

128 FERC ¶ 61,273
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Rockies Express Pipeline LLC

Docket No. RP09-587-000

Shell Energy North America (US), L.P.

Docket No. RP09-610-000

v.

Rockies Express Pipeline LLC and
Sempra Rockies Marketing, LLC

ORDER ON PETITION AND ORDER ON COMPLAINT
ESTABLISHING HEARING

(Issued September 24, 2009)

1. This order addresses two filings related to a temporary release of capacity on Rockies Express Pipeline LLC (Rockies Express) from Sempra Rockies Marketing, LLC (Sempra) to Shell Energy North America (US), L.P. (Shell). On May 12, 2009, in Docket No. RP09-587-000, Rockies Express filed a petition for waiver of its capacity release payment crediting mechanism. On July 31, 2009, Rockies Express submitted a pleading stating that the requested waiver may not be necessary if the Commission confirms Rockies Express' interpretation of its tariff concerning the processing of charges disputed by replacement shippers. On June 15, 2009, in Docket No. RP09-610-000, Shell filed a complaint against Rockies Express and Sempra regarding the rate to be paid by Shell to Rockies Express for the capacity released to Shell by Sempra. For the reasons discussed below, with respect to Rockies Express' petition, the Commission confirms Rockies Express' interpretation of its tariff concerning capacity release billing disputes. With respect to Shell's complaint, the Commission finds that there are material issues of fact in dispute and a hearing should be established to determine the rate to be paid by Shell for the capacity released by Sempra.

Background

Docket No. RP09-587-000 Petition for Waiver

2. On May 12, 2009, in Docket No. RP09-587-000, Rockies Express filed a petition for a limited waiver of its tariff provisions so that it could temporarily alter the capacity release payment crediting mechanism in section 15.13D of its General Terms and Conditions (GT&C). Rockies Express states that there is a dispute between Shell and Sempra regarding the proper reservation rate to be applied to a temporary release of capacity on Rockies Express from Sempra to Shell. Shell claims that it bid a fixed rate of \$1.4863 per MMBtu equal to the then applicable maximum *pro forma* tariff reservation rate. Sempra claims that the rate should be \$1.7785 per MMBtu, which is the recourse rate that was amended and approved in the Rockies Express certificate proceeding in Docket No. CP07-208-003.¹ Rockies Express is concerned that because its tariff sets the order in which it must apply proceeds from Shell for the purpose of crediting revenue to Sempra it could not retain variable charges (e.g. commodity, ACA, etc.) received from Shell. Rockies Express asserts that this could place it at risk for the collection of variable charges from Shell about which there is no dispute, and may require Rockies Express to fund the payment of these charges until the dispute between Shell and Sempra is resolved. In order to ensure that Rockies Express collects variable costs, it requested a waiver of its tariff provisions so that it would only be required to apply the undisputed portion of the reservation charge paid by Shell as a credit to Sempra's reservation charge.
3. Sempra filed an answer in opposition to Rockies Express' request for waiver. Sempra asserts that there is no justification for the waiver; the waiver would be unduly discriminatory because it would only apply to Sempra; and that the tariff provision at issue contemplates a shortfall in revenue because it contains an order of priority for the application of proceeds for the purposes of revenue crediting.
4. On July 31, 2009, Rockies Express filed a letter to advise the Commission of events following the submittal of its petition and to state that the requested waiver would not be necessary if the Commission confirms that Rockies Express' interpretation of the tariff provisions concerning the processing of billing disputes is correct.
5. Rockies Express states that by letter dated July 24, 2009, Shell provided Rockies Express with a "Notice of Billing Dispute" under section 12.4 of the GT&C. Rockies Express states that Shell's letter and worksheets supported a remittance of less than the full invoiced amount and provided detail as to the disputed charges. Specifically, Shell stated that it was withholding payment of the disputed amount of reservation charges, i.e., the difference between the invoiced maximum reservation rate of \$1.7785 per MMBtu

¹ *Rockies Express Pipeline LLC*, 126 FERC ¶ 61,225 (2009).

and the \$1.4863 per MMBtu that Shell maintains is applicable as a fixed rate bid instead. Rockies Express states that while Shell withheld payment of the disputed reservation charges, it remitted to Rockies Express all of the undisputed charges, i.e., the portion of the bill reflecting reservation charges of \$1.4863 per MMBtu that Shell claimed it bid, as well as all variable charges contained in the Rockies Express invoice sent to Shell.

