

129 FERC ¶ 61,262
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

December 18, 2009

In Reply Refer To:
Kern River Gas Transmission
Company
Docket No. RP10-160-000

Kern River Gas Transmission Company
2755 East Cottonwood Parkway
Salt Lake City, Utah 84121

Attention: Mary Kay Miller, Vice President
Regulatory & Government Affairs

Reference: Revised Tariff and Related General Terms and Conditions

Dear Ms. Miller:

1. On November 19, 2009, Kern River Gas Transmission Company (Kern River) filed revised tariff sheets¹ to (1) improve the *pro forma* firm transportation service agreement (TSA) for Rate Schedule KRF-1 service and provide clarity related to common transactions between Kern River and its shippers, and (2) clarify existing provisions in the General Terms and Conditions (GT&C) of Kern River's tariff. For the reasons discussed below, the revised tariff sheets listed in Appendix A are accepted effective December 19, 2009, as proposed. Fourth Revised Sheet No. 107 listed in Appendix B, relating to non-conforming provisions, is accepted effective December 19, 2009, subject to the condition discussed herein. Kern River must file revisions in its tariff to provide credits consistent with Commission policy when firm service is curtailed or show cause why it should not be required to do so.

2. Kern River proposes to revise its *pro forma* service agreement under firm Rate Schedule KRF-1 to provide flexibility for standard transactions entered into between Kern River and its shippers. Kern River proposes to modify or expand

¹ See Appendices A and B.

certain “fill-in-the-blank” items that are used to set forth specific terms and conditions of each transaction. Specifically, Kern River proposes to expand the scope of information provided in the “fill-in-the-blank” items by capturing details of (1) the execution date, (2) restatement date if any, (3) measured quantities in dekatherms (Dth) or cubic feet (Mcf), (4) term and rate group (i.e. rolled-in or incremental), (5) construction or governmental approval contingencies that may affect the term of service, and (6) right of first refusal (ROFR) in agreements where there is not an automatic ROFR right.

3. Kern River proposes to revise Exhibits A and B to its *pro forma* service agreement under Rate Schedule KRF-1 and related *pro forma* amendment and attachment for transportation service in its tariff. Specifically, Kern River proposes to (1) change effective date to execution date, (2) provide a reference to amended transportation service agreements, (3) clarify that date ranges are terms of service, (4) clarify that changes to receipt and delivery points as well as changes to entitlements are optional, (5) replace a line item for a specific date range with an entry for specific months for multiple years or other time periods, (6) provide an option for either Mcf based agreements or Dth based agreements, (7) provide for receipt and delivery point pressure information when applicable, (8) add Dth as the unit of measurement for all receipt and delivery point entitlements, (9) move footnote pertaining to receipt and delivery point entitlements to section 11 of the General Terms and Conditions (GT&C) of Kern River’s tariff, (10) combine footnotes pertaining to receipt and delivery point pressure into one footnote for clarity, (11) provide for insertion of page number at bottom of each page, (12) clarify that effective dates for the rate may be stated, (13) reorganize format for clarity, (14) change Kern River to Transporter, (15) change a reference from “attached exhibits” to “attachments” to eliminate confusion, and (16) describe when an attachment is appropriately used.

4. Kern River proposes to revise section 6.2 and 6.4 of its GT&C to allow Kern River and a shipper or interconnect operator to mutually agree to receipt and delivery point pressures on a not unduly discriminatory basis. Section 6.2 also provides that notwithstanding the foregoing, Kern River is under no obligation to modify its line pressures to permit the entry of shipper’s gas into its system. Kern River states that if the above tariff provision is included in a shipper’s TSA, then it would not be considered non-conforming and Kern River would not plan on filing such a provision as non-conforming.²

² Citing *Northern Natural Gas Company*, 102 FERC ¶ 61,171 at P 14-19 (2003).

5. Kern River proposes to revise section 11.2(a) of its GT&C to clarify that the term of agreement between Kern River and a shipper may be extended as the result of contingencies such as completion of construction, or board or governmental approval, and extension rights such as rollover, evergreen, or a right of first refusal (ROFR) provision. In a related tariff change, Kern River proposes to include new section 27.5(a)(3) to its GT&C to provide a ROFR for discounted or negotiated rate agreements in situations where Kern River has agreed to such a provision. Finally, Kern River proposes to revise section 11.2(a) to provide that the term of agreement between Kern River and a shipper may contain a related termination provision.

6. Kern River proposes to include a new section 11.3 to its GT&C to address circumstances where the Commission determines that a contract provision is an impermissible material deviation. Section 11.3 provides that to the extent the Commission rejects the provision or requires Kern River to modify its tariff to make the provision generally available, Kern River and the shipper will enter into good faith negotiations to amend the agreement. If Kern River and the shipper cannot agree on an amendment, Kern River may, at its sole discretion, either amend or restate the agreement to delete the non-conforming provision, or revise its tariff to make such provision generally available.

