

156 FERC ¶ 61,165
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Midcontinent Express Pipeline LLC

Docket No. RP16-1168-000

ORDER ACCEPTING TARIFF RECORDS SUBJECT TO CONDITIONS

(Issued September 9, 2016)

1. On August 11, 2016, Midcontinent Express Pipeline LLC (MEP) filed revised tariff records¹ to add a new section 16.5 to the General Terms & Conditions (GT&C) of its tariff to provide that MEP and a Shipper may agree to reduce the Maximum Daily Quantity (MDQ) of an existing Rate Schedule FTS transportation agreement or terminate an existing Rate Schedule FTS transportation agreement in certain circumstances, in exchange for a payment to MEP of an exit fee equal to all or a portion of the present value of reservation charges for the remaining term of the agreement. MEP states it is proposing this new provision to provide flexibility to its shippers in implementing transfers of producing acreage to other entities and in light of significant changes in natural gas commodity markets that have affected the financial condition of some of its shippers. Atmos Energy Corporation (Atmos) filed a protest to MEP's proposal. We accept the subject tariff records effective September 10, 2016, as requested, subject to the conditions discussed below.

I. Background

2. MEP states that it presently provides firm transportation service to 14 unique shippers, most of whom produce and/or market natural gas and use their capacity on MEP to transport production from Oklahoma and Texas to pipeline interconnects in the Southeast United States. MEP states that, from time to time, producers transfer producing acreage and assets in certain supply areas to other producers, and these transactions often include the transfer of firm pipeline transportation capacity held to

¹ Midcontinent Express Pipeline LLC, FERC NGA Gas Tariff, First Revised Volume No. 1, [Sheet No. 2, Table of Contents, 1.0.0](#), [Sheet No. 328, PreGranted Abandonment/Contract Rollovers/ROFR/Buy-Outs, 1.0.0](#) and [Sheet No. 332, , 1.0.0](#).

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transport production from supply areas to downstream markets, done in accordance with a pipeline's capacity release procedures and the Commission's regulations, or pursuant to a waiver of those provisions and regulations. MEP states that in some circumstances, a party acquiring the producing acreage may not need all of the firm transportation capacity that the other party holds. MEP suggests that in these circumstances, either party may desire to buy-out of all or a portion of the associated firm transportation contracts.

3. MEP notes that in the past several months, two of its original shippers, Quicksilver Resources Inc. and SandRidge Energy, Inc., have filed bankruptcy, rejecting their transportation agreements with MEP, thereby leaving MEP with large, unsecured claims for which there is likely to be little to no recovery. MEP also notes that among its current producer-shippers that receive independent credit ratings, all but one have been downgraded recently by at least one level. To help mitigate this risk, MEP states it has determined that, in some circumstances, it may be beneficial to both pipeline and shipper to negotiate a buy-out of all or a portion of a shipper's long-term firm transportation commitments. MEP contends that such a buy-out could reduce MEP's exposure to a future default by a shipper, particularly a producer facing extraordinary financial challenges presented by the steep drop in commodity prices. MEP states the reduction provision could also help protect such capacity, which could otherwise be used to serve other shippers, from becoming entangled in bankruptcy proceedings.

II. Details of the Instant Filing

4. MEP's proposed new section 16.5 to the GT&C of its Tariff states as follows:

MEP and a Shipper may agree to reduce the MDQ of a FTS transportation Agreement ("MDQ Reduction") or to terminate an existing FTS transportation Agreement before the expiration of the term of the Agreement ("Early Termination") in the following circumstances: (1) as part of a transfer of producing acreage or other producing assets from an existing Shipper to another entity; or (2) in response to an observable deterioration, based upon a review of the criteria specified in Section 12.1(a) of these General Terms and Conditions, of a Shipper's financial ability to perform the payment of obligations due to MEP over the term of the existing Agreement. As a condition of an MDQ Reduction or Early Termination, MEP may require that a Shipper provide a payment to MEP equal to all or a portion of the reservation charges that shipper would be obligated to pay MEP for the remaining term of the Agreement. MEP shall be under no obligation to agree to a MDQ Reduction or Early Termination. MEP shall negotiate MDQ Reductions and

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Early Terminations with Shippers on a not unduly discriminatory basis.

