

155 FERC ¶ 61,250  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Encana Marketing (USA) Inc.

v.

Docket No. RP14-169-001

Rockies Express Pipeline LLC

ORDER ON REHEARING

(Issued June 9, 2016)

1. In this order, the Commission denies the requests for rehearing of the Commission's March 7, 2014 Order (Complaint Order) rejecting Encana Marketing (USA) Inc.'s (Encana) November 15, 2013 Complaint alleging that Rockies Express Pipeline LLC (Rockies) unlawfully denied its request to reallocate primary delivery point capacity.<sup>1</sup> The Commission affirms its determination in the Complaint Order declining to act on Encana's Complaint, because Encana's request was denied consistent with the Commission's general policy against granting service more than 90 days in the future (the 90-day rule), and finding that Encana had otherwise failed to establish undue discrimination in the administration of Rockies' tariff.

**I. Complaint Order**

2. As detailed more fully in the Complaint Order, Rockies was constructing the 14 mile Seneca Lateral transporting 250,000 Dth/day from the Seneca processing plant in

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<sup>1</sup> *Encana Marketing (USA) Inc. v. Rockies Express Pipeline LLC*, 146 FERC ¶ 61,161 (2014) (reviewing Encana's firm transportation service rights under Contract No. 553078, Rate Schedule FTS (Firm Transportation Service) service agreement).

Noble County, Ohio to delivery points located in the western portion of Rockies' Zone 3, its East zone.<sup>2</sup>

3. In its Complaint, Encana objected to Rockies' denial of its request to re-allocate its delivery point capacity to take advantage of new capacity made available with the construction of the Seneca Lateral. In particular, Encana objected to Rockies' declining to re-allocate capacity that Encana held for delivery to the Texas Leb delivery point in Lebanon, Ohio, to alternative delivery points located further west, namely the Midwestern Edgar interconnection with Midwestern Gas Transmission Company in Illinois and the ANR Shelby interconnection with ANR Pipeline Company in Indiana.

4. In the Complaint Order, the Commission accepted Rockies' explanation that it relied on the Commission's policy requiring delivery point changes to be effective within 90 days, when it rejected Encana's request. Service under Encana's requested delivery point change was to commence in 187 days.

5. In the Complaint Order, the Commission also addressed comments filed by other shippers regarding Rockies' treatment of other requests for service using the expanded capacity in order to address allegations of undue discrimination. The Commission declined to make an undue discrimination finding and instead accepted Rockies' explanation for granting two other shippers' requests, made on September 26, 2013 and October 10, 2013, respectively, to change their delivery point capacity to Midwestern Edgar in Illinois and ANR Shelby in Indiana effective on November 1, 2013 and January 1, 2014, respectively. Rockies explained that capacity was available and the requests conformed with the aforementioned 90-day rule.

6. On October 23, 2013, Rockies signed a new Rate Schedule BHS (Backhaul Service) transportation service agreement with an unnamed "Cornerstone Shipper" that provided a binding financial commitment for the construction of the lateral for use of Midwestern Edgar capacity "beginning the later of December 1, 2013, or the in-service date of the Seneca Lateral facilities."<sup>3</sup> Rockies reported that it initially expected the Seneca Lateral to be in service in early December 2013; however, the in-service date was postponed to March 1, 2014 due to weather and permitting delays. The Commission

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<sup>2</sup> Rockies filed an Advanced Notice of Construction with the Commission on August 26, 2013 in Docket No. CP13-539-000.

<sup>3</sup> Rate Schedule BHS is a special backhaul service which has a lower scheduling priority than nominations to primary points under existing Rate Schedule FTS, but a higher scheduling priority than secondary FTS nominations and interruptible nominations.

found that the action was consistent with the 90-day rule, noting that it recognizes an exception for requests for service that depend upon the construction of new facilities.<sup>4</sup> The Commission found that service to the Cornerstone Shipper was linked to the construction of the Seneca Lateral.

