UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Kern River Gas Transmission Company Docket No. RP04-274-000

ORDER DENYING MOTION TO PLACE REFUNDS IN AN ESCROW ACCOUNT

(Issued January 3, 2007)

1. This order addresses a motion filed on November 15, 2006 by Kern River Gas Transmission Company (Kern River) requesting permission to place the refunds due to be paid to its customers in an escrow account rather than paid directly by Kern River, pursuant to the Commission's decision in Opinion No. 486.[1] This order denies the motion for the reasons set forth below.

Background

2. On October 19, 2006, the Commission issued Opinion No. 486, which addressed briefs on and opposing exceptions to an Initial Decision issued on March 2, 2006 by the Presiding Administrative Law Judge (ALJ) in the captioned proceeding.[2] The Initial Decision set forth the ALJ's findings concerning a general rate case filed by Kern River pursuant to section 4 of the Natural Gas Act on April 30, 2004. The Commission affirmed the ALJ on most issues; however, the Commission reversed the ALJ on several issues and directed Kern River to make a compliance filing and refund to its customers amounts collected in excess of the just and reasonable rates.

Description of the Filing

3. Kern River proposes to utilize an interest-bearing escrow account for the payment of refunds and related interest due and accruing as a result of Opinion No. 486. Kern

[1] *Kern River Gas Transmission Company*, 117 FERC ¶ 61, 077 (2006). Ordering paragraph (C) directed Kern River to refund amounts recovered in excess of the just and reasonable rates approved by the Commission within 30 days of a final order in this case.

[2] *Kern River Gas Transmission Company*, 114 FERC ¶ 63,031 (2006).

River proposes to deposit the estimated refund amounts owed to all customers, and from the date of deposit of the funds in the escrow account to the date of the refunds, to pay

interest at the rate paid on the interest-bearing account rather than the required interest rate under section 154.501 of the Commission's regulations.[3] Interest accruing prior to the deposit of the funds in the escrow account would be accrued and paid at the Commission-required interest rate. Kern River states that due to the pending nature of its refund obligation, Kern River's motion is time-sensitive and requires expedited consideration.

4. Kern River states that in Opinion No. 486, the Commission found that Kern River's proposed rates were unjust and unreasonable and ordered Kern River to make refunds within 30 days of a final order in this case. Kern River states that section 154.501(a)[4] of the Commission's regulations requires that pipelines refund such refunds, with interest at the applicable Commission-prescribed interest rate set forth in section 154.501(d). Kern River argues, however, that the Commission has also permitted pipelines to pay amounts potentially subject to refund into an escrow account, and then use the interest rate in that account to determine the ultimate refunds to its customers.[5] Kern River contends that its motion here is consistent with that approach. Kern River also states that it will pay interest on the refunds at the Commission-prescribed rate for the period from November 1, 2004 to the date the refunds are placed in the proposed escrow account and for any refunds in excess of the amount placed into the escrow account, should that be required by further order of the Commission.

Answers to the Motion

5. The Rolled-in Customer Group (RCG)[6] filed an answer in opposition to Kern River's proposal to establish an escrow account, arguing that Kern River's proposal does not comply with the Commission's regulations and provides no justifiable reason for breaking the well-established regulation on pipeline rate case refunds. Further, RCG argues that there are no precedents allowing a pipeline to base its interest rate on refunds

[3] 18 C.F.R. § 154.501 (2006).

[4] 18 C.F.R. § 154.501(d).

[5] Kern River cites the Commission's decisions in *Panhandle Eastern Line Co.*, 107 FERC ¶ 61,239, *order on reh'g*, 109 FERC ¶ 61,054 (2004) (*Panhandle)*; *Southern Star Central Gas Pipeline, Inc.*, 108 FERC ¶ 61,316, *order on reh'g*, 108 FERC ¶ 61,316 (2004).

[6] RCG is composed of Aera Energy LLC, Anadarko E&P Company LP, Chevron U.S.A., Inc., Coral Energy Resources, L.P., Occidental Energy Marketing, Inc., Southwest Gas Corp., and Shell Oil Company.

on any other rate than the Commission approved interest rate. RCG also asserts that allowing refunds to be place in escrow could create hardship and confusion because of lack of clarity in the interest rate applicable to an escrow account and which amounts would be subject to the interest rate payable at the Commission's interest rate and the interest rate payable in the escrow accounts. Finally, RCG argues that the cases cited by Kern River are inapplicable to Kern River's section 4 rate increase case, as the cited cases involved producer refunds to pipelines which arose from the collection of ad valorem taxes to be held in escrow pending a determination of contested issues.

6. BP Energy Company (BP) also filed an answer opposing Kern River's motion, arguing that the applicable Commission required interest rate likely exceeds the interest rate paid by banks for immediately-accessible funds and thus, Kern River is attempting to shift the cost of a negative interest rate to its customers. BP asserts the interest rate risk should be assigned to Kern River because of its conscious choices when it filed its rate increase case, specifically, its requested rate of return, changes in its levelization program, its filed for 95 percent load factor rate design and its EFV rate, which will result in refunds, the interest risk of which it seeks to shift to the customers. BP argues that Kern River can avoid the interest rate risk by immediately refunding all amounts now to all shippers, which will stop the accrual of interest. BP claims the extension of time[7] allowed to Kern River to make its compliance filing further disadvantages the shipper by adding 30 days to its interest rate risk. Finally, BP argues that the cases cited by Kern River dealt with the overpayment of ad valorem taxes rather than excess rates in a section 4 rate increase case.

