

132 FERC ¶ 61,111
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Kern River Gas Transmission Company

Docket Nos. RP10-160-001
RP10-160-002
RP10-160-003

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued August 6, 2010)

1. On November 19, 2009, Kern River Gas Transmission Company (Kern River) filed revised tariff sheets that, among other things, proposed to add a new section 11.3 to the General Terms and Conditions of its FERC Gas Tariff (GT&C) to address circumstances where the Commission determines that a contract provision is an impermissible material deviation. Proposed section 11.3 provided 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, and if they 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.

2. On December 18, 2009, the Commission issued an order¹ accepting Kern River's proposed tariff revisions subject to conditions. The Commission found that section 11.3 provided 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. Accordingly, the Commission conditioned 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 Kern River and the shipper cannot mutually agree to an amended agreement which does not

¹ *Kern River Gas Transmission Company*, 129 FERC ¶ 61,267 (2009) (December 18 Order).

include the impermissible provision. The Commission also clarified 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 did require that any amendments to existing non-conforming agreements, whether they are term or rate related, are to be filed with the Commission consistent with the Commission's ruling in *Southern Star Central Gas Pipeline, Inc.*² Finally, the Commission found that consistent with *Southern Star* any future agreements that contain non-conforming provisions must be filed with the Commission.

3. In addition, the Commission in its December 18 Order exercised its Natural Gas Act (NGA) section 5 authority after reviewing Kern River's tariff with respect to calculation of firm reservation charge credits during times of curtailment and found the tariff was inconsistent with Commission policy. The order directed Kern River to either file revisions in its tariff to provide credits in a uniform way consistent with Commission policy or explain why it should not be required to do so.

4. On January 19, 2010, Kern River made three separate filings. First it filed a request for rehearing or reconsideration or, in the alternative, clarification of the December 18 Order as it relates to the requirement to file amendments to previously accepted non-conforming agreements to eliminate the condition, or if that is denied, to allow Kern River to withdraw new section 11.3. Kern River also included a request that the Commission should not have taken any action on the reservation charge credit issue since it was not part of Kern River's November 19 filing. Second it made a compliance filing in Docket No. RP10-160-002, revising certain tariff sheets,³ one of which was to delete proposed section 11.3 rather than revising it as the December 18 Order had directed, but made no change in its tariff concerning the reservation charge credit. Finally, Kern River filed a response explaining why it should not be required to include a uniform system of reservation charge credits as part of the generally applicable terms and conditions in its tariff. On January 21, 2010, Kern River filed a supplement to its January 19th response. For the reasons set forth below, the Commission grants rehearing in part, permits Kern River to withdraw section 11.3, and clarifies the December 18 Order.

5. Public notice of the Kern River compliance filing in Docket No. RP10-160-002 was issued on February 2, 2010. Protests were due on or before February 5, 2010. Nevada Power Company (NVE) filed comments as discussed below.

² *Southern Star Central Gas Pipeline, Inc.*, 125 FERC ¶ 61,082, at P 6-7 (2008) (*Southern Star*).

³ Sub Fourth Revised Sheet No. 107, Sub Fifth Revised Sheet No. 108, Sub Third Revised Sheet No. 108-A, and Sub First Revised Sheet No. 108-B to FERC Gas Tariff, Second Revised Volume No. 1.

A. The Reservation Charge Credit Issue

6. Although Kern River's November 19, 2009 tariff filing did not involve reservation charge credits, commenters raised the issue, asserting that neither the GT&C nor Kern River's general rate schedule, KRF-1, included any provisions to grant shippers reservation charge credits during periods of curtailment. The December 18 Order rejected Kern River's contention that the Commission should not consider the issue because that issue can only be addressed in a rate case, and its filing here did not involve the reservation charge credit. The order recognized that certain designated rate schedules in Kern River's tariff did contain provisions crediting reservation charges during curtailment periods.

7. The December 18 Order found that Kern River's tariff did not contain a consistent method for crediting the reservation charge, and that firm Rate Schedule KRF-1 did not contain any such provision. The order concluded, "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."⁴ Accordingly, the Commission required Kern River to file revisions to its tariff to provide such credits in conformance to Commission policy, or explain why it should be exempted from this requirement.