7. The Commission also found no need for an open season, since neither Commission policy nor Rockies' tariff required an open season before the sale of delivery point capacity at Midwestern Edgar and ANR Shelby to the Cornerstone Shipper. Rather, a pipeline may sell capacity on a first-come, first-served basis so long as all available firm capacity is posted, as Rockies did in this case.<sup>5</sup> The pipeline may always be assumed to seek the highest possible rate from non-affiliated shippers, since it is in its own economic interest to do so. Therefore, use of the first-come, first-served method is consistent with the Commission's goal of placing capacity in the hands of those that value it the most.<sup>6</sup>

8. After the October 23, 2013 agreement with the Cornerstone Shipper, Rockies rejected requests by other shippers to shift primary point capacity to the Midwestern Edgar and ANR Shelby delivery points if the requests exceeded available long-term capacity.<sup>7</sup> In the Complaint Order, the Commission accepted Rockies' justification for its rejection of ConocoPhillips Company's (ConocoPhillips) October 29, 2013 request to shift 208,000 Dth/day of capacity to the Midwestern Edgar delivery point and 162,000 Dth/day to the ANR Shelby delivery point, effective November 1, 2013.<sup>8</sup> Rockies denied this request, stating that ConocoPhillips' request exceeded the available capacity.<sup>9</sup> After accepting a ConocoPhillips request for the remaining capacity, effective November 1, 2013, Rockies began reporting a lack of long term, firm capacity at Midwestern Edgar and ANR Shelby.

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<sup>4</sup> *Gulf South Pipeline Co., LP*, 135 FERC ¶ 61,119, at P 25 (2011) (*Gulf South*).

<sup>5</sup> *Northern Natural Gas Co.*, 110 FERC ¶ 61,361, at P 10 (2005).

<sup>6</sup> *Northern Natural Gas Co.*, 111 FERC ¶ 61,379, at PP 37-38 (2005).

<sup>7</sup> Complaint Order, 146 FERC ¶ 61,161 at P 6.

<sup>8</sup> *Id.* P 4 & n.7.

<sup>9</sup> *Id.* P 6.

9. Consequently, although Rockies made capacity available on an interim basis, it rejected Encana's subsequent request to reallocate capacity from Ohio to Illinois and Indiana, because Encana sought service on a long-term basis.<sup>10</sup>

10. The Commission rejected Indicated Shippers'<sup>11</sup> suggestion that Rockies' tariff be modified to require mandatory open bidding processes for all new capacity on Rockies' system as not being required by Commission precedent. In addition, the Commission rejected Indicated Shippers' requests for additional actions, such as nullifying service agreements and subjecting the capacity to an open season, as beyond the scope of the complaint. The Commission acknowledged that it considered subsequent contractual arrangements in order to examine claims of discrimination, but declined to expand the scope of the complaint – which relates to Rockies' rejection, based upon the 90-day rule, of Encana's September 26, 2013 request to shift primary delivery point capacity to Midwestern Edgar and ANR Shelby.<sup>12</sup>

## **II. Requests for Rehearing**

11. Encana and Indicated Shippers each filed a request for rehearing, objecting to the Complaint Order on a number of grounds. Encana claims that the Commission failed to distinguish cases holding that a pipeline is not permitted to implement a policy, here the Commission's 90-day policy, that is not in its tariff. Further, Encana objects to the Commission's application of the 90-day rule based on holdings relating to the Northern Natural Gas Company, Trailblazer Pipeline Company LLC, and Gulf South Pipeline Company, LP systems. According to Encana, these holdings on other systems do not, in and of themselves, justify adoption of the 90-day rule for the Rockies system.

12. Encana faults the Commission for failing to address arguments to the effect that the Commission's order on remand of Order No. 637 from the United States Court of Appeals for the District of Columbia Circuit<sup>13</sup> was not binding precedent on this

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<sup>10</sup> *Id.* P 8.

<sup>11</sup> Anadarko Energy Services Company, BP Energy Company, ConocoPhillips Company, and WPX Energy Marketing, LLC.

<sup>12</sup> Rockies filed an Advanced Notice of Construction with the Commission on August 26, 2013 in Docket No. CP13-539-000. In that proceeding, on September 24, 2013, the Indicated Shippers filed a "Request for Clarification" which raises issues related to Rockies' Natural Gas Policy Act (NGPA) section 311 Seneca Lateral project.

<sup>13</sup> *Interstate Natural Gas Assoc. of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002) (*INGAA*) remanded certain issues to the Commission concerning, among other things, the relationship of a regulatory right-of-first-refusal (ROFR) to a pipeline's tariff

(continued...)

proceeding, because that order addressed specific facts and the Commission cautioned that its actions were not meant to establish a rule of general applicability regarding the rationalization of regulatory policies and tariff provisions.<sup>14</sup>

13. Encana contrasts the development of the regulatory right of first refusal policy in the Order on Remand with application of the 90-day rule and characterizes the former as being made clear ahead of time, while the latter is addressed on an “ad hoc” basis in tariff filing cases. According to Encana, because the Commission has never stated that the 90-day rule should be a governing principle for all pipelines, this proceeding does not represent a particular circumstance where a policy should be imputed even though a pipeline’s tariff does not specifically incorporate the policy. Encana challenges the Commission’s conclusion that it was appropriate for Rockies to apply the 90-day rule to Encana’s request to change its primary delivery points. Encana notes the Commission’s factual finding that Rockies’ actions were appropriate because failure to do so would have permitted Encana “at no additional cost, to block other shippers from acquiring long term transportation capacity at the new Midwestern Edgar and ANR Shelby delivery points.”<sup>15</sup>

14. Encana claims that the Commission’s conclusion is unsupported by substantial evidence because its request was not motivated by a desire to block any other shippers from access to capacity, and evidence of such intent is lacking in the record.

