127 FERC ¶ 61,205
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kinder Morgan Cochin LLC Docket No. IS09-221-000

ORDER ACCEPTING AND SUSPENDING TARIFF AND ESTABLISHING TECHNICAL CONFERENCE

(Issued May 29, 2009)

1. On May 1, 2009, Kinder Morgan Cochin LLC (KM Cochin) filed FERC Tariff No. 33 Rules and Regulations Tariff to cancel FERC Tariff No. 26 effective June 1, 2009. KM Cochin states that it is filing FERC Tariff No. 33 to update the date and content of its Line Fill Policy to June 1, 2009, as incorporated by reference in Item 20 of the Rules and Regulations Tariff.[1]

2. On May 27, 2009, BP Canada Energy Marketing Corp. (BP) filed a motion for leave to intervene out of time and a protest. BP asserts that the Line Fill Policy implemented under FERC Tariff No. 33 is inconsistent with Commission precedent, discriminatory, and fundamentally flawed.

3. As discussed below, the Commission accepts and suspends FERC Tariff No. 33 to be effective January 1, 2010, subject to the outcome of the technical conference established in this order.

Background

4. The Cochin pipeline system is an approximately 1,900-mile, 12-inch products pipeline that transports primarily propane and has an approximate capacity of 70,000 barrels per day. The Cochin pipeline system originates in Fort Saskatchewan, Alberta, and crosses the Canada-U.S. border near Maxbass, North Dakota. It then traverses parts

[1] Line fill is the inventory or volume of product required in a pipeline system at all times in order to maintain pressure and ensure uninterrupted flow or transportation and delivery.

of Minnesota, Iowa, Illinois, Indiana, Ohio, and Michigan and crosses the U.S.border again near Detroit, Michigan, terminating at Windsor, Ontario. There are numerous delivery points on the U.S. segment of the pipeline.

5. BP states that KM Cochin's Line Fill Policy was originally implemented in its FERC Tariff No. 26 Rules and Regulations Tariff, which was filed March 28, 2008, in Docket No. IS08-177-000.[2] BP states that it did not object to the filing at that time, even though, it asserts, the first year of experience with the policy has shown it to be unworkable and discriminatory. BP emphasizes that it made numerous attempts to resolve its operational concerns and various inconsistencies between the policy and KM Cochin's tariff, finally meeting with representatives of KM Cochin on March 12, 2009. BP states that KM Cochin presented a proposed draft of revisions to the policy at that meeting, but BP contends that the revisions did not address, and indeed exacerbated, BP's concerns. BP also describes its subsequent unsuccessful efforts to resolve its differences with KM Cochin.

6. BP explains that the current Line Fill Policy, which was implemented in 2008 in Docket No. IS08-177-000, requires shippers to make an annual choice among three line fill options:

(a) Option 1 requires a shipper to provide a pro rata share of line fill.

(b) Option 2 provides that a shipper willing to increase its tariff payments and injections by at least 50 percent over the previous calendar year is not required to provide line fill.

(c) Option 3 provides that shippers that make deliveries only to destinations on the so-called East Leg segment[3] of the pipeline also are not required to provide line fill and may elect to have their barrels sequenced down the pipeline on a strictly transit time basis.

[2] BP states that, prior to that time, KM Cochin operated a batched system, which permitted a shipper to inject a batch into the pipeline and receive the batch, after transit time, at a delivery point on the pipeline.

[3] BP states that the Line Fill Policy divides the KM Cochin pipeline into two segments, a West Leg segment extending from Fort Saskatchewan, Alberta, to New Hampton, Iowa, and an East Leg segment extending from New Hampton, Iowa, to Windsor, Ontario.

7. BP states that it was required to elect Option 1 because it was economically unable to increase its volumes by 50 percent, as required by Option 2, and Option 3 was not available because BP ships on both legs of the system.