7. Kern River proposes to include a new section 11.4 to its GT&C pertaining to receipt and delivery point entitlements. Section 11.4 replaces footnote No. 1 of Exhibit A to its *pro forma* service agreement under Rate Schedule KRF-1. Section 11.4 provides that receipt and delivery point entitlements must be equal to a shipper's transportation maximum daily quantity. For shippers that amend existing firm TSAs, each ratio of receipt point and delivery point entitlement to total transportation maximum daily quantity or maximum daily quantity (as applicable) must be retained, except in the case of capacity release where a shipper must comply with section 5.2(d) of the GT&C. Kern River also proposes to incorporate section 11.4 by reference into Rate Schedules CH-1, UP-1 MO-1, and SH-1. Kern River states that the language in section 11.4 is consistent with its historical business practices.

8. Notice of the subject filing was issued with interventions and protests due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2009)). Nevada Power Company (NVE) filed comments requesting clarification and modification of proposed section 11.3 of Kern River's GT&C pertaining to impermissible material deviations in non-conforming agreements. BP Energy Company (BP) timely filed a motion to intervene and subsequently filed a motion for leave to file comments one day out of time and comments requesting Kern River to include tariff provisions for the crediting of reservation

charges when Kern River curtails firm service. Indicated Shippers³ moved out of time to intervene and filed an answer in support of NVE and BP's comments. Kern River filed an answer to comments of NVE, BP, and Indicated Shippers. Generally, the commission does not accept answers to comments; however, the Commission will accept Kern River's answer as it assists in the Commission's review of Kern River's filing. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁴ all timely filed notices of intervention and motions to intervene and any motions to intervene out of time filed before issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties.

9. The Commission accepts Kern River's proposed changes to its *pro forma* service agreement under Rate Schedule KRF-1, the related *pro forma* exhibits and amendments, as well as related changes to the GT&C of its tariff. The Commission finds that Kern River has satisfactorily supported the changes and explained how they provide clarity and flexibility to transactions entered into between Kern River and its shippers. The Commission finds the revisions (1) allow Kern River and shippers to accurately represent standard transactions entered into between them in a conforming document, (2) clarify what the "fill-in-the-blank" items may include when commencing service, and (3) allow Kern River to make routine changes to provisions such as term of agreement, receipt and delivery point pressure, or unit of measurement without having to submit revisions for filing with the Commission. In addition, the Commission finds the proposed changes are to be implemented in a not unduly discriminatory manner, and shall apply equally to all shippers receiving service. However, the Commission conditions its acceptance of section 11.3 to Kern River's GT&C for the reasons discussed below.

10. Section 11.3 of Kern River's GT&C states that to the extent an agreement with a shipper contains one or more provisions that deviate in any material aspect from the applicable form of service agreement, Transporter will file such agreement for acceptance by the Commission. Section 11.3 further states that if the Commission rejects the provision or requires Transporter to modify its tariff to make the provision generally available, unless otherwise agreed, shipper and Transporter will enter into good faith negotiations to amend the agreement. Section 11.3 has a final provision which states that if shipper and Transporter

³ Indicated Shippers include Aera Energy LLC, Anadarko E & P Company LP, Chevron U.S.A. Inc., Occidental Energy Marketing, Inc., Shell Energy North America (US), L.P., and SWEPI LP.

⁴ 18 C.F.R. § 385.214 (2009).

cannot agree, Transporter may, at its sole discretion, either amend or restate the agreement to delete the non-conforming provision or revise its tariff to make such provision generally available.

11. NVE requests that the Commission require Kern River to modify section 11.3 to recognize the right of a shipper to reject any unilateral change to an agreement by Kern River. Specifically, NVE has concerns with the last sentence of section 11.3 which states that if shipper and Transporter cannot agree, Transporter may, at its sole discretion, either amend or restate the agreement to delete the non-conforming provision or revise its tariff to make such provision generally available. NVE submits that section 11.3 should be modified to provide that a shipper is not required to be bound by an agreement rejected by the Commission if the shipper and Kern River are unable to agree on an amended agreement or if Kern River's tariff revision fails to preserve the benefits of the agreement negotiated by the shipper. NVE suggests the following sentence be added at the end of proposed section 11.3. This sentence states that "in either event, shipper may, at its sole discretion, terminate the agreement without further obligation to Transporter." NVE concludes that with the addition of its suggested language to section 11.3, neither party is bound to amend the agreement.