7. Pinnacle West Capital Corporation (Pinnacle West) filed an answer in opposition to the motion, arguing that Kern River has provided no good cause or justification for its request to waive the interest rate regulation, as required by section 154.7 (a)(7) of our regulations.[8] Pinnacle West states that it fully supports and joins with the arguments made by other parties in opposition to Kern River's proposal that *Panhandle* presented an entirely different situation, and thus is inapplicable here. Pinnacle West adds that the proposal would allow Kern River to insulate itself from the interest rate risk. Thus, according to Pinnacle West, Kern River would have no incentive to resolve any issue whereas requiring Kern River to continue to pay interest at the prime rate would encourage speedy resolution of the issues and prompt refunds.

8. Calpine Energy Services, L.P. (Calpine) filed an answer in opposition to the motion, arguing that Kern River has provided no rationale for its proposed departure from

[7] *See,* Notice of Extension of Time issued November 15, 2006, granting Kern River a 30-day extension of time to and including December 18, 2006, as requested by Kern River, to make its compliance filings.

[8] 18 C.F.R. § 154.7 (a)(7) (2006).

the traditional Commission refund policies, has cited no hardship or inability to pay the Commission-approved interest rate or any other justification for a waiver of the regular interest rate requirement. Calpine asserts that there is no justification for the payment of a lower interest rate on refunds due the customers than that required by the Commission's regulation for the period the increased rates were placed into effect subject to refund and the date the refunds are made to the customers. Calpine asserts that the cases cited by Kern River do not support the proposed waiver of the interest rate regulation. Calpine notes that the refunds involved in those case were refunds owed to the pipeline on the basis of over-collection of ad valorem taxes collected by the producers of natural gas where the level of refund liability remained undetermined, where here the Commission has already established Kern River's refund liability with only the calculation of refunds remaining. Further, Calpine argues Kern River has failed to carry the burden as a movant for an exception to the Commission's regulation because the motion lacks essential details necessary to determine whether the proposal would yield just and reasonable results, even lacking an estimate of the interest rate to be applied to an escrow account.

Commission Ruling

9. Under section 154.501(d) of the Commission's regulations,[9] Kern River is obligated to pay interest on section 4 rate increases which are found to be unjust and unreasonable, based on the average prime rate for each calendar quarter on which such excessive rates or charges are held by the pipeline. Kern River's proposal to utilize an interest-bearing escrow account for the payment of any refunds and related interest resulting from Opinion No. 486 must, at a minimum, show the existence and nature of any public benefits accruing through such a proposal.[10] We have carefully analyzed this proposal and find that there are no apparent benefits to the customers which could be realized through the placement of refunds in an escrow account.

10. The *Panhandle* case relied on by Kern River is distinguishable. As noted by the parties in opposition to Kern River's motion, that case concerned the refund of ad valorem taxes which producers had collected in excess of the maximum lawful prices for first sales under the Natural Gas Policy Act of 1978 during the period 1983-1988. The Commission ordered the refunds in 1997 in order to implement a decision of the United States Court of Appeals of the District of Columbia Circuit.[11] The Commission then

[9] 18 C.F.R. § 154.501(d) (2006).

[10] *Compare, Algonquin Gas Transmission Co.,* 2 FERC ¶ 61,287 at 61,720 (1978), where we rejected a proposal to place refunds in escrow accounts, an optional refund procedure deviating from the normal practice of a pipeline making direct refunds.

[11] *Public Service Company of Colorado,* 80 FERC ¶ 61,058 (1997), *order on reh'g,* 82 FERC ¶ 61,058 (1998), implementing *Public Service Company of Colorado v. FERC,* 91 F.3d 1478 (D.C, Cir. 1996).

authorized the producers to place any disputed refunds in escrow accounts for ad valorem tax refunds in an order issued in *Northern Natural Gas Co.*[12] In that order, the Commission recognized that the ad valorem tax refunds, which it had already ordered producers to disburse, might present problems not ordinarily encountered when the Commission orders refunds of overcharges. The Commission explained that it would permit the use of escrow to respond to the concern that, if a producer paid a disputed amount to the pipeline and the pipeline flowed the money through to its former sales customers as required by the Commission, the producer might not be able to obtain the return of the disputed amount even if it ultimately prevailed in the dispute. The escrow provided the producer protection because the funds would not be distributed until the dispute was resolved.[13]

11. Here, Kern River has stated no similar rationale which would compel the use of an escrow account in place of the traditional direct refund of overcollections with interest at the Commission-prescribed rate. Here, unlike in the ad valorem tax refund situation, there can be no concern about Kern River's ability to obtain the return of any refunds, if only because we have not yet ordered it to disburse any refunds.[14] Additionally, there is no uncertainty as to the amount of the refunds which will be readily determined by an examination of the compliance filings to be made by Kern River. Another factor in our decision on this matter is the lack of specificity of Kern River's escrow proposal, both as to the amount of the refunds and the interest rate provisions of an escrow account. Thus, we find that Kern River has failed to provide any factual basis for distinguishing this situation from any other section 4 rate case with a refund obligation, and therefore we see no reason to depart from our normal practice.

12. Accordingly, we conclude that Kern River's proposal has not shown any public benefits to be achieved, as compared to the advantages of the Commission-required method set out in our regulations. Thus, we will deny Kern River's motion.

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[12] 82 FERC ¶ 61,059 (1998), *order on clarification*, 82 FERC ¶ 61,196 (1998).

[13] Further, the interest assessed in those cases generally applied to periods before an adjudication by the Commission on the merits of the refund claim (i.e., for amounts paid as early as 1983 even though the Commission did not issue its order until 2004).

[14] Opinion No. 486 only required the refunds to be paid after a final order.

The Commission orders:

The motion filed on November 15, 2006 by Kern River is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.