

136 FERC ¶ 61,140
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.

Kern River Gas Transmission Company

Docket No. RP11-2328-000

ORDER ACCEPTING AND SUSPENDING TARIFF RECORDS SUBJECT TO
REFUND AND ESTABLISHING TECHNICAL CONFERENCE

(Issued August 29, 2011)

1. On July 29, 2011, Kern River Gas Transmission Company (Kern River) filed revised tariff records to amend several provisions under certain firm rate schedules, which it refers to as the “Self-Contained Rate Schedules.”¹ Kern River proposes to limit service under these rate schedules exclusively to the currently effective contracts of shippers taking service under those rate schedules.² Kern River also proposes to include in its tariff a *pro forma* agreement applicable to rollover service under the subject rate schedules. As discussed below, the instant tariff records are accepted and suspended to be effective February 1, 2012, subject to refund and the outcome of the technical conference established in this order.

Background

2. Kern River states that the instant Self-Contained Rate Schedules were established as a result of firm service agreements that were negotiated around the time when Kern River’s original system was certificated in 1990. Kern River states that it entered into firm service agreements with a small group of large oil producers engaged in enhanced oil recovery in a limited area of California.

3. In November 1990, the Commission directed Kern River to incorporate the terms of the Self-Contained firm service agreements that it had entered into with the large oil producers within the General Terms and Conditions (GT&C) of its tariff so all shippers that requested such service might receive service under the

¹ The Rate Schedules subject to the instant filing are Rate Schedules CH-1, MO-1, SH-1, and UP-1.

² See Appendix.

same terms and conditions that were available under the terms of the service agreements.³ Subsequently, Kern River filed the instant Rate Schedules CH-1, SH-1, MO-1, and UP-1 to reflect the terms of the Self-Contained service agreements, making such terms available to others on an open access basis.

4. Kern River's tariff continues to include these four rate schedules, in addition to its standard firm open access transportation Rate Schedule KRF-1. Kern River states that there are currently six shippers,⁴ with a total contract demand of less than 300,000 Dth/day that receive service pursuant to one of the Self-Contained rate schedules.

5. Kern River states that on July 21, 2011, the Commission issued Opinion No. 486-E in Kern River's general rate case proceeding in Docket No. RP04-274-023.⁵ Kern River asserts that in that order the Commission addressed Kern River's proposed eligibility requirements for firm service under stepped down Period Two rates,⁶ including Kern River's proposal to require all shippers that wished to contract for Period Two rates to obtain service under Rate Schedule KRF-1. Kern River points out that in Opinion No. 486-E, the Commission stated:

³ *Kern River Gas Transmission Co.*, 53 FERC ¶ 61,172, at 61,632-3 (1990), *order on reh'g*, 55 FERC ¶ 61,089, at 61,270 (1991); *Kern River Gas Transmission Co.*, 60 FERC ¶ 61,128, at 61,456 (1992).

⁴ Kern River Transmittal Letter at p. 6-7; fn. 9. Kern River states that these shippers are: Aera Energy LLC; Anadarko E&P Company LP; Chevron U.S.A. Inc.; Nevada Power Company d/b/a NV Energy; Seneca Resources Corporation; and Shell Energy North America (U.S.) L.P.

⁵ *Kern River Gas Transmission Co.*, Opinion 486-E, 136 FERC ¶ 61,045 (2011).

⁶ Kern River's firm shippers pay levelized rates, which are designed to recover 70 percent of Kern River's investments in its Original System and in various subsequent expansions over the terms of the shippers' initial contracts for service on each project (Period One). Because this rate design allows Kern River to recover more invested capital during Period One than it would under ordinary straight-line depreciation, the Commission has required Kern River to return that excess recovery by offering its firm shippers stepped-down "Period Two" rates, after the initial Period One contracts expire. *Kern River Gas Transmission Co.*, Opinion 486, 117 FERC ¶ 61,077, at P 37 (2006), *order on reh'g*, Opinion 486-A, 123 FERC ¶ 61,056, at P 61 (2008). Opinion No. 486-E generally affirmed an Administrative Law Judge's initial decision concerning the Period Two rates.

While the Commission finds that it cannot approve Kern River's proposal in this section 5 proceeding to require shippers contracting for Period Two service to do so under Rate Schedule KRF-1, that finding is without prejudice to Kern River proposing under section 4 of the NGA to eliminate the rate schedules with the Self Contained Contracts pursuant to just and reasonable terms and conditions.⁷

6. Kern River states that in the instant filing it proposes to close the Self-Contained Rate Schedules to new shippers rather than to eliminate these rate schedules. Kern River states that under the instant proposal the Self-Contained Rate Schedules will remain available to the existing shippers until their current contracts expire.

