved pipeline proposals to base reservation charge credits on each shipper's average usage during the seven days immediately before the outage.[14] The Commission recognized that a shipper's need to transport gas may change over time, with the result that usage during the period immediately before an outage may become less representative of the service a shipper would have nominated during the outage the longer the outage lasts. The Commission stated that it did not intend to foreclose pipelines from proposing other objective methods of estimating the service shippers would have nominated, particularly during longer term outages.[15]

12. The Commission finds that the April 2012 Order did not specify the type of historical average Kern River was required to use. Instead, the Commission provided examples of Commission approved historical averages on other pipelines. The Commission did recognize that for longer term outages it may be possible to base the credits on a shipper's usage of its primary firm service during a comparable period of the prior calendar year or years. However, the Commission stated that it did not intend to foreclose pipelines from proposing other objective methods.[16] Therefore, the Commission finds that Kern River has complied with the April 2012 Order by proposing one of the Commission approved historical average methods that base reservation charge credits on each shipper's average usage during the seven days immediately before the outage.[17]

[12] *Midwestern*, 137 FERC ¶ 61,257 at P 22.

[13] *Southern*, 135 FERC ¶ 61,056 at P 33.

[14] *See, e.g.*, *Midwestern*, 137 FERC ¶ 61,257 at P 22.

[15] April 2012 Order, 139 FERC ¶ 61,044 at P 49.

[16] *Id.*

[17] *See, e.g.*, *Midwestern*, 137 FERC ¶ 61,257 at P 22.

B. Nominations on Third Party Pipelines

13. Proposed section 9.3(e) defining "Undelivered Quantities" includes a proviso that the term "Undelivered Quantities does not include quantities reduced as a result of the third party operator confirmation process or other actions beyond the direct control of Transporter." NV Energy and RCG request the Commission require Kern River to clarify that proviso. NV Energy states that the proposed language could be interpreted such that a shipper would not be entitled to reservation charge credits for undelivered quantities attributable to a *force majeure* event, because *force majeure* events are generally understood to be beyond the control of transporter. NV Energy states that it contacted Kern River about its concern and Kern River agreed to modify the language as follows if the Commission accepts the agreed upon revisions. The revised language agreed upon by the parties' to section 9.3(e) states "Undelivered Quantities" means […]; provided, however, Undelivered Quantities does not include quantities reduced as a result of the third party operator confirmation process or other actions beyond the direct control of Transporter, *other than a force majeure on Transporter's facilities*." RCG states that this agreed-upon language would address its concerns as well.

14. The Commission finds the revised agreed upon tariff language would alleviate any concern whether a shipper is entitled to receive reservation charge credits for undelivered quantities attributable to a *force majeure* event. Therefore, the Commission requires Kern River to revise section 9.3(e) of its tariff to reflect the revised agreed-upon language.

15. Kern River has revised its reservation charge crediting procedures in section 9.4(c) including those applicable to a shipper whose nomination has been cut during the Timely Nomination Cycle and who subsequently nominates on another pipeline. It provides that to the extent shipper's previously undelivered quantities are scheduled by transporter in a subsequent nomination cycle, shipper's adjustment shall be appropriately reduced.

16. RCG requests the Commission require Kern River to clarify certain language proposed in section 9.4(c)(1). RCG states that this language could allow Kern River to reduce the amount of reservation charge credits owed by scheduling "Undelivered Quantities" in a later scheduling cycle, even where a shipper has scheduled service on an alternate pipeline, or has not submitted a nomination in a subsequent scheduling cycle. RCG states that the proposed language does not comply with the Commission's policy in *Wyoming Interstate Co.*[18] because it eliminates the requirement that a shipper actually submit a nomination to Kern River for a subsequent scheduling cycle. BP states that

[18] 130 FERC ¶ 61,091 (2010).

proposed section 9.4(c)(1) appears to excuse Kern River from liability if, during the first scheduling cycle, Kern River does not schedule a shipper's nominated quantity, after which the shipper then nominated such amounts on a third party pipeline, but Kern River subsequently schedules such amounts in a later nomination cycle. RCG states that it contacted Kern River about its concern and Kern River agreed to modify the language as follows if the Commission accepts the agreed upon revisions. The revised language agreed upon by the parties to section 9.4(c)(1) states "To the extent *Shipper nominates, and Transporter schedules, previously Undelivered Quantities* in a subsequent nomination cycle, Shipper's Adjustment shall be appropriately reduced."

17. In its answer Kern River states it will modify section 9(c)(1) in accordance with this agreement. The Commission finds the above agreed upon tariff language would alleviate any concern about reducing the reservation charge credits owed by scheduling Undelivered Quantities in a later scheduling cycle, even where a shipper has scheduled service on an alternate pipeline.

18. BP contends proposed section 9.4(c)(1)(i) inappropriately requires a shipper to nominate the entire amount of its Undelivered Quantities on a third party pipeline. BP states this proposal is improper because the shipper (1) may not be able to acquire the entirety of the Undelivered Quantities on short notice from a different supplier at a viable price, (2) may not be able to obtain all of the capacity it seeks on a third party pipeline, or (3) may have lost a portion of the market because of supply disruptions. BP requests that this provision be modified to apply if some or all of the Undelivered Quantities are nominated for service on a third party pipeline.