8. Kern River submitted a response, and also filed a request for rehearing on the Commission's conclusion to order that change to its tariff in this proceeding.⁵

9. Kern River argues that it should not be required to file uniform tariff revisions providing for crediting firm service reservation charges during periods of curtailment because Kern River is not the typical interstate pipeline. Kern River states that it was certificated as a project-financed pipeline in the early 1990s, and following the issuance of the optional expedited certificate authorizing construction of the original Kern River pipeline, Kern River entered into 17 firm Transportation Service Agreements (TSA) with prospective shippers.

⁴ December 18 Order, 129 FERC ¶ 61,267 at P 22.

⁵ In its January 21, 2010 supplemental filing Kern River states that its current GT&C is consistent with the Commission's 1990 order granting it optional certificate authority which directed it to include language in its tariff "that specifies that the payment of the reservation fee under circumstances of nondelivery is negotiable and subject to agreement by the shipper." *Kern River Gas Transmission Gas Co.*, 50 FERC ¶ 61,069 at 61,155-156 (1990).

10. Kern River asserts that many of these contracts, which have been brought forward to the existing tariff in specified Rate Schedules contained individually negotiated provisions regarding reservation charge credits, and these schedules were cited in the December 18 Order.⁶

11. Kern River argues that many of its contracts with shippers have different reservation charge credit provisions that reflect the individual negotiations between sophisticated parties, so there is good reason why the crediting provisions should not be made “uniform.” In fact, Kern River asserts, the Commission, when it accepted Kern River’s original compliance filing in 1990,⁷ recognized that the shippers executing these contracts were major, sophisticated market participants fully capable of negotiating at arm’s length. The Commission approved the different contracts stating:

It is not *per se* unduly discriminatory for Kern River to provide service for those customers willing to share in the project risk under service agreements which differ from each other. Put another way, it appears that the shippers had the same opportunity to negotiate their agreements.⁸

12. Kern River also contends that it is a project-financed pipeline, and that each of its firm TSAs is assigned to its lenders as collateral for the financing dollars that permit Kern River’s continued service and growth on behalf of its customers. It asserts that Kern River’s lenders accepted the original system contracts as their collateral, each with a carefully negotiated set of provisions, including specific provisions related to crediting of reservation charges, while other contracts did not contain such provisions. Thus, it would be contrary to the public interest to order any changes in these contracts at this time. This conclusion Kern River contends is buttressed by the fact that crediting the reservation charge during curtailment periods was never raised as an issue in Kern River’s most recent rate case, a proceeding where the Commission issued an order on the day prior to the December 18 Order.⁹

13. Kern River requests that the Commission not require Kern River to change its contracts or rate schedules to reflect a uniform system of credits for reservation charges at

⁶ *Id.* P 22 (citing Rate Schedules CH-1, UP-1, MO-1 and SH-1).

⁷ *Kern River Gas Transmission Co.*, 53 FERC ¶ 61,172 (1990).

⁸ *Id.* at 61,634.

⁹ *See Kern River Gas Transmission Co.*, 129 FERC ¶ 61,240 (2009).

this juncture, but rather – if at all – require such inclusion as part of Kern River’s next filed general rate case proceeding.

14. Kern River also argues in its response, as well as in its request for rehearing, that the instant proceeding is not an appropriate vehicle for requiring a change in its tariff to include a uniform reservation charge credit provision. Kern River states that if the Commission agrees that Kern River need not revise the reservation charge credit provisions in its tariff at this time, the rehearing request concerning this issue would be moot.

15. The Commission finds that Kern River has not shown why the Commission should not consider the reservation charge credit issue in this proceeding. As set forth in the December 18 Order, Commission precedent establishes that the reservation charge credit issue can be addressed in proceedings besides a rate case.¹⁰

16. The Commission finds that as set forth above, Kern River’s response establishes why Kern River should not be required to have a uniform reservation charge credit provision in the various rate schedules in its tariff. These rate schedules are the result of individually negotiated contracts. Thus, Kern River can continue to include the varying provisions related to reservation charge credits in Rate Schedules CH-1, UP-1, MO-1 and SH-1 to Kern River’s tariff, since these rate schedules reflect the result of individually negotiated contracts.

17. However, Kern River’s response does not dispute that Kern River’s firm Rate Schedule KRF-1 does not contain any provision for granting shippers reservation charge credits during periods of curtailment. Thus, the Commission affirms that Rate Schedule KRF-1 must be revised to include such a provision consistent with Commission policy. Accordingly, the Commission will deny rehearing and require Kern River to modify Rate Schedule KRF-1 consistent with Commission policy that 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. As the December 18 Order noted, the Commission has approved two different methods for providing a partial reservation charge credit, the Safe Harbor method and the No-Profit method, and the Commission will not direct which partial credit method Kern River should choose.