5. MEP asserts that this provision is just and reasonable, and consistent with Commission policy and precedent approving similar provisions for other pipelines, such as in *Columbia Gas, Tennessee*, and *Northern Natural*.² MEP states that in *Northern Natural* the Commission approved a contractual reduction provision that was tailored to address specific conditions on the Northern system at the time. According to MEP, the Commission recognized that, because Northern was obligated to negotiate reduction rights “in a good faith, non-discriminatory manner,” the “existing language in Northern’s Firm Rate Schedules allowing it to negotiate reduction rights does not pose a risk of undue discrimination.”³ The Commission also found that, because Northern was under no obligation to offer reduction rights, the conditions that it proposed relating to local distribution company bypasses were acceptable.⁴

6. MEP contends that its reduction right proposal in the instant filing is intended to address specific circumstances on its system, consistent with the Commission’s approval of the reduction right in *Northern Natural*. MEP states its proposed buy-out provision will provide flexibility to its shippers and offer MEP the opportunity to mitigate its financial risk associated with changes in its shipper’s financial conditions. MEP further states that by referencing the creditworthiness evaluation standards in its tariff, the proposed tariff language provides objective criteria to establish eligibility for an MDQ reduction or early termination. MEP asserts it will negotiate contractual buy-outs and buy-out payments on a not unduly discriminatory basis. MEP thus asserts that its proposed section 16.5 is just and reasonable and consistent with the Commission’s policy and precedent. MEP requests that the Commission accept the tariff filing and permit the proposed tariff records to become effective September 10, 2016.

III. Notice, Interventions, and Protest

7. Public notice of the filing was issued on August 15, 2016. Interventions and protests were due as provided in section 154.210 of the Commission’s regulations.⁵

² MEP Transmittal at 3 (citing *Columbia Gas Transmission, LLC*, 148 FERC ¶ 61,218, at P 51 (2014) (*Columbia Gas*); *Northern Natural Gas Co.*, 133 FERC ¶ 61,103, at PP 20-21 (*Northern Natural*), *reh’g denied*, 135 FERC ¶ 61,024 (2010); and *Tennessee Gas Pipeline Co.*, 91 FERC ¶ 61,292, at 62,008-10 (2000) (*Tennessee*)).

³ *Id.* (citing *Northern Natural*, 133 FERC ¶ 61,103 at P 20).

⁴ *Id.* (citing *Northern Natural*, 133 FERC ¶ 61,103 at P 21).

⁵ 18 C.F.R. § 154.210 (2016).

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Pursuant to Rule 214,⁶ 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. On August 23, 2016, Atmos filed a timely protest. On August 30, 2016, MEP filed an answer to Atmos' protest. Rule 213(a)(2) prohibits answers to protests or answers unless otherwise ordered by a decisional authority.⁷ The Commission accepts MEP's answer as it aided in the decision-making process.

8. Atmos protests that MEP's proposed GT&C section 16.5 has not been shown to be just and reasonable. Atmos disagrees with MEP's claim that its proposed contractual buyout provision is consistent with similar provisions that the Commission has approved, and contends these other situations are distinguishable. For example, Atmos contends that unlike its proposal, the provisions approved in the cases cited by MEP all allowed for negotiation of reductions rights prior to, or at the time of, the execution of the contracts.

9. Atmos argues that the instant filing does not explain why the ability to negotiate an MDQ Reduction with MEP is available for the transfer of "producing acreage or other producing assets" but not for the transfer of a marketer's book of business, or an LDC's distribution systems or an industrial user's facilities. Atmos asks whether or not, in the event that an FTS shipper was seeking to negotiate an MDQ reduction as part of a specific transfer of producing acreage or other producing assets to another entity, it would make more sense for that shipper to request a waiver from FERC in connection with its proposed transaction on a specific case-by-case basis.

