

132 FERC ¶ 61,276  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

September 30, 2010

In Reply Refer To:  
Fayetteville Express Pipeline LLC  
Docket No. RP10-1132-000

Fayetteville Express Pipeline LLC  
711 Louisiana St, Suite 900  
Houston, TX 77002

Attention: Shelley A. Korman, Senior V.P. of Commercial and Regulatory

Reference: Tariff Sections and Non-Conforming Agreements

Dear Ms. Korman:

1. On August 31, 2010, Fayetteville Express Pipeline LLC (FEP) filed five non-conforming service agreements that potentially materially deviate from its Form of Service Agreements and accompanying tariff sections listing the agreements in compliance with the Commission's Certificate order.<sup>1</sup> FEP is also seeking approval of the negotiated rates contained in those non-conforming agreements. As Appendix A (clean) and Appendix B (redline), FEP files two tariff records revising its lists of negotiated rates and non-conforming agreements.<sup>2</sup> As Appendix C (clean) and Appendix D (redline), FEP files a copy of each of the executed non-conforming agreements.<sup>3</sup> FEP requests that the Commission accept the tariff filing effective

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<sup>1</sup> *Fayetteville Express Pipeline LLC*, 129 FERC ¶ 61,235 (2009) (Certificate Order).

<sup>2</sup> Part 4, Section 6. Statement of Negotiated Rates, Version 1.0.0; Part 6, Section 38. Non-Conforming Agreements, Version 1.0.0.

<sup>3</sup> The five agreements filed are: Southwestern Energy Services Company, Transportation Rate Schedule FTS Agreement, January 6, 2010, Contract No. 200000;

(continued...)

October 1, 2010, as it expects to begin interim service on or soon after that date. We accept the negotiated rate and non-conforming agreements and tariff sections, effective October 1, 2010 as requested, subject to the conditions discussed below in this order.

### **Notice, Interventions, and Comments**

2. Notice of Fayetteville's filing was issued on September 1, 2010.<sup>4</sup> Interventions and protests were due as provided in section 154.210 of the Commission's regulations.<sup>5</sup> Pursuant to Rule 214,<sup>6</sup> all timely filed motions to intervene and any motions 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 this proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

### **Discussion**

#### **Negotiated Rates**

3. FEP states that, in compliance with the Certificate Order and section 30 of its General Terms and Conditions (GT&C), it is seeking the Commission's approval for the negotiated rates contained in Exhibit C to the filed agreements. FEP states that these negotiated rates constitute an essential element of the precedent agreements that provided the critical financial support allowing FEP to move forward with construction.

4. FEP's tariff, at section 30 of its GT&C, authorizes it to charge negotiated rates. Accordingly, we approve the negotiated rates in the five agreements that FEP has filed.

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Chesapeake Energy Marketing, Inc., Transportation Rate Schedule FTS Agreement, December 29, 2009, Contract No. 200001; XTO Energy Inc., Transportation Rate Schedule FTS Agreement, December 17, 2009, Contract No. 200002; BP Energy Company, Transportation Rate Schedule FTS Agreement, December 17, 2009, Contract No. 200003; and Southwestern Energy Services Company, Transportation Rate Schedule ITS Agreement, January 8, 2010, Contract No. 200004.

<sup>4</sup> 75 Fed. Reg. 54,860 (2010).

<sup>5</sup> 18 C.F.R. § 154.210 (2010).

<sup>6</sup> 18 C.F.R. § 385.214 (2010).

### **Non-Conforming Provisions**

5. Section 154.112(b) of the Commission's regulations,<sup>7</sup> requires that a pipeline file all contracts that contain material deviations, and that all such non-conforming agreements must be referenced in the pipeline's open access transmission tariff. Consistent with that regulation, FEP has filed several provisions which do not conform with its *pro forma* service agreements. In *Columbia Gas Transmission, LLC*,<sup>8</sup> the Commission clarified that a material deviation is any provision in a service agreement that: (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties. However, not all material deviations are impermissible. As explained in *Columbia Gas*, provisions that materially deviate from the corresponding *pro forma* service agreement fall into two general categories: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination.<sup>9</sup>

6. For the reasons discussed below, we accept all of the non-conforming provisions filed by FEP. As discussed below, some of the deviations from the *pro forma* service agreement are not material because they do not give the shipper any rights not already contained in FEP's tariff. While we are accepting these provisions, we remind FEP that unnecessary deviations from the *pro forma* agreement "hinder the Commission's ability to assess whether the transaction is unduly discriminatory as well as the assessment of the transaction by shippers attempting to determine if they are similarly situated to the shipper in the negotiated transaction."<sup>10</sup>

### **Previously Approved Provisions**

7. FEP urges the Commission to approve three non-conforming provisions that, it states, the Commission already approved in the Certificate Order for its two Foundation Shippers, Southwestern Energy Services and Chesapeake Energy Marketing. First, FEP

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<sup>7</sup> 18 C.F.R. § 154.112(b) (2010).

<sup>8</sup> 97 FERC ¶ 61,221 (2001) (*Columbia Gas*). See also *ANR Pipeline Co.*, 97 FERC ¶ 61,224 (2001) (*ANR*).

<sup>9</sup> *Columbia Gas*, 97 FERC ¶ 61,221 at 62,002; *ANR*, 97 FERC ¶ 61,224 at 62,022.

<sup>10</sup> *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 31 (2003).

notes that the agreements provide for caps on shippers' exposure to Lost and Unaccounted-For Gas reimbursement percentages. Significantly, FEP states that it will calculate these reimbursement percentages such that no other shipper will be subsidizing the Foundation Shippers' capped charges. Second, FEP notes that the Foundation Shippers will receive a credit for a portion of FEP's Rate Schedule ITS revenues. Third, these Foundation Shippers have a most-favored nation clause in their negotiated rates, entitling them to any negotiated, discounted, or recourse rate that FEP offers in the future that is more favorable than their current negotiated rates.