8. BP states that Item 20 of FERC Tariff No. 33 implements KM Cochin's Line Fill Policy, the substance of which is posted on its website. Section a. provides that, on an annual basis, a shipper shall select which line fill option it wishes to use for the specified year. Section b. directs the reader to the pipeline's website for details of the Line Fill Policy. The Policy states that its purpose is as follows:

> While Shippers have always borne responsibility for the line fill, the purpose of this program is to eliminate Shipper concerns that, in the absence of a robust line fill program, a disproportionate share of their barrels could become "trapped" on the pipeline, especially as the end of the winter season approaches.

9. On May 22, 2009, BP filed a letter with the Commission stating that, after KM Cochin filed FERC Tariff No. 33, BP attempted to engage KM Cochin in discussions to resolve its serious concerns with the Line Fill Policy. However, BP advised that, given the lack of success with the negotiations, it expected to file its motion for leave to intervene out of time and a protest. On May 27, 2009, KM Cochin filed a letter requesting that the Commission take no action on BP's late-filed protest. On May 28, 2009, KM Cochin filed a response to the protest, reiterating its claim that the Commission should reject the untimely protest. However, if the Commission accepts the protest, KM Cochin further asks the Commission to afford it five days to respond to BP's substantive claims.

<u>BP's Protest</u>

10. BP states that the Line Fill Policy that KM Cochin seeks to implement on June 1, 2009, establishes a time limitation on a shipper's ability to change the destination of its tendered product. BP argues that this time limitation is unjustified and inconsistent with Item 17 of KM Cochin's Rules and Regulations Tariff, both current and as proposed in FERC Tariff No. 33, which permits diversion and reconsignment of a shipment to another destination with no time limitation.

11. Moreover, continues BP, the June 1, 2009 Line Fill Policy changes the type of product that constitutes line fill from only "propane" to "comparable product." BP emphasizes that, from a physical standpoint, products other than propane must be batched and cannot be made available on demand.

12. Third, BP asserts that the June 1, 2009 Line Fill Policy contains a host of unjustified penalties, such as requiring a shipper that fails to deliver the binding nomination to pay a 10-percent "non-compliance penalty." BP also cites the proposal to

assess a penalty where, even in the absence of an overdraw, a shipper cancels a binding nomination. According to BP, in such a situation, KM Cochin proposes to charge the shipper for the full tariff rate and applicable fees, plus a premium fee of 10 percent of the applicable tariff(s) and fee(s).

13. BP further claims that KM Cochin's Line Fill Policy allows some shippers to withdraw their line fill inventories in a manner that adversely affects other shippers by effectively allowing one shipper to take another shipper's volumes and potentially preventing the first shipper's volumes from reaching the delivery points until the first shipper or shippers have made up the overdraw. BP states that it has experienced such situations and that KM Cochin's inability to deliver BP's volumes on certain occasions is inconsistent with Item 23 of KM Cochin's FERC Tariff No. 32, which requires KM Cochin to schedule deliveries on an equitable basis when shippers request delivery of volumes greater than can be immediately delivered. BP contends that a similar problem arises from the fact that KM Cochin does not manage volumes and deliveries on a daily basis and in a transparent process, which precludes shippers from managing their volumes effectively and creates the potential for the pipeline to discriminate in favor of one shipper over another. BP argues that the Line Fill Policy implemented by FERC Tariff No. 33 exacerbates the existing problems in a number of ways and also includes a host of unjustified penalties.

14. BP contends that the Commission has rejected similar pipeline proposals that required shippers to provide line fill in order to support "on-demand" withdrawals of propane.[4] BP states that, as in those earlier cases, the pipeline here has not shown that the basis on which it proposes to determine each shipper's line fill obligation is just and reasonable and not unduly discriminatory. BP emphasizes that, while some shippers (such as BP) are required to provide a pro rata share of line fill, other shippers are not subject to such a requirement. BP asserts that this difference in treatment is unduly discriminatory under section 3(1) of the Interstate Commerce Act.