6. In light of Shell's Notice of Billing Dispute, Rockies Express has reviewed the tariff provisions involved in processing disputed charges by a replacement shipper for the pricing of released capacity, and has concluded that the requested waiver of section 15.13D is not needed to process the payments made by Shell under a billing dispute governed by section 12.4 to ensure the appropriate crediting of variable charges. Specifically, Rockies Express has determined that when a replacement shipper disputes reservation charges under section 12.4, as Shell has done, Rockies Express must apply the payments received consistent with the underlying billing dispute as detailed by the shipper, rather than under the order set forth in section 15.13D.

7. Rockies Express states that section 12.4 establishes the procedures and timing of payments that must be followed by a shipper. In particular, a shipper must submit "supporting documentation identifying what is being paid," and Rockies Express must "apply payment per such supporting documentation." Rockies Express states that if a shipper disputes a bill or a portion of a bill and the payment differs from the invoiced amount, the shipper must provide remittance detail, "supporting and identifying the basis for the dispute." Rockies Express has determined that Shell has satisfied the requirements of section 12.4. Rockies Express states that Shell has identified the "disputed" and "undisputed" portions of the bill, and has provided supporting documentation. Rockies Express states that since Shell did not dispute the reservation charges reflecting the *pro forma* reservation rate of \$1.4863 or the commodity-based charges in the bill and paid them, Rockies Express must "apply" such payments accordingly.

8. Rockies Express states that it advised Sempra on July 29, 2009 of Shell's billing dispute and failure to pay the full invoiced amount. Rockies Express also provided notice to Sempra of how Rockies Express would process Shell's net payment for June activity under the terms of the tariff and in future months until the billing dispute is resolved. Specifically, pursuant to section 15.13B of the GT&C, Rockies Express will issue invoice statements to Sempra showing a concurrent conditional credit for billed reservation charges due from Shell. Assuming that Shell continues to dispute the same portion of the reservation charges and pays less than the full invoiced amount, Rockies Express will then re-bill Sempra for the unpaid portion of the Shell reservation charges under section 15.13C of the GT&C. Rockies Express states that Sempra's capacity release credits are expected to continue to exceed the amount of any outstanding balances due Rockies Express. Accordingly, Rockies Express states that the excess credit is available to be refunded to Sempra, on written request, as provided in section 15.13D. In accordance

with the above described steps, Rockies Express states that the net available to Sempra as a refund payment each month will equal the undisputed reservation charges paid by Shell; variable commodity charges are not disputed by Shell and will be retained by Rockies Express.

9. Rockies Express believes that this is a fair and reasonable reading of the tariff. In the absence of a Commission ruling on the requested waiver, Rockies Express has processed the first bill and applied payment in accordance with the detail provided by Shell. Rockies Express has advised Sempra that it will continue to re-bill Sempra for reservation charges disputed and not paid by Sempra and remit only undisputed reservation charges until the dispute has been resolved by the Commission, a court, or the parties. Rockies Express states that it will adjust billings thereafter, as necessary, pursuant to the direction of the appropriate authority and remit any outstanding payments.

10. Rockies Express respectfully requests the Commission to confirm that Rockies Express' tariff interpretation is correct, and that it can continue to process disputed payments in this manner. If the Commission determines that this is not a permissible reading of the tariff, Rockies Express reiterates its request for temporary waiver of the capacity release payment crediting mechanism of section 15.13D, as set forth in the waiver petition.

Docket No. RP09-610-000 Complaint

11. On May 26, 2009, Shell filed a complaint against Rockies Express and Sempra regarding the rate to be paid by Shell to Rockies Express for release of Sempra's capacity to Shell (Contract Number 553040) for service from Opal, Wyoming to Zone 3. Shell asserts that it submitted a bid for a fixed rate of \$1.4863/MMBtu/d for Sempra's released capacity. Shell states that Sempra has taken the position that the rate should be escalated to the newly effective maximum recourse rate, of \$1.7785/MMBtu/d. Shell states that Rockies Express has stated that it intends to bill Shell the newly effective maximum recourse rate, even though Rockies Express has also stated it is not taking a position on the merits of the dispute as to what rate Shell should pay under its contract. Shell asserts that while Rockies Express is the actual counter-party to the capacity release contract with Shell, Sempra, as the releasing shipper, is the beneficiary to the capacity release contract because the portion of the payment from Shell to Rockies Express, in excess of Sempra's negotiated rate, will be flowed through to Sempra. Thus, Shell states that it is filing the complaint against both Rockies Express and Sempra.