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

B. Non-Conforming Provisions

18. In its request for rehearing or reconsideration in Docket No. RP10-160-001, and its compliance filing in Docket No. RP10-160-002, Kern River argues that the Commission exceeded its authority under section 4 of the NGA by requiring Kern River to revise section 11.3 to provide a shipper with termination rights.¹¹ Kern River explains that providing a termination right to a shipper could create a situation whereby Kern River is subjected to an unacceptable financial risk since Kern River expends significant resources in anticipation of providing service to shippers that have signed service agreements with Kern River. Therefore, it argues, a shipper should not be permitted to terminate an agreement on which Kern River has a substantial investment, and such a negotiating right is adequate protection for the shipper. Kern River argues that the December 18 Order's failure to provide a reasoned explanation for granting such termination right was arbitrary and not reasoned decision making,¹² and the Commission should eliminate the requirement that Kern River modify section 11.3.

19. In the alternative, and in its compliance filing, Kern River states that it finds unacceptable the Commission's condition providing a shipper the right to terminate an agreement that contains an impermissible non-conforming provision. Thus, Kern River explains, it proposes to delete section 11.3 from its tariff. Kern River asserts that there is no requirement that the Commission's policy regarding material deviations must be set forth in a pipeline's tariff, and Kern River still remains subject to the Natural Gas Act and the Commission's requirement to file contracts that materially deviate from its applicable form of service agreement. Kern River explains that if the Commission finds a contract provision to be an impermissible material deviation, the pipeline may be required to make such provision available to all shippers or remove it from the contract. Kern River states that by removing section 11.3 from its tariff, Kern River and its shipper must agree how to address the Commission's finding that a provision in the contract is an impermissible deviation without being constrained by the tariff.

¹¹ Kern River Rehearing at 4, (citing *Western Resources, Inc. v. FERC*, 9 F.3d 1568 (D.C. Cir. 1993)).

¹² Kern River cites to *Motor Vehicles Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 48, 57 (1983). See also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851, (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1016 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 516 (D.C. Cir. 1985); and *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511, 1513 (D.C. Cir. 1984).

20. NVE which had objected to Kern River's proposed section 11.3, filed an answer objecting to Kern River's request to permit it to withdraw section 11.3. NVE asserts the Commission should deny the request because the new section is needed to ensure continued compliance with Commission guidelines. NVE argues that Kern River's request to withdraw the section is contradicted by Kern River's own previous assertion in its original filing that it was proposing to add section 11.3 because it was needed to address compliance with the Commission's guidelines. NVE asserts that shippers have the same concern that Kern River has about expending resources on contracts containing valuable provisions. Thus, NVE contends, the Commission should require Kern River to retain section 11.3, but modified in accordance with the Commission's condition of according the parallel right of termination to both shippers and Kern River.

21. Consistent with the December 18 Order, the Commission finds that section 11.3 grants too much discretion for Kern River to amend or delete a non-conforming provision that is found to be impermissible unless shippers are provided a parallel right to refuse the agreement as amended. However, the Commission agrees with Kern River that there is no Commission regulation that requires a pipeline to set forth the Commission's policy regarding material deviations in the pipeline's tariff. Section 154.1(d) of the Commission's regulations only requires that where a contract or executed service agreement deviates in any material aspect from the form of service agreement in a pipeline's tariff, the pipeline must file the non-conforming contract or non-conforming service agreement with the Commission. Therefore, the Commission accepts Kern River's proposal in its response to the December 18 Order to remove section 11.3 from its tariff. After removing section 11.3 from its tariff, Kern River will no longer have the unilateral right to either amend or restate the agreement to delete the non-conforming provision. Instead the parties must agree how to address the Commission's finding that a provision in the service agreement is an impermissible material deviation, unless the service agreement between the parties specifically sets forth a resolution procedure. As a result, Kern River's request for rehearing on this section 11.3 issue is moot since the provision is being removed.