12. Kern River responds that NVE's concerns are unfounded. Kern River states that section 11.3 specifically contemplates that Kern River and a shipper may negotiate a special provision that would apply in the event the Commission determines a provision to be impermissible. Kern River contends that NVE is free to bargain for the termination right it requests at the time the agreement is entered into, as was the case in its recent agreement with Kern River filed on March 17, 2009, in Docket No. RP09-457. Kern River concludes that allowing a shipper to terminate a contract when Kern River has revised its tariff to make the non-conforming provision generally available is unreasonable.

13. The Commission finds section 11.3 provides too much discretion for Kern River to amend or delete a non-conforming provision that the Commission finds impermissible, without providing a shipper the right to refuse the agreement as amended. As currently stated, section 11.3 may force a shipper to accept an agreement unilaterally modified by Kern River that the shipper no longer wishes to be a party to because of the modification. In circumstances where Kern River has revised its tariff only to make a non-conforming provision generally available to all shippers, no exclusive termination right by shipper would apply. In this circumstance, the non-conforming agreement between the parties has not been altered. Accordingly, the Commission will condition its acceptance of section 11.3 by requiring Kern River to file a revised tariff sheet that modifies section 11.3 by providing a shipper with the right to terminate an agreement when the Commission finds a provision in the agreement to be impermissible and

Transporter and the shipper cannot mutually agree to an amended agreement which does not include the impermissible provision.

14. NVE also contends that the new filing requirement in section 11.3 should not apply to future amendments to existing Commission approved non-conforming agreements, when such amendments affect only limited provisions such as price and term. NVE requests the Commission clarify that extensions to initial shipper agreements beyond Period One established in the rate case in Docket No. RP04-274-000, and the resulting access to lower Period Two rates, will not result in a filing requirement under Kern River's proposed section 11.3.

15. Kern River's response agrees with NVE's concern about further review of existing Commission approved non-conforming agreements. Kern River states that if a contract previously accepted by the Commission is amended by use of Kern River's *pro forma* amendment, and such amendment affects only limited provisions, such as price and term, the amendment need not be filed unless it, too, contains a material deviation. Kern River also agrees with NVE's concern that approval of the provisions in section 11.3 should not be applied in a way that modifies existing rights of shippers, such as access to the lower Period Two rates.

16. The Commission clarifies that the filing requirements contained in section 11.3 do not apply to non-conforming agreement provisions that have already been accepted by the Commission. However, the Commission will require any amendments to existing non-conforming agreements, whether they are term or rate related, to be filed with the Commission consistent with *Southern Star Central Gas Pipeline, Inc.*⁵ Further, consistent with *Southern Star Central Gas Pipeline, Inc.*, any future Period Two agreements that contain non-conforming provisions must be filed with the Commission.

17. BP filed comments pertaining to crediting of reservation charges during periods of curtailment. This issue, while not directly related to tariff changes proposed herein by Kern River, merits further discussion.

18. BP argues that neither the GT&C, nor Rate Schedule KRF-1 includes any provision providing for the crediting of reservation charges during periods of curtailment.⁶ BP states that this tariff omission is inconsistent with long-standing

⁵ See *Southern Star Central Gas Pipeline, Inc.*, 125 FERC ¶ 61,082, at P 6-7 (2008).

⁶ BP notes that while Articles 9.3 and 10.2 of Kern River's Rate Schedule SH-1 does provide for curtailment credits, this relates only to Shell Western E&P, Inc.

Commission policy which requires reservation charge credits during periods of curtailment. BP points out that the Commission has held that because pipelines should be able to provide the service that they have contracted to perform, it is reasonable for pipelines to provide reservation charge credits when they interrupt the service they have contracted to perform. Thus, BP states, Commission policy requires that when firm service is curtailed as a result of an event within the pipeline's control or management, the shipper is entitled to a full credit of the applicable reservation charges. However, where firm service is curtailed due to circumstances outside of the pipelines control (i.e. *force majeure* event), a partial reservation charge credit is appropriate so all parties will share the risk.

19. Kern River responds that this proceeding is not the proper forum to raise this issue. Kern River states that Commission policy is to consider issues involving reservation charge credits in a rate case.⁷ Moreover, Kern River contends that its tariff is consistent with Commission policy because its tariff contains numerous provisions related to the crediting of reservation charges.⁸

20. In a *force majeure* situation the Commission has approved two different methods for providing a partial reservation charge credit. The first method is the Safe Harbor method where shippers are entitled to a full credit of applicable reservation charges incurred after the curtailment has been in effect for a specified time period. The second is the No-Profit method where shippers receive a partial reservation charge credit (i.e. the shippers are credited an amount equal to the portions of the reservation charge that reflect the pipeline's return on equity and related taxes) for the entire curtailment period. BP states that the No-Profit method is preferable because it creates a greater incentive for the pipeline to act quickly to resume service. BP requests that the Commission require Kern River to revise its tariff consistent with Commission policy, and require Kern River to use the No-Profit method when curtailment is due to a *force majeure* event.