12. Shell states that prior to the construction of the Rockies Express system, Sempra contracted with Rockies Express for 200,000 MMBtu/d of firm transportation capacity for a ten-year term. Shell states that Sempra agreed to a reservation rate of \$1.074/MMBtu/d for service from Opal to Zone 3 on the Rockies Express system. Shell states that in April 2008, Sempra negotiated a prearranged deal for a release of a portion of its capacity to a third party for 50,000 MMBtu per day, beginning July 1, 2008 through

March 31, 2013, at a reservation rate of \$1.455/MMBtu/d, which was less than the maximum reservation rate under Rockies Express' tariff. Shell states that on April 24, 2008, Rockies Express posted Sempra's prearranged capacity release deal for competitive bidding on Rockies Express' Electronic Bulletin Board (EBB). Shell states that this offer, which was offer number 36855, stated the following regarding the negotiated rates to be paid under the prearranged release with the third-party shipper: "Replacement Shipper will pay the following demand charges, subject to any rate limits that may be established by FERC: REX – West \$0.87 per MMBtu per day. REX – East \$1.455 per MMBtu per day. Interim Service for up to 12 months: REX East: REX – East rate less \$0.05 per MMBtu per day." Shell states that the offer also stated that "[w]ith respect to all demand charges above, Replacement Shipper will also pay and be responsible for all other charges including, but not limited to, fuel reimbursement charges (FL&U), any FERC-approved surcharges, applicable penalties, and commodity costs per MMBtu imposed by Rockies Express for the volumes of gas transported by Replacement Shipper pursuant to the REX tariff."

13. Shell states that on April 24, 2008, Shell, (previously doing business as Coral Energy Resources, L.P. (Coral)) submitted a bid (Bid ID 37084) on offer number 36855 for all of the capacity (50,000 MMBtu/d). Shell states that in section 2 of the bid form, Coral selected "Reservation-\$Denom." Shell states that in section 4, Coral inserted the following "Contingency Text" for its bid: "REX East MDQ 50000 MMBtu per day REX East Rate: \$1.4863 (Current Max Proforma Tariff) Opal Receipt to Zone 3." Shell states that on April 28, 2008, Coral was awarded the capacity. Shell Energy states that it has been using transportation service under this contract since July 1, 2008, using the Rockies Express West capacity from Opal, Wyoming to Audrain, Missouri. Shell states that it will commence service on the Rockies Express East portion of the system (which is the rate zone at dispute herein) when Rockies Express places Zone 3 into service.

14. Shell states that on October 31, 2008, in Docket No. CP07-208-003, Rockies Express filed a petition to amend the certificate authorization it received on May 30, 2008. Rockies Express claimed that the cost to construct the REX-East pipeline (from Audrain, Missouri to the Clarington Hub in Monroe County, Ohio) had increased. Accordingly, Rockies Express filed to increase its proposed recourse rate for Zone 3 from \$17.7797 per Dth per month to \$26.6651 per Dth per month, which the Commission approved.² Shell states that the maximum tariff reservation rate from the Opal receipt point in Zone 1 to any delivery point in Zone 3, including the Overthrust Lease facilities, increased from \$1.4863/MMBtu/d to \$1.7785/MMBtu/d.

15. Shell states that it intervened in that proceeding and requested the Commission to confirm that Shell's capacity release contract contained a fixed rate, and was, therefore,

² *Rockies Express Pipeline LLC*, 126 FERC ¶ 61,225, at P 6 (2009).

not subject to the proposed increase in Zone 3 rates. Shell states that on March 16, 2009, the Commission issued an order stating that the Rockies Express certificate amendment proceeding was not the appropriate forum to address provisions in Shell Energy's capacity release contract. The Commission dismissed Shell's request without prejudice to Shell to pursue the matter in an appropriate forum.³

16. Shell states that on April 28, 2009, Shell received an email from Rockies Express, stating that Rockies Express intended to bill Shell the "max rate" for its contract number 553040. Shell states that it sought clarification of what numerical rate Rockies Express intended to charge on April 29, 2009, May 1, 2009, and May 8, 2009, but Rockies Express did not clarify its intent. Shell states that on May 12, 2009, Rockies Express filed its petition, where it stated, for the first time, that it intended to charge Shell \$1.7785/MMBtu/d, the current maximum recourse rate, and not the rate stated in Shell Energy's contract number 553040.