10. Atmos further contends that MEP's draft tariff language does not require an FTS shipper to attempt to release its capacity on MEP's electronic bulletin board pursuant to 18 C.F.R. § 284.8 before negotiating an MDQ reduction with MEP pursuant to proposed GT&C section 16.5. Atmos states that in the event another entity was willing to pay the maximum tariff rates for the FTS service at issue, a permanent release to that entity would be more appropriate than negotiating an MDQ reduction with MEP.

11. Atmos takes issue with the lack of detail provided in the instant filing. Atmos asserts that neither the transmittal letter nor the draft tariff language describe how a negotiated MDQ reduction will be treated in a subsequent rate case. Atmos asks whether MEP would be able to seek to recover the reduction in its revenues relating to the MDQ reduction in its maximum tariff rates, or whether such an adjustment would reflect any "buyout" payment made to MEP, or whether such an adjustment would impact any rate schedules other than FTS.

⁶ 18 C.F.R. § 385.214 (2016).

⁷ 18 C.F.R. § 385.213(a)(2) (2016).

IV. Answer

12. In its answer, MEP states its proposed tariff revisions are a response to drastic changes in the commodity markets for natural gas that have significantly affected the operations of producers in shale plays across the country and, in some cases, the financial condition of MEP's producer shippers. MEP states it has proposed to offer to all of its shippers the opportunity to negotiate an MDQ reduction or early termination in certain circumstances that are specifically applicable to the community of shippers on its system. MEP asserts its proposal will benefit its shippers by giving them the flexibility to plan transactions to respond to changing market conditions and benefit MEP by giving it a tool to manage and respond to increasing credit risk.

13. MEP argues that Atmos has misread the Commission precedent on this issue. MEP avers that in *Northern Natural*, the Commission approved the pipeline's proposal to move existing contract reduction provisions from the general terms and conditions of the tariff to Rate Schedule FDD.⁸ Furthermore, MEP contends that whether a buy-out provision is offered to a shipper at the time of contracting or available to a shipper while a contract is in-service should not affect the Commission's analysis of whether the provision is just and reasonable.

14. In response to Atmos' claim that MEP should have considered other alternatives to its proposed buy-out provision, MEP states that Atmos is merely second guessing a producer's business decision. In addition, responding to Atmos' position that the proposed buy-out provision should also apply when a marketer transfers its book of business, MEP argues that the Commission "recognizes that pipelines have the right under section 4 of the NGA to tailor tariff proposals to fit the facts and circumstances on their systems."⁹ In response to Atmos' suggestion that it would make more sense for a producer transferring acreage to seek a waiver from FERC in connection with its proposed transaction, MEP states that Atmos fails to recognize that not all transfers of producing acreage or producing assets might involve capacity that the acquiring party needs, and that in these circumstances, a waiver would be of no use to the transferring party, whose primary goal is to exit its capacity position, not to transfer the capacity through capacity release. MEP also contends that if a producer believes that capacity release transactions potentially requiring a waiver are the best way to implement a business transaction, then they may proceed on that course but if a buy-out of their existing contractual obligations with MEP would be preferable, then MEP's proposed tariff language will provide for that option.

⁸ MEP Answer at 3 (citing *Northern Natural*, 133 FERC ¶ 61,103 at P 17).

⁹ *Id.* at 6.

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15. Finally, in response to Atmos' questions about how an MDQ reduction or early termination and associated buy-out payment will be handled in a future general section 4 rate case, MEP states that these concerns may also be disregarded as they are not relevant to this proceeding and the Commission's evaluation of MEP proposal.

V. Commission Determination

16. We accept MEP's proposal, subject to the condition that MEP revise the proposal to ensure that it is not unduly discriminatory, as discussed below. The Commission does not require pipelines to permit customers to terminate or reduce their contract demand before the end of the contract terms.¹⁰ The Commission similarly does not require pipelines to offer to negotiate exit fees with shippers who wish to reduce or terminate their contract demand. When a pipeline does propose to "offer such a right on a voluntary basis," the Commission will accept it "so long as there is no undue discrimination among shippers."¹¹ We find that MEP's proposal only partly meets that requirement.