22. In its request for rehearing, Kern River also takes issue with that part of the December 18 Order requiring Kern River to file amendments to non-conforming agreements with the Commission. Kern River cites *Guardian Pipeline L.L.C.*¹³ where the Commission accepted a non-conforming agreement that contained a material deviation that was subsequently amended to revise points of receipt shown on Exhibit A to the agreement. The pipeline filed a revised tariff sheet to show the amended points of receipt and also filed the amended Exhibit A, but requested Commission guidance as to

¹³ Kern River Rehearing at 7, (citing *Guardian Pipeline L.L.C.*, 129 FERC ¶ 61,166 (2009) (*Guardian*)).

whether the filing of the conforming amended Exhibit A was necessary. The Commission found that it was not necessary to file the conforming amended Exhibit A stating:

In this case, Guardian's filing of the revised tariff sheets, which describe the changes to the negotiated rate agreement, is sufficient to comply with these requirements, and there is no need for Guardian to file the revised Exhibit A. The revisions to Exhibit A do not materially deviate from the Form of Exhibit A to Rate Schedule FT-1 in Guardian's tariff, since the revisions to Exhibit A do not go beyond the filling-in-the-blank spaces or affect the substantive rights of the parties. In addition, section 154.1(d) of the Commission's regulations states, in part, that "[a]ny contract that conforms to the form of service agreement that is part of the pipeline's tariff...does not have to be filed."¹⁴

23. Kern River states that it intends to amend its non-conforming agreements by use of an approved *pro forma* amendment,¹⁵ as did Guardian. Kern River explains that the only difference is that here the Commission used "rate" and "term" as examples of potential conforming amendments to non-conforming agreements, while in *Guardian* the amendment pertained to changes in receipt points. Kern River argues that requiring conforming amendments here serves no useful purpose, but would create unnecessary delay in the effectiveness of a requested change to a shipper's rate, receipt or delivery points or other terms. Kern River explains this delay would result since such a filing would need to be filed with the Commission at least thirty days before the change was implemented. Kern River also states that in other transactions, the changes to the agreement made in the conforming amendment will be included in the transactional information posted on Kern River's website.

24. As discussed below, the Commission will clarify its December 18 Order as it relates to section 154.1(d) and section 154.110 of the Commission's regulations as well as *Guardian*. Section 154.1(d) of the Commission's regulations provides that any contract that conforms to the form of service agreement that is part of the pipeline's tariff pursuant to section 154.110 does not have to be filed. Section 154.110 of the Commission's regulations states:

The tariff must contain an unexecuted *pro forma* copy of each form of service agreement. The form for each must refer to the service to be

¹⁴ *Id.* P 6 (2009).

¹⁵ Kern River cites to Sheet Nos. 359-361 of Kern River's tariff.

rendered and the applicable rate schedule of the tariff; and, provide spaces for insertion of the name of the customer, effective date, expiration date, and term. Spaces may be provided for the insertion of receipt and delivery points, contract quantity, and other specifics of each transaction as appropriate.¹⁶

25. The Commission clarifies that the intent of the December 18 Order was to require pipelines to file contracts/agreements or amended contracts/agreements that deviate from the fill-in-the-blank spaces included in the *pro forma* service agreements of a pipeline's tariff. Where a pipeline amends an agreement to reflect a change to a receipt point, as was the case in *Guardian*, no filing of the amendment is necessary. However, as stated in the December 18 Order, when a pipeline reflects a change in the rate (i.e. a negotiated rate) other than the recourse rate, the amended agreement must be filed with the Commission pursuant to the Commission's Alternative Rate Policy Statement.¹⁷ Similarly, where a pipeline reflects a change to the terms of the agreement (i.e. a new condition imposed), as opposed to a change in the length of the agreement, the amended agreement must be filed with the Commission pursuant to section 154.1(d) and section 154.110 of the Commission's regulations and consistent with Commission policy set forth in *Southern Star*, *supra*.

The Commission orders:

- (A) Kern River's request for rehearing is granted in part, and denied in part, as discussed above.
- (B) Kern River's request for clarification of the December 18 Order's treatment of the Part 154 regulations is granted as discussed above.
- (C) Kern River's request to withdraw section 11.3 is granted.

¹⁶ 18 C.F.R. § 154.110 (2010)

¹⁷ See *Statement of Policy on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996).

(D) The revised tariff sheets listed in footnote No. 3, reflecting the removal of section 11.3, are accepted effective December 19, 2009, as proposed.

By the Commission. Commissioner LaFleur is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.