17. Shell asserts that its contract number 553040 contains a fixed rate of \$1.4863/MMBtu/day for service from Opal to Zone 3 of the Rockies Express system. Shell argues that in direct contravention of this provision of the contract, Rockies Express stated that it intends to bill Shell the currently effective maximum applicable recourse rate for service under this contract of \$1.7785/MMBtu/d. Shell contends that this proposed action violates the Natural Gas Act, relevant precedent and Commission policy, which prohibits a party from unilaterally modifying the terms of a bilateral contract.

18. Shell submits that under relevant case law and Commission precedent, where there is a dispute as to the terms of a contract, the Commission will look to the terms of the contract to determine whether those terms are ambiguous. Shell asserts that it is only after the Commission determines that the contract terms are ambiguous, or are susceptible to different interpretations, that the Commission should look to extrinsic evidence to aid in its interpretation of the contract terms. In this case, Shell maintains the fixed rate term under the contract is not ambiguous. Shell argues that the Commission need only look to the terms of the contract between Rockies Express and Shell, as supplemented by Shell's bid and the Sempra capacity release posting. However, Shell submits that to the extent the Commission determines that the rate bid is ambiguous, the extrinsic evidence regarding the intent of the parties also supports the conclusion that Shell's intent was to bid a fixed rate and that Sempra contemplated receiving a negotiated fixed rate.

19. Shell argues that it bid a fixed numerical rate for Sempra's capacity that was equal to the then current maximum recourse rate and was not intended to fluctuate with changes to the maximum recourse rate. Shell submits that under the fixed rate Sempra will make

³ *Id.* P 22.

a \$30 million profit for the remainder of the term of the release. Shell asserts that if the rate is increased to the current effective maximum recourse rate of \$1.7785/MMBtu/d, Sempra's profits increase to \$50 million and Shell will incur an additional \$20 million in costs above what it expected at the time the capacity was awarded. Shell requests that the Commission confirm that the rate for Sempra's capacity is a fixed rate of \$1.4863/MMBtu/d and that Rockies Express may not unilaterally change such rate.

20. Rockies Express filed an answer asserting that the Commission should dismiss the complaint as it applies to Rockies Express. Rockies Express submits that it does not have an economic stake in the outcome of the contract dispute. Rockies Express argues that it has not, and certainly has no intention to change the contract in any way. Rockies Express contends that through its waiver petition, it is seeking to provide the means to protect itself from liability in the event of a resolution of the dispute at some rate higher than that claimed by Shell. Rockies Express asserts that it does not believe that its actions can be remotely construed to violate any applicable statutory standards or regulatory requirements.

21. Sempra asserts that the complaint should be dismissed as to Sempra. Sempra asserts that the complaint identifies Sempra as the party that posted a pre-arranged capacity release transaction that resulted in a transportation contract between Shell and Rockies Express. Sempra submits that there is no contract between Shell and Sempra. Sempra argues that there is no fixed rate language to be found. Sempra asserts that if the right to a fixed rate was unambiguously established, words to that effect would appear in the contract and Shell would not have needed to seek a determination on this very issue from the Commission either in its complaint or in the prior proceeding in which Rockies Express obtained Commission authorization to increase the Rockies Express-East transportation rates. Sempra contends that the decision by Rockies Express to invoice Shell for the recently-approved increase in the maximum tariff rate demonstrates that the counterparty to the underlying transportation agreement has reached a fundamentally different conclusion from Shell.

22. Sempra disagrees with Shell's argument that Shell submitted a fixed rate bid according to the instructions on Rockies Express' EBB. Sempra claims that certain features of Rockies Express' EBB were not functioning at the time of the bid and that special instructions were provided by Rockies Express personnel on how to submit a bid. Sempra asserts that while Shell contends that the application of the higher rate will result in a windfall to Sempra, that claim has no foundation. Sempra contends that it is not a windfall for Sempra to receive the benefit provided by the Commission's rules from its release of capacity. Sempra argues that the revenue credit that it will be provided reflects nothing other than the result of the contract that Shell entered into with Rockies Express.