17. As drafted, MEP's proposal allows shippers to seek a reduction in MDQ or a buy-out in two separate scenarios: (1) as part of a transfer of producing acreage or other producing assets from an existing Shipper to another entity; or (2) in response to an observable deterioration of a Shipper's financial ability to perform.

18. We find that allowing an MDQ buy-out or reduction in scenario (2) is just and reasonable, and not unduly discriminatory, because it applies to all shippers that have an observable deterioration in their creditworthiness. All shippers who have experienced credit rating downgrades, or other objective financial hardship, are eligible to negotiate a reduction in MDQ or a buyout under scenario (2). Inclusion of this provision in MEP's GT&C ensures that all shippers have notice that MEP is willing to negotiate such a contract reduction and/or buyout pursuant to the generally applicable conditions set forth in the provision and ensures that MEP has tariff authority to charge an exit fee. However, scenario (1) appears to allow for potential discrimination. Scenario (1) allows shippers with "producing acreage or other producing assets" to negotiate a reduction in MDQ or a buy-out of an existing contract, even if they have not experienced a credit downgrade of the type required to qualify for scenario (2). MEP has not demonstrated that it is just and reasonable and not unduly discriminatory to provide shippers that have "producing acreage or other producing assets," but who have not experienced a credit downgrade, a

¹⁰ *El Paso Natural Gas Co.*, 139 FERC ¶ 61,096, at P 102 (2012) (citing *Northern Natural Gas Co.*, 135 FERC ¶ 61,024 at P 19).

¹¹ *Columbia Gulf Transmission Co.*, 105 FERC ¶ 61,351, at P 11 (2003) (*Columbia Gulf*), quoted in *Northern Natural*, 133 FERC ¶ 61,103 at P 17.

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special right to negotiate a reduction in MDQ or a buy-out of an existing contract, , without affording such a right to all other shippers.

19. Accordingly, we condition our approval of MEP's proposal on MEP submitting a compliance filing, within 30 days, in which it revises scenario (1) of its proposed tariff revision so that "there is no undue discrimination among shippers,"¹² either by making this language apply to all shippers, or else by removing this language from the proposal.

20. Further, we reject Atmos' other arguments against MEP's proposal. Atmos protests that the tariff language does not require an entity to seek a capacity release pursuant to 18 C.F.R. § 284.8 prior to negotiating an MDQ reduction. The Commission has never imposed such a requirement.¹³ There is nothing in MEP's proposal that would prevent a shipper from seeking to obtain the termination of its contract through a permanent release. The Commission presumes that a shipper would prefer to reduce or terminate its existing contract through a permanent capacity release out of its own economic interest, if it is able to obtain a replacement shipper willing to agree to pay a rate that would render the pipeline financially indifferent to the termination of the releasing shipper's contract. A permanent release would eliminate the need for the shipper to pay an exit fee to obtain a contract demand reduction or termination. Accordingly, we expect a shipper will choose capacity release, without the need for Commission intervention, whenever capacity release is a realistic option.

21. Atmos also protests that neither the transmittal letter nor the draft tariff language describe how a negotiated MDQ reduction will be treated in a subsequent rate case. The Commission finds that this is a rate matter that can be addressed in a subsequent rate case where all parties will be free to raise this issue.¹⁴

¹² *Id.*

¹³ Indeed, in some instances, the Commission has suggested that pipelines whose tariffs lack a provision that would allow free negotiation of an MDQ reduction to consider proposing one on compliance. *E.g.*, *Vector Pipeline L.P.*, 155 FERC ¶ 61,251, at P 8 (2016).

¹⁴ *C.f.* *Portland Natural Gas Transmission Sys.*, Opinion No. 510, 134 FERC ¶ 61,129 (2011), *on reh'g*, 142 FERC ¶ 61,198, at PP 117-176 (2013) (considering impact of a previous bankruptcy proceeding on a current rate case).

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The Commission orders:

MEP's proposed tariff language is accepted, subject to MEP submitting a compliance filing revising its tariff proposal consistent with the discussion above within 30 days as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.