Details of the Instant Filing

7. Kern River states that it proposes to close the Self-Contained Rate Schedules. Kern River explains that service to existing customers may continue under the Self-Contained Rate Schedules, but that all new service will be offered exclusively under Kern River's Rate Schedule KRF-1. Accordingly, new shippers requesting initial service, acquiring capacity via capacity release, or obtaining capacity from expiring or terminating Self-Contained contracts will be required to execute new contracts pursuant to the *pro forma* agreement applicable to firm service under currently effective Rate Schedule KRF-1. Similarly, Kern River proposes that if an existing shipper under one of the Self-Contained Rate Schedules elects to retain its contract demand pursuant to a right of first refusal (ROFR), the shipper will be required to execute a new contract under Rate Schedule KRF-1.

8. Kern River states that current shippers with Self-Contained contracts may continue to receive service pursuant to the Self-Contained Rate Schedules until the end of the initial and any rollover term of their applicable contract. However, Kern River proposes to include in its tariff a *pro forma* agreement applicable to service under the Self-Contained Rate Schedules which is similar in most respects to the *pro forma* agreement for Rate Schedule KRF-1. Kern River explains that if an existing Self-Contained shipper is entitled to continue service under its current contract when the initial term of the contract expires (i.e. pursuant to a contractual rollover provision), the existing shipper will be required to execute a new agreement consistent with this newly proposed *pro forma* agreement.

⁷ *Id.* P 120.

9. Kern River asserts that there are three significant reasons to justify its proposal. First, Kern River argues that the Self-Contained contracts are complex, administratively burdensome, and difficult to understand and they appear to differ from Kern River's current business practices. Second, Kern River argues that the original basis for distinguishing different customer classes no longer exists. Kern River explains that all of Kern River's firm mainline service can be provided under Rate Schedule KRF-1 and that there are only six shippers, with a total contract demand of less than 300,000 Dth/day, that receive service pursuant to one of the Self-Contained Rate Schedules.

10. Third, Kern River argues that system expansions and other industry and shipper changes have rendered the Self-Contained Rate Schedules obsolete. Kern River states that the distinctions between the large oil producers that entered into the Self-Contained contracts and the other early shippers that signed Rate Schedule KRF-1 contracts no longer exist. Therefore, Kern River concludes that a differentiation of service based on distinctions that no longer exist renders the perpetuation of the Self-Contained Rate Schedules unreasonable.

Public Notice

11. Public notice of the filing was issued on August 1, 2011. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2011)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2011)), 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. Self-Contained contract shippers⁸ (SCRS Shippers) filed a protest and request for the rejection of the proposal. Nevada Power Company d/b/a NV Energy (NVE) filed a protest and requested either rejection of the filing or the acceptance of the filing subject to maximum suspension and an evidentiary hearing. On August 12, 2011, BP Energy Company (BP) filed a late motion to intervene and protest. On August 22, 2011, Kern River filed an answer to these protests which, under these circumstances, the Commission will accept in order to fully understand the filing.

⁸ The SCRS shippers include Aera Energy LLC, Anadarko E&P Company LP and Anadarko Petroleum Corporation, Chevron U.S.A. Inc., and Shell Energy North America (US) L.P.

12. NVE states that Kern River's proposal will adversely affect the quality of service available to NVE.⁹ NVE, BP, and SCRS Shippers argue that the instant proposal is a collateral attack on Opinion No. 486-E because it relies on the same arguments that the Commission rejected in Opinion No. 486-E.¹⁰ NVE and SCRS Shippers also argue that the instant proposal does not satisfy the requirements set forth in the *Mobile-Sierra* doctrine for a proposed contract modification of this type.¹¹ NVE asserts that Kern River's unilateral efforts to force NVE out of its MO-1 Self-Contained Contract, and into the KRF-1 Rate Schedule, is contrary to the *Mobile-Sierra* doctrine and its application by the court in the *Exxon* case.¹²

13. Further, NVE argues that Kern River's proposal does not comply with section 154.204 of the Commission's regulations that provides this type of filing must: (1) explain the impact of the proposed revision on firm and interruptible customers; (2) include workpapers showing the estimated effect on revenues and costs over the 12-month period commencing on the proposed effective date of the filing, and; (3) list other filings pending before the Commission which may significantly affect the filing.