15. BP asks the Commission to initiate an investigation by accepting and suspending the tariff for the maximum seven-month statutory period, subject to refund and subject to the outcome of a technical conference. In the alternative, if the Commission declines to establish a technical conference, BP asks the Commission to set the filing for hearing.[5]

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[4] *Mid-America Pipeline Co.*, 99 FERC ¶ 61,119 (2002), *reh'g denied*, 103 FERC ¶ 61,233 (2003); *Kinder Morgan Operating L.P. "A,"* 99 FERC ¶ 61,133 (2002), *reh'g denied*, 101 FERC ¶ 61,017 (2002).

[5] BP states that the Commission has taken similar action with respect to previous oil pipeline line fill policy disputes. *See Kinder Morgan Operating L.P. "A,"* 97 FERC ¶ 61,132 (2001); *Mid-America Pipeline Co.*, 96 FERC ¶ 61,368 (2001).

Discussion

16. While the Commission will grant BP's motion to intervene out of time and has considered its protest because it raises legitimate concerns about the potential effects of FERC Tariff No. 33, the Commission is troubled by the lateness of BP's filing. The Commission has stated previously that, in oil pipeline cases, it will look closely at the justification given for requests to intervene out of time.[6]

17. In the instant case, BP admits that its dispute with KM Cochin over the Line Fill Policy has been ongoing since at least March 12, 2009. BP determined immediately when FERC Tariff No. 33 was filed on May 1, 2009, that KM Cochin had not addressed the concerns it raised. While the Commission encourages parties to resolve their differences outside of the Commission's official processes, the Commission's ability to consider legitimate issues raised in a protest is hampered by the filing of such a protest so near the statutory deadline with which the Commission must comply. Accordingly, the Commission advises any party that has concerns with a tariff filing to file a *timely* motion to intervene and a conditional protest or comment advising the Commission of its concerns, stating that it is seeking to resolve its concerns with the pipeline, and stating that the conditional protest or comment is filed solely to preserve its rights in the event settlement is not achieved.

18. Upon review of BP's protest, the Commission finds that a large portion of it is devoted to BP's concerns about the operation of KM Cochin's existing Line Fill Policy, which is described above. Those concerns are not at issue in this docket and are more appropriately the subject of a complaint. Nevertheless, the Commission concludes that a number of issues specifically relating to FERC Tariff No. 33 require additional clarification and that the Commission can best explore such issues by means of a technical conference. At the technical conference, KM Cochin will have the opportunity to provide full support for FERC Tariff No. 33. Following the conference, the parties will have an opportunity to file comments that will be included in the formal record of the proceeding and will form the basis for the Commission's final decision on the filing.

19. Accordingly, the Commission will accept and suspend FERC Tariff No. 33, to be effective January 1, 2010, subject to the outcome of the technical conference established in this order. The Commission will direct the Staff to convene a technical conference addressing FERC Tariff No. 33 and report the results of the conference to the Commission within 150 days of the date on which this order is issued. KM Cochin must be prepared at the technical conference to respond to the issues raised by BP concerning the changes to the Line Fill Policy proposed in FERC Tariff No. 33 and to provide full

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[6] *Rio Grande Pipeline Co.*, 123 FERC ¶ 61,080, at P 12 (2008); *Mid-America Pipeline Co., LLC*, 123 FERC ¶ 61,085, at P 11 (2008).

support for its position. The Commission favors resolution of the contested issues through informal means to the extent possible and encourages the parties to discuss these issues in advance of the technical conference with the aim of reaching agreement.

The Commission orders:

(A) KM Cochin's FERC Tariff No. 33 is accepted and suspended, to be effective January 1, 2010, subject to the outcome of the technical conference established in this proceeding.

(B) Staff is directed to convene a technical conference to examine the issues raised by FERC Tariff No. 33 and to report on the conference to the Commission within 150 days of the date on which this order is issued.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.