21. BP refers to two cases where the Commission found the pipeline's tariff was clearly inconsistent with Commission policy and exercising its authority under section 5 of the Natural Gas Act (NGA) required the pipeline to revise its

⁷ Kern River cites to *Natural Gas Pipeline Company of America*, 106 FERC ¶ 61,310, at P 12 (2004) and *Texas Eastern Transmission Corporation*, 62 FERC ¶ 61,015 (1993).

⁸ Kern River refers to provisions contained in section 7.2 of its GT&C; Article 4.1.7 of Rate Schedule CH-1; Articles 9.1.2 and 13.1 of Rate Schedule UP-1; Article 9.1 of Rate Schedule MO-1; and Articles 9.3 and 10.2 of Rate Schedule SH-1 to Kern River's tariff.

tariff even though the revised provisions were unrelated to the filing before the Commission.⁹ In those cases the same issue was presented, namely the pipeline's tariff did not provide for reservation credits to shippers during periods of curtailment. Kern River contends that the *Wyoming Interstate Company, Ltd.* (*WIC*) case is not applicable here since in *WIC* the Commission found that the pipeline's tariff was clearly inconsistent with Commission policy and here Kern River's tariff is consistent with Commission policy.

22. The Commission finds Kern River's support for addressing reservation charge credits only in a rate case contrary to recent Commission precedent. In *WIC* and *Tuscarora*, neither of which was a rate case, the Commission exercised NGA section 5 authority to reflect Commission policy with regard to reservation charge credits. Further, upon review of Kern River's tariff, the Commission finds various methods are utilized in calculating firm reservation charge credits during times of curtailment for firm Rate Schedules CH-1, UP-1, MO-1, and SH-1. In addition, firm Rate Schedule KRF-1 does not include a provision providing for the crediting of reservation charges during periods of curtailment. Finally, the Commission finds section 7.2 of Kern River's GT&C to be inconsistent with the various rate schedules stated above by providing that continued payment of the monthly reservation charge for firm service during a *force majeure* event will be a matter for individual negotiation between Kern River and shipper. Accordingly, the Commission will require Kern River either to file revisions in its tariff to provide credits in a uniform way consistent with Commission policy when firm service is curtailed or show cause why it should not be required to do so. The fact that a proposed revision is not directly related to the subject filing and the absence of a complaint are not conditions precedent to Commission action under section 5 of the NGA where the Commission is made aware of a tariff provision that is clearly contrary to Commission policy.¹⁰ Commission policy requires that pipelines provide full reservation charge credits for all scheduled gas not delivered due to a non *force majeure* event and partial reservation charge credits during *force majeure* events.¹¹ The Commission will not direct which partial credit method Kern River should choose. Within 30 days of the date of this order, Kern

⁹ See *Wyoming Interstate Company, Ltd.*, 129 FERC ¶ 61,022, at P 10 (2009) and *Tuscarora Gas Transmission Company*, 120 FERC ¶ 61,022 (2007) (*Tuscarora*).

¹⁰ See *Tuscarora*, 120 FERC ¶ 61,022 at P 13 (2007).

¹¹ See *Ingleside Energy Center, LLC*, 112 FERC ¶ 61,101, at P 58 (2005) and *Tennessee Gas Pipeline Company*, 76 FERC ¶ 61,022, at 61,086 through 61,089 (1996).

River must revise its tariff to provide such credits in conformance to Commission policy, or explain why it should be exempted from this requirement.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

**Kern River Gas Transmission Company
Docket No. RP10-160-000
Second Revised Volume No. 1
Tariff Sheets Accepted
Effective December 19, 2009**

Fourth Revised Sheet No. 97
Fifth Revised Sheet No. 98
Third Revised Sheet No. 98-A
Fifth Revised Sheet No. 108
Third Revised Sheet No. 108-A
First Revised Sheet No. 108-B
Fourth Revised Sheet No. 212
Fourth Revised Sheet No. 300
Fifth Revised Sheet No. 301
Sixth Revised Sheet No. 302
Fourth Revised Sheet No. 303
Third Revised Sheet No. 304
First Revised Sheet No. 359
First Revised Sheet No. 360
First Revised Sheet No. 361
Eighth Revised Sheet No. 501
Eighth Revised Sheet No. 601
Eighth Revised Sheet No. 701
Twelfth Revised Sheet No. 901

Appendix B

**Kern River Gas Transmission Company
Docket No. RP10-160-000
Second Revised Volume No. 1
Tariff Sheet Accepted Subject to Condition
Effective December 19, 2009**

Fourth Revised Sheet No. 107