14. SCRS Shippers state that Kern River's proposal would negatively affect Asset Management Agreements because it eliminates the ability of the asset manager replacement shipper to use the acquired capacity in a similar manner to the releasing shipper. SCRS Shippers also argue that by placing the asset manager replacement shipper in a different position from the releasing shipper, Kern River's proposal violates the Commission's determination that the Commission

⁹ For example, NVE states that the MO-1 Rate Schedule includes the following valuable terms not matched by Rate Schedule KRF service: (1) the right to match any lower authorized overrun rate offered by Kern River; (2) daily balancing of receipts and deliveries; (3) a longer period to eliminate cumulative imbalances; and (4) a specifically tailored ROFR provision. NVE Protest at 13.

¹⁰ Citing, e.g., Opinion 486-E, 136 FERC ¶ 61,045 at P 100, 118.

¹¹ NVE Protest at 9 (citing *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956)) (*Mobile-Sierra*); see also *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 554 U.S. 527, 530 (2008). SCRS Shippers Protest at pp.4-5.

¹² NVE Protest at 10 (citing *Exxon Mobile Corporation v. FERC*, 430 F.3d 1166 (2005) (*Exxon*)).

would examine on a case-by-case basis whether the asset manager replacement shipper was similarly situated to the releasing shipper.¹³

Discussion

15. The Commission finds that Kern River's proposal to close the Self-Contained rate schedules raises many issues that have not been fully examined or explained herein. The Commission finds that further exploration of these issues is necessary to determine whether Kern River's proposal is just and reasonable. Accordingly, the Commission will direct its Staff to conduct a technical conference to further ventilate the issues raised by the instant proposal. Kern River should be prepared to discuss the issues raised by the parties to this proceeding.

16. In particular, at this conference, parties should be prepared to delineate and discuss the precise differences in the terms and conditions of service between the Self-Contained Rate Schedules and Rate Schedule KRF-1 and the effects such differences, if any, have on the quality of transportation service provided by Kern River to the subject shippers. In such a proceeding, the Commission may assess the effects of Kern River's proposals against the current status to determine whether Kern River's proposals are just and reasonable.

Suspension

17. Based upon review of the filing, the Commission finds that the proposed tariff records set forth in the appendix have not been shown to be just and reasonable, and may be unjust, unreasonable, and unduly discriminatory or otherwise unlawful. Accordingly, the Commission shall accept and suspend the effectiveness of such tariff records for the period set forth below.

18. The Commission's policy regarding suspensions is that tariff filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or inconsistent with other statutory standards. (*See Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension)) It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results. (*See Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension)). Such circumstances do not exist here. Therefore, the Commission

¹³ SCRS Shippers Protest at 10 (citing *Texas Eastern Transmission LP*, 129 FERC ¶ 61,031, at P 21 (2009)).

will exercise its discretion to suspend Kern River's proposed tariff records set forth in appendix, to be effective February 1, 2012, subject to refund and the outcome of the technical conference ordered herein.

The Commission orders:

(A) The tariff records listed in the appendix are accepted and suspended to become effective February 1, 2012, subject to refund, and the outcome of a technical conference established in this order.

(B) The Commission Staff is directed to convene a technical conference to explore all issues raised by the filing and report the results of the conference to the Commission within 120 days of the issuance of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX

Kern River Gas Transmission Company
FERC NGA Gas Tariff
Gas Tariff

Tariff Records to be Effective February 1, 2012, Subject to Refund
and the Outcome of a Technical Conference

Sheet No. 211, GT&C Capacity Release Program, 1.0.0
Sheet Nos. 398-399, , 1.0.0
Sheet No. 400, Pro Forma Self-Contained Rate Schedules, 0.0.0
Sheet No. 401, Pro Forma Self-Contained Rate Schedules, 0.0.0
Sheet No. 402, Pro Forma Self-Contained Rate Schedules, 0.0.0
Sheet No. 403, Pro Forma Self-Contained Rate Schedules, 0.0.0
Sheet No. 404, Pro Forma Self-Contained Rate Schedules, 0.0.0
Sheet Nos. 405-419, , 0.0.0
Sheet No. 500, Rate Schedule CH-1, 1.0.0
Sheet No. 532, Rate Schedule CH-1, 1.0.0
Sheet No. 600, Rate Schedule UP-1, 1.0.0
Sheet No. 622, Rate Schedule UP-1, 1.0.0
Sheet No. 700, Rate Schedule MO-1, 1.0.0
Sheet No. 724, Rate Schedule MO-1, 1.0.0
Sheet No. 800, Rate Schedule SH-1, 1.0.0
Sheet No. 813, Rate Schedule SH-1, 1.0.0