Discussion

23. Before the Commission are two separate, but related, filings related to a temporary release of capacity on Rockies Express from Sempra to Shell. In Docket No. RP09-587-000, Rockies Express asks the Commission to grant a waiver of certain capacity release billing provisions or to confirm that its application of the capacity release billing dispute procedures is correct. In Docket No. RP09-610-000, Shell filed a complaint against Rockies Express and Sempra requesting that the Commission determine that the rate for the capacity on Rockies Express released to it by Sempra is at fixed rate not subject to fluctuation with changes in the maximum recourse rate. We will first address the petition in Docket No. RP09-587-000 and then the complaint in Docket No. RP09-610-000.

24. The Commission finds that Rockies Express' application of its billing dispute tariff provisions as discussed in its July 31, 2009 letter in Docket No. RP09-587-000 is correct. The Commission agrees with Rockies Express that when a replacement shipper disputes reservation charges under section 12.4, as Shell has done, Rockies Express must apply the payments received consistent with the underlying billing dispute as detailed by the shipper, rather than under the order set forth in section 15.13D. Under Rockies Express's interpretation, since Shell did not dispute the reservation charges reflecting the *pro forma* reservation rate of \$1.4863 or the commodity-based charges in the bill and paid them, Rockies Express must "apply" such payments accordingly, and provide a conditional credit to Sempra for the disputed amount. The Commission finds this is a reasonable interpretation of the tariff pending the outcome of the underlying dispute. Accordingly, the Commission finds that the waiver requested by Rockies Express in its May 12, 2009 petition is not necessary and is therefore denied.

25. With respect to the complaint filed by Shell, the Commission finds that there are genuine issues of material fact in dispute that require a hearing. In this case there is no single contract which definitively establishes the rate that Shell is to pay for the released capacity from Sempra. Rather, there are a number of different documents, such as the capacity release posting, the capacity release bid, the notice of the award of capacity, and the master capacity release agreement which all form the capacity release contract between Rockies Express and Shell, and therefore, each of these documents have a bearing on the rate to be paid by Shell. Shell and Sempra have conflicting versions of the events which resulted in the formation of the capacity release contract. As discussed above, Shell asserts that it bid a fixed rate of \$1.4863/MMBtu/d while Sempra maintains that Shell bid at the maximum rate subject to fluctuation and that the current maximum rate is \$1.7785/MMBtu/d. On the other hand, Rockies Express the administrator of its capacity release program and its EBB takes no position on dispute and is only providing a conditional credit to Sempra based on the higher rate to protect itself from liability. The Commission has examined the pleadings, exhibits and affidavits filed in this proceeding and finds that this case cannot be resolved based upon the written pleadings alone. There are a number of unanswered questions concerning the rate to be paid for the released

capacity that can only be answered in the context of a hearing where all the relevant facts and circumstances can be established and all parties' assertions can be subject to examination. Accordingly, the Commission establishes a hearing to resolve the complaint filed by Shell. The issue to be determined by the Administrative Law Judge is whether Shell bid a fixed, numeric rate of \$1.4863/MMBtu/day for the capacity released by Sempra, which happened to be the maximum recourse rate at the time of the bid or whether Shell bid at the maximum recourse rate which would be subject to fluctuation depending on changes to Rockies Express' maximum recourse rate.

The Commission orders:

(A) Rockies Express' May 12, 2009 petition for waiver in Docket No. RP09-587-000 is denied.

(B) Rockies Express' request for clarification concerning billing dispute procedures filed in its July 31, 2009 letter in Docket No. RP09-587-000 is granted as discussed above.

(C) Pursuant to the authority of the Natural Gas Act, particularly sections 4, 5, 8, and 15, and the Commission's rules and regulations, a public hearing is to be held in Docket No. RP09-610-000 to resolve Shell's complaint.

(D) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose pursuant to 18 C.F.R. § 375.304 (2009), must convene a prehearing conference in this proceeding to be held within 20 days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. The prehearing conference is for the purpose of clarification of the positions of the participants and establishment by the presiding judge of any procedural dates necessary for the hearing. The presiding administrative law judge is authorized to conduct further proceedings in accordance with this order and the rules of practice and procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.