

152 FERC ¶ 61,022  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

American Midstream Bakken, LLC

Docket No. IS15-511-000

ORDER ACCEPTING AND SUSPENDING TARIFF, SUBJECT TO REFUND,  
AND ESTABLISHING HEARING PROCEDURES

(Issued July 8, 2015)

1. On June 8, 2015, American Midstream Bakken LLC (American Bakken) filed FERC Tariff No. 2.0.0 to be effective on six days notice on June 15, 2015, to institute initial rates for a new pipeline transportation service from origin and destination points in McKenzie County, North Dakota.<sup>1</sup> The tariff sets forth rates for committed and uncommitted shippers, including tiered rates for both committed and uncommitted shipments based on volume commitments. On June 19, 2015, American Bakken's only current committed shipper, Newfield Production Company (Newfield), protested FERC Tariff No. 2.0.0, claiming that the provisions of the tariff violated the Transportation Service Agreement (TSA) entered into by American Bakken and Newfield.

2. The Commission, as discussed below, grants special permission for good cause shown and accepts and suspends FERC Tariff No. 2.0.0, to be effective June 15, 2015, subject to refund, on less than 30 days notice. The Commission will set the matter for hearing in order to adjudicate the issues raised by the protest.

---

<sup>1</sup> American Bakken requests a waiver of the 30-day notice requirement as provided for in section 6(3) of the Interstate Commerce Act (49 App. U.S.C. § 6(3) (1988)) pursuant to the special permission procedures set forth in section 341.14 of the Commission's Rules and Regulations (18 C.F.R. § 341.14 (2014)). American Bakken states that allowing the tariff to become effective as proposed will enable shippers to begin using the new transportation services as soon as the pipeline is operational and ready for service.

## **Background**

3. On June 12, 2014, Costar Bakken, LLC (Costar) and Newfield entered into a TSA where Newfield would receive priority gathering and transportation service on a to-be-constructed gathering pipeline and related facilities in and around McKenzie County, North Dakota. Newfield dedicated all of its production from leases covering approximately 24,000 acres to the gathering system for a period of ten years, in exchange for an initial transportation rate of \$1.30 per barrel.

4. In August of 2014 construction commenced on the gathering system. The system consists of approximately 50 miles of pipeline in a web pattern with a capacity of approximately 40,000 barrels/day to an interconnection with Tesoro High Plains Pipeline Company LLC (Tesoro). On October 1, 2014, American Bakken purchased Costar and changed its name to AMID Bakken.

5. In the spring of 2015, negotiations took place between Newfield and American Bakken. Newfield claims that its production forecasts had declined due to a steep decline in world oil prices, and that it shared these updated production forecasts with American Bakken.<sup>2</sup> American Bakken states that Newfield notified it that “it (Newfield) no longer intended to drill wells reasonably consistent with the drilling forecast contained in the TSA and would not be drilling any wells in 2015 or 2016.”<sup>3</sup>

6. On April 7, 2015, American Bakken filed FERC Tariff No. 1.0.0 in Docket No. IS15-241-000. The tariff was identical to the *pro forma* tariff attached to the TSA. FERC Tariff No. 1.0.0 was withdrawn on April 21, 2015.

7. On May 22, 2015, American Bakken conducted a second open season to ascertain the level of interest of shippers in various volume-based tiers for committed and uncommitted service. The open season closed on June 21, 2015 and produced no additional committed shippers.

8. On June 8, 2015, American Bakken filed FERC Tariff No. 2.0.0 to institute initial rates for new pipeline transportation service on the gathering system. Tariff 2.0.0 contains the agreed-upon \$1.30 per barrel rate for acreage-dedicated committed shippers, but contains a provision that such committed shippers drill wells on its dedicated acreage “reasonably consistent with the expectation contained in the TSA’s drilling forecast.”<sup>4</sup> Specifically, FERC Tariff No. 2.0.0

---

<sup>2</sup> Motion to Intervene and Protest of Newfield at p. 4.

<sup>3</sup> Answer of American Bakken at p. 7.

<sup>4</sup> Answer of American Bakken at p. 9.

provided that an acreage-dedicated committed shipper would only be entitled to the \$1.30 per barrel rate upon the cumulative transportation of seventy-nine percent of the barrels in the shippers initial drilling forecast.

9. On June 12, 2015, Newfield sent a letter to American Bakken claiming that American Bakken had materially breached and/or repudiated the TSA by filing FERC Tariff No. 2.0.0.