19. Kern River responds that the proposed language in proposed section 9.4(c)(1) is not intended to require the shipper to nominate its entire volume on the third party pipeline. Kern River states that to the extent shipper nominates some portion of its Undelivered Quantities on a third party pipeline and provides the appropriate representation, the reservation charge credits would not be adjusted unless the shipper has nominated on Kern River and volumes are scheduled for delivery.

20. The Commission finds that Kern River's response appropriately addresses BP's concern about the quantity of gas scheduled on an alternate pipeline and its impact on reservation charge credits. Therefore, the Commission directs Kern River to revise section 9.4(c)(1) of its tariff to reflect the above agreed-upon language.

C. "Scheduled for Delivery" vs. "Failed to Deliver"

21. BP states that Kern River's tariff language repeatedly and erroneously purports to calculate reservation charge credits as the difference between the amount the shipper nominates for scheduling and the amount Kern River schedules for delivery. BP contends that the credits should be calculated as the difference between the nominated amount and the amount Kern River actually delivers. BP states that in the event Kern

River schedules 10,000 Dth in response to a shipper nomination but delivers only 2,000 Dth, the reservation charge credit computation based upon Kern River's proposed language would shield Kern River from responsibility to credit the customer for the 8,000 Dth of service which Kern River scheduled but failed to deliver. BP refers to Kern River's proposed definition in section 9.3(b) of an "Event" which triggers crediting for both *force majeure* and non-*force majeure* situations as a divergence between nominated quantities and "amounts *scheduled* by Transporter [emphasis added]." BP also refers to proposed section 9.4(c)(2) which limits Kern River's crediting obligation to quantities scheduled for delivery by Transporter, not quantities actually delivered by Kern River. BP states that the Commission's orders in this proceeding have repeatedly held that Commission policy requires that pipelines provide full reservation charge credits for all nominated gas not delivered.[19] BP requests that the Commission reject Kern River's proposed tariff language that would eliminate liability for reservation charge credits for any deviation between the quantities scheduled for delivery by Transporter and amounts actually delivered by Kern River.[20]

22. In its answer, Kern River responds that its proposed tariff language recognizes that there are operational balancing agreements (OBAs) at all but two delivery points on Kern River's system under which actual volume delivered to each shipper at a delivery point is considered to be equal to the volume scheduled for that shipper. Kern River states that the actual physical volume for each shipper is not determinable. Kern River further states that the use of the phrase "scheduled for delivery" is appropriate. Kern River asserts that it can only schedule an amount that is actually available for service. Kern River concludes that BP's example of Kern River scheduling 10,000 Dth when only 2,000 Dth is available is unrealistic.

23. The Commission has repeatedly stated that pipelines must provide full reservation charge credits for all gas nominated for scheduling by shippers but not delivered to shippers. For example, on rehearing in *Southern*, the Commission clarified that "the amount of reservation charge credits a pipeline must give in the non-*force majeure* situation is measured by the amount of service which the shipper nominated to be scheduled by the pipeline but the pipeline was unable to schedule or deliver."[21]

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[19] BP cites to the April 2012 Order, 139 FERC ¶ 61,044 at P 45 and *Southern*, 135 FERC ¶ 61,056 at P 32.

[20] BP cites to Rate Schedule KRF-1 of Kern River's tariff, Sheet No. 27 at section 9.3(e).

[21] *Southern*, 137 FERC ¶ 61,050 at P 19.

Consistent with *Southern*, the April 2012 Order[22] stated that the Commission "has held, when the pipeline gives notice of the outage at any time after the shipper's first opportunity to submit a scheduling nomination for the day in question, the credit should be based on the quantity the shipper nominated for scheduling but the pipeline was unable to deliver." The Commission has also held that the full reservation charge credits to be given after the tenth day of a *force majeure* outage under the Safe Harbor Method are measured "in the same way as the full credits to be given throughout a non-*force majeure* outage," that is, "based upon the amount of service the shipper requested for that day *which the pipeline failed to deliver* [emphasis added]."[23]

24. The Commission finds that Kern River's proposal to define the terms used in the calculation of reservation charge credits so that credits are based on the difference between the nominated quantity and the amount scheduled for delivery does not comply with the April 2012 Order or Commission policy. The Commission recognizes that the OBAs on Kern River's system should generally operate so that most shippers at a delivery point are able to take delivery of the same amount that Kern River scheduled for delivery to them. However, Kern River has not shown that this will always be true. For example, there could be situations where a non-*force majeure* outage prevents Kern River from delivering the total quantities it scheduled for delivery to the various shippers at a delivery point. In that situation, it is inevitable that one or more of the shippers at the point will not be able to take delivery of the amount of service that Kern River scheduled for delivery to them. In that situation, the affected shippers should receive reservation charge credits for the undelivered amounts. Therefore, consistent with the April 2012 Order and Commission policy, Kern River is required to file revised tariff records that define the terms used in the calculation of reservation charge credits so that credits are based on the amount of service which the shipper nominated for scheduling but the pipeline was unable to deliver.

[22] April 2012 Order, 139 FERC ¶ 61,044 at P 45.

[23] *See Midwestern*, 137 FERC ¶ 61,257 at P 21.

The Commission orders:

The tariff records listed in footnote no. 1 of this order are accepted effective December 1, 2010. Kern River is directed to file revised tariff records in compliance with the directives in this order within twenty (20) days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.