15. Encana questions the Commission’s acceptance of Rockies’ claim that it had never accepted a delivery point change request made more than 90 days in advance, because there is also no evidence that Rockies has ever denied a request by any shipper, other than Encana, for making a request outside the 90-day limit. Encana concludes that,

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provisions; segmentation of capacity and forwardhauls and backhauls to the same point; and the conditions for waiving the posting of short-term capacity releases for bidding.

<sup>14</sup> Encana Rehearing at 9-10 (citing *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, 101 FERC ¶ 61,127, at P 24, n.23 (2002) (Order on Remand) and Complaint Order, 146 FERC ¶ 61,161 at P 18 & n.27).

<sup>15</sup> Encana Rehearing at 11 (quoting Complaint Order, 146 FERC ¶ 61,161 at P 19). Encana clarifies that it sought capacity at the existing Midwestern Edgar and ANR Shelby delivery points, and that the points themselves were not new. Encana concludes that any analogy to an existing shipper’s attempt to switch its primary delivery to new points of delivery must fail.

before Encana made its request, there had been no occasion for Rockies to establish a basis for consistent application of the 90-day rule.

16. Indicated Shippers dispute the Commission's reliance on an exception to the 90-day rule for new construction in awarding capacity to its Cornerstone Shipper more than 90 days before an agreement was executed, while at the same time applying the 90-day rule strictly to Encana. According to Indicated Shippers, the Commission's precedent clearly holds that the exception to the 90-day rule for new construction applies only where the pipeline submits an application for a certificate of public convenience and necessity under section 7 of the Natural Gas Act (NGA). Indicated Shippers cite a *Gulf South* proceeding rejecting a proposal to reserve capacity for "smaller prior notice projects" where the Commission stated:

Gulf South has not presented sufficient need for a new policy reserving capacity for construction, acquisition, or lease of these smaller projects. For instance, it is unclear the extent to which such a policy would lead to a more efficient use of a pipeline's existing capacity, or encourage the construction of appropriately sized facilities. In fact, such a policy might have no effect on the size or efficiency of these smaller projects and would only result in the loss of shipper's Right of First Refusal (ROFR).<sup>16</sup> Further Gulf South has failed to address how the Commission can ensure that the prior notice process, which is easier to employ than the formal certificate process, will not be utilized to withhold capacity unnecessarily from the market.<sup>17</sup>

17. Indicated Shippers also contend that the Commission erred when it declined to require Rockies to amend its tariff to specify how it would apply the 90-day rule. Indicated Shippers contrast the treatment of Encana's request, which was denied for being outside the 90-day window, and that of the unnamed Cornerstone Shipper, which received an effective date which ultimately was more than 90 days in the future. Indicated Shippers claim that inconsistent application of the 90-day rule demonstrates the need for tariff language in Rockies' tariff so that all parties will "know the rules."

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<sup>16</sup> The ROFR is a process which allows long-term firm natural gas transportation customers to continue receiving firm natural gas transportation service by paying up to the maximum rate and matching the length of a term offered by another customer who is seeking service.

<sup>17</sup> Indicated Shippers Rehearing at 5 (quoting *Gulf South Pipeline Co., LP*, 132 FERC ¶ 61,145, at P10 (2010) (*Gulf South Pipeline*), citing *Transcontinental Gas Pipe Line Corp.*, 118 FERC ¶ 61,234, at P 10 (2007)).

18. Indicated Shippers seek to rely on precedent requiring a pipeline or electric utility to implement tariff provisions to implement a particular policy.<sup>18</sup> In addition, they note that the Commission stopped short of making a blanket holding that Commission policy must always apply, noting that applicability depends on the particular circumstances of a case.<sup>19</sup> Indicated Shippers conclude that a shipper cannot therefore rely on the Commission's policy in a given case. Indicated Shippers cite past proceedings where Indicated Shippers assert the Commission permitted Rockies to implement service changes commencing more than 90 days in the future.<sup>20</sup> Thus, Indicated Shippers argue that tariff language is needed to ensure that Rockies will not apply a more rigid view of the 90-day rule, to the detriment of Rockies' existing shippers.