### **Pleadings**

10. On June 19, 2015, Newfield filed a Motion to Intervene and Protest in response to the filing of FERC Tariff No. 2.0.0. In its protest, Newfield claimed that American Bakken proposed to charge Newfield a tariff rate that is significantly higher than the rate agreed to in the parties' TSA. Specifically, Newfield states that the provision in Item No. 22 of the tariff, that the acreage dedication requires a minimum quantity to be delivered, is inconsistent with the TSA, and that the proposed rates for committed shippers that do not meet certain volume commitments exceed those set forth in the TSA. Newfield also argues that the rates proposed in the tariff have not been properly supported by American Bakken, and may be unjust and unreasonable.

11. On June 24, 2015, American Bakken filed an answer to Newfield's protest. American Bakken agrees that neither the TSA nor the tariff impose a minimum volume transportation obligation on Newfield. However, American Bakken contends that FERC Tariff No. 2.0.0 is an accurate memorialization of the parties' agreements as set forth in the TSA. American Bakken argues that Newfield is obligated under its drilling forecast to drill wells in its acreage dedication that are reasonably consistent with expectations relied upon by the parties.

### **Discussion**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), all timely, unopposed motions to intervene are granted.

13. Newfield's protest deals primarily with an issue of contract interpretation, specifically whether Item 22 in FERC Tariff No. 2.0.0 accurately memorializes the TSA entered into between Newfield and American Bakken. In its answer, American Bakken questions whether the Commission has jurisdiction over this dispute as it relates to the interpretation of the TSA. However, American Bakken states that if a state court were to rule in Newfield's favor on the contractual

dispute, the Commission should assert jurisdiction and rule that Newfield's ability to ship any volumes at the \$1.30 per barrel TSA rate is unduly discriminatory.<sup>5</sup>

14. To evaluate the protest, the Commission must first determine whether the contractual dispute between Newfield and American Bakken is one that should be resolved by the Commission or if the dispute is more properly heard in a proceeding in state court. In deciding whether to assert primary jurisdiction over this dispute, the Commission is guided by the decision in *Arkansas Louisiana Gas Company v. Hall*,<sup>6</sup> where the Commission devised a three-part test. The Commission there stated:

Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.<sup>7</sup>

15. Applying the *Arkla* test, the Commission will assert primary jurisdiction over the present dispute. First, the contractual provisions at question deal specifically with acreage commitments, and could entail extrinsic evidence of industry expectations and norms surrounding acreage commitments made between pipelines and shippers. The Commission does possess special expertise in this area.

16. Second, we find that there is a need for uniformity of interpretation of the language in the TSA concerning acreage commitments. Other parties have entered into TSAs involving acreage agreements similar to that between American Bakken and Newfield. The Commission's ultimate findings regarding the interpretation of the TSA could potentially impact other similar agreements.

17. Third, we find that this case will ultimately determine the rate that Newfield will be subject to for its shipments with American Bakken. Rate regulation is the primary regulatory responsibility of the Commission.

18. For these reasons, we will establish a hearing for the purpose of determining whether FERC Tariff No. 2.0.0 is a proper memorialization of the

---

<sup>5</sup> Answer of American Bakken at p. 15.

<sup>6</sup> 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

<sup>7</sup> *Arkla*, 7 FERC at 61,322.

TSA between American Bakken and Newfield. If the tariff is not a proper memorialization, American Bakken must file a new tariff in accordance with the TSA and provide appropriate refunds. If the tariff does properly characterize the TSA, American Bakken must still provide support for all of the proposed rates and ensure all rates are consistent with the Interstate Commerce Act.<sup>8</sup>

19. While we are setting the matters in Docket No. IS15-511-000 for an evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>9</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>10</sup> The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) FERC Tariff No. 2.0.0 is accepted and suspended, subject to refund, effective June 15, 2015.

(B) Waiver of the 30-day notice period is granted.

---

<sup>8</sup> American Bakken requests that if Newfield is entitled to ship any volume at the TSA rate of \$1.30 per barrel, the Commission establish a hearing to determine whether the rate is "confiscatory" and derive an appropriate rate. Answer of American Bakken at pp. 20-21. The Commission will not do so in this proceeding. The proper vehicle for pursuing such a claim, essentially a request to invalidate the TSA, is the filing of a complaint.

<sup>9</sup> 18 C.F.R. § 385.603 (2014).

<sup>10</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

(C) An evidentiary hearing will commence to adjudicate the issues raised by the protest of Newfield, as discussed in the body of the order.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2014), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a limited evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and an evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.