### **III. Discussion**

19. The Commission denies the requests for rehearing and affirms its decision in the Complaint Order to decline to grant the relief requested by Encana. The Commission reviewed the pleadings in this proceeding and, in light of its 90-day rule which generally prohibits new service requests made more than 90 days in advance of the date for which service is sought, found that Rockies' rejection of Encana's request to reallocate its primary delivery point capacity was consistent with Commission policy. Simply put, in the absence of specific terms to the contrary in Rockies' tariff, the 90-day rule applies as a matter of general Commission policy.<sup>21</sup> The Commission has emphasized that the 90-day rule is "standard Commission policy" and that it provides the "appropriate time limit for commencement of service."<sup>22</sup> With respect to Encana's claim that the Commission failed to address its arguments that the 90-day prohibition must be in

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<sup>18</sup> Indicated Shippers Rehearing at 8.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 9-10.

<sup>21</sup> Complaint Order, 146 FERC ¶ 61,161 at P 18 (citing Order on Remand, 101 FERC ¶ 61,127 at P 24, n.23; explaining that Commission policy requirements may apply although the pipeline's tariff does not specifically incorporate the policy and the applicability of a particular Commission policy in the absence of a specific pipeline tariff provision depends upon the particular circumstances).

<sup>22</sup> *Northern Natural Gas Co.*, 52 FERC ¶ 61,047 at, 61,211 (1990) (*Northern Natural*).

Rockies' tariff, we find that the Commission clearly identified the Commission's policy that applies in the absence of language to the contrary in a pipeline's tariff.<sup>23</sup>

20. Encana complains that, in applying its 90-day rule, the Commission relied on precedent which was developed in response to unique facts. However, in the Complaint Order, the Commission explained why, based on the facts in this case, it declined to act on the Complaint. Namely, that "permitting Encana to switch primary delivery points more than 90 days in the future, would allow Encana: (a) to continue receiving service at its existing primary delivery points pursuant to its reservation charge until April 1, 2014; and (b) at no additional cost, to block other shippers from acquiring long term firm transportation capacity at the new Midwestern Edgar and ANR Shelby delivery points."<sup>24</sup>

21. In addition, the Commission reviewed other contemporaneous service requests and found no discrimination in favor of the Cornerstone Shipper, because Rockies' failure to apply the 90-day rule in that case was justified by the exception to the rule for service requests related to new construction.<sup>25</sup> The Commission explained that the Commission allows exceptions to the 90-day rule for requests for service which depend upon the construction of new facilities, to encourage new facilities and the development of new supply sources.<sup>26</sup> The Commission stated, "Commission policy permits certain exceptions to the 90-day rule, such as for the construction of facilities which may require substantial time planning and investment."<sup>27</sup> The backhaul service agreement with the Cornerstone Shipper was clearly linked to the construction of the Seneca Lateral, and thus was within the exception to the 90-day rule for new construction. Because Encana had not demonstrated that its request qualified for the new construction exemption, the Commission denied Encana's Complaint. Other than Encana's objection to any suggestion it intended to tie up capacity, Encana's rehearing presents no new facts or

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<sup>23</sup> Complaint Order, 146 FERC ¶ 61,161 at P 18. Elsewhere, the Commission has held "when a tariff does not include facets of the Commission's policies or if the tariff is ambiguous on matters of Commission policy... the tariff should be interpreted as consistent with Commission policy." *ProGas USA Inc. v. Iroquois Gas Transmission Sys.*, 116 FERC ¶ 61,033, at P 19, n.9 (2006) (quoting Order on Remand, 101 FERC ¶ 61,127 at P 35).

<sup>24</sup> Complaint Order, 146 FERC ¶ 61,161 at P 19.

<sup>25</sup> *Id.* P 25.

<sup>26</sup> *Id.* (citing *Gulf South*, 135 FERC ¶ 61,119 at P 25).

<sup>27</sup> *Id.* P 20.

argument that warrant any change to the determinations in the Complaint Order or its application of the 90-day rule.<sup>28</sup> In the Complaint Order, the Commission reasonably applied its policy and took into consideration the facts in this proceeding.

22. Indicated Shippers argue that the 90-day rule construction exception only applies to pipelines which submit an application for a certificate of public convenience and necessity under Section 7 of the NGA,<sup>29</sup> and that since the Seneca Lateral is being constructed pursuant to Section 311 of the NGPA, the construction exception to the 90-day rule does not apply. Indicated Shippers argue the 90-day rule construction exception should not apply to the October 23, 2013 backhaul service agreement.

23. The Commission disagrees. The Complaint Order held that the October 23, 2013 agreement qualified for the new construction exception to the 90-day rule, because the agreement was linked to the construction of the Seneca Lateral project. New construction is new construction, under whatever aegis. In *Northern Natural*,<sup>30</sup> the Commission recognized that both pipelines and shippers need certain assurances on capacity availability in order to make new construction investments. In *Gulf South*, the Commission found that “[s]uch an exception appropriately encourages new facilities and the development of new supply sources.”<sup>31</sup> Consequently, the construction exception is rooted in the need for adequate assurance of capacity availability in order to make new construction investments. The construction exception is not, as Indicated Shippers suggest, merely based upon which regulatory scheme the construction commences under.

24. As for Indicated Shippers’ position that tariff revisions concerning application of the 90-day rule are required, the Commission confirms on rehearing that it finds such revisions unnecessary in the circumstances. The Complaint Order also reasonably

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<sup>28</sup> Encana also attempts to manufacture a factual issue over the Commission’s referring to reservations at “new” delivery points, with the western delivery points being in operation for some time. However, in context, the Commission’s description merely reflects Encana’s attempt to change its service featuring its existing delivery point at Texas Leb in Ohio to use new delivery points in Illinois and Indiana. That is, the Commission referred to new, or changed, arrangements, not to newly established facilities.

<sup>29</sup> Indicated Shippers Rehearing at 5 (citing *Gulf South Pipeline*, 132 FERC ¶ 61,145 at P 15; *see also Gulf South*, 135 FERC ¶ 61,119 at P 25, n.19).

<sup>30</sup> *Northern Natural*, 52 FERC ¶ 61,047.

<sup>31</sup> *Gulf South*, 135 FERC ¶ 61,119 at P 25.

declined to order revisions to Rockies' tariff to provide for an open season under these circumstances and otherwise found Indicated Shippers' request to be beyond the scope of this proceeding.<sup>32</sup> On rehearing, Indicated Shippers renew their request for these revisions to Rockies' tariff. Since the Commission has now further delineated how the 90-day rule should apply, there is no basis for requiring such revisions.

25. The Commission does not find the precedent identified by Indicated Shippers to be relevant to this proceeding. The *Gulf South Pipeline* order addressed an attempt by a pipeline to reserve capacity for up to one year in anticipation of new construction.<sup>33</sup> The Commission rejected that proposal as interfering with shippers' ROFR. However, this proceeding relates to a pipeline's sale of available delivery firm capacity which had been properly posted in accordance with its tariff.<sup>34</sup> Consequently, Indicated Shippers have failed to convincingly demonstrate the relevance of the *Gulf South Pipeline* order to this proceeding.

26. Indicated Shippers also cite delegated letter orders issued by the Commission's staff in an attempt to demonstrate that Rockies has accepted delivery point changes commencing more than 90 days from the effective date.<sup>35</sup> However, delegated letter orders do not establish any binding precedent on the Commission.<sup>36</sup> Because the delegated letter orders were issued in uncontested proceedings lacking a developed record, the Commission does not find in them any convincing evidence of discrimination. These proceedings appear to be routine uncontested amendments or restatements of negotiated service agreements that sought to implement temporary adaptive changes, not related to a major reconfiguration of the pipeline to structurally reconfigure itself to serve changing markets. Accordingly, the Commission finds no support in these delegated

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<sup>32</sup> Complaint Order, 146 FERC ¶ 61,161 at PP 18, 34.

<sup>33</sup> *Gulf South Pipeline*, 132 FERC ¶ 61,145 at P10.

<sup>34</sup> Complaint Order, 146 FERC ¶ 61,161 at P 26. Similarly, no issue with respect to shippers' ROFR is implicated in this proceeding.

<sup>35</sup> Rehearing at 9-10.

<sup>36</sup> *Millennium Pipeline Co., LLC*, 145 FERC ¶ 61,088, at P 10, n.11 (2013). Furthermore, actions taken by the Commission's staff pursuant to delegated authority do not constitute Commission precedent binding the Commission in future cases and the exercise of delegated authority cannot serve to supplant Commission policies established in its decisions and regulations. *Norwalk Power, LLC*, 122 FERC ¶ 61,273, at P 25 (2008).

letter orders for Indicated Shippers' contention that these letters' approval of temporary delivery point changes undermines the Commission's determination here that Rockies Express properly applied the 90-day rule with respect to both Encana and the Cornerstone Shipper in the instant proceeding.

The Commission orders:

Encana's and Indicated Shippers' requests for rehearing are denied for the reasons discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.