8. We confirm our acceptance of all of the non-conforming provisions filed by FEP that were previously accepted in the Certificate Order for the reasons set forth in that order.

### **Interim Period Provisions**

9. In the certificate proceeding, FEP stated that it intended to construct its pipeline with multiple construction teams and that it anticipated that it would be able to offer interim service on the portion of its pipeline upstream of its NGPL delivery point, before the remainder of the pipeline was completed. Accordingly, FEP proposed, and the Commission approved, initial rates for this Interim Period Service.<sup>11</sup> The filed agreements each contain several non-conforming provisions designed to address Interim Period Service. First, all five agreements contain non-conforming language in Section 3 to distinguish between Interim Period Service and full service for purposes of defining the primary term, and to acknowledge the uncertainty related to the precise date on which Interim Period Service and/or full service would commence.

10. In the firm agreements, Sections 2.1 and 2.2 in Exhibit C contain provisions regarding the nature and availability of Interim Period Service. Interim Period Service provisions were included in the Precedent Agreements discussed in the Certificate Order in connection with the Commission's approval of the Interim Period Service rates. Each of the firm non-conforming Agreements also contains a provision in Section 4.6 or 4.7 of Exhibit C which addresses the shipper's rights to assign its Precedent Agreement and FTS Agreement prior to the Effective Date of the relevant FTS Agreement. Following the Effective Date, the agreements expressly revert to the assignment and capacity release provisions in GT&C Sections 14 and 25.

11. Finally, the ITS Agreement with Southwestern Energy Services contains a non-conforming Maximum Daily Quantity (MDQ) provision which FEP argues was

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<sup>11</sup> Certificate Order, 129 FERC ¶ 61,235 at P 25-27.

necessary to describe the quantity of ITS service to which the shipper's negotiated ITS rate would apply during the period in which any Interim Period Service is available.

12. We find that these provisions in Exhibit C to the service agreements are limited in their substance to the revisions necessary to implement and define the terms of the Interim Period Service approved in the Certificate Order and the applicability of the shippers' negotiated rates to that service. In its filing, FEP commits to provide Interim Period Service to all shippers on a not unduly discriminatory basis, in accordance with its Tariff.<sup>12</sup> We accept these non-conforming provisions, subject to FEP offering Interim Period Service to all shippers on a not unduly discriminatory basis, as proposed.

13. While we are accepting these provisions, we note that Exhibit C to FEP's *pro forma* service agreements is solely for the purpose of setting forth the negotiated rate agreed to between FEP and the shipper. Therefore, contractual provisions, including non-conforming provisions, which go beyond setting forth the negotiated rate should not be included in Exhibit C. For example, sections 2.1 and 2.2 of Exhibit C in the instant service agreements defining Interim Period Service and its availability should have been set forth in the main body of these shippers' service agreements, rather than in Exhibit C. In the future, FEP should avoid putting such non-rate provisions in Exhibit C.

#### **Penalty Revenue Crediting**

14. Section 3.5 of Exhibit C to the Southwestern Energy Services and Chesapeake Energy Marketing firm agreements clarifies these Foundation Shippers' rights, as shippers with negotiated rate agreements, to receive penalty revenue credits, under the mechanism established in GT&C Section 9.3. The Commission approves this provision as an integral part of the shippers' negotiated rates approved above.

#### **Credit Requirements**

15. Each of the firm non-conforming agreements sets forth, in Section 4.5 of Exhibit C, the specific credit requirements applicable to the shipper. FEP states that these credit provisions were part of the open season held in connection with FEP's solicitation of initial commitments for the project, and also reflect certain specific credit requirements negotiated with the individual shippers on a not unduly discriminatory basis.

16. The *Policy Statement on Creditworthiness* permits pipelines to include different credit requirements in the service agreements of the initial shippers on a project. The non-conforming creditworthiness provisions at issue here fall within the scope of the

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<sup>12</sup> FEP Initial Filing at 9.

*Policy Statement on Creditworthiness.* As such, we accept them as not resulting in undue discrimination to any other shippers.<sup>13</sup> However, as with the Interim Period Service provisions discussed above, creditworthiness provisions go beyond simply setting forth the agreed upon negotiated rates and therefore should not have been included in Exhibit C.

### **Available In-Service Capacity**

17. Section 4.6 of Exhibit C to the Southwestern Energy Services and Chesapeake Energy Marketing firm agreements address the extent to which the negotiated rates apply to any additional firm capacity contracted for by these Foundation Shippers. This provision was an integral part of each Foundation Shipper's negotiated rate agreed to in its Precedent Agreement. FEP argues that this provision requires a Foundation Shipper to contract for any additional capacity on an equal basis in accordance with the provisions of FEP's Tariff.

18. We find that this provision is permissible, because it relates solely to the rates to be paid by these Foundation Shippers for additional capacity. The provision does not give these shippers a preferential right to such capacity. Such additional capacity will be made available to all shippers consistent with the provisions of FEP's tariff. We accept it accordingly.<sup>14</sup>

### **Succession and Assignment**

19. Section 4.7(b) of Exhibit C of the Chesapeake Energy Marketing firm agreement permits that shipper to request that FEP permit assignment of its capacity under the agreement to certain affiliates during the primary term, but specifically states that the exercise of such rights shall be subject to all applicable Commission regulations and policies.

20. In light of the provision that any assignment to an affiliate must be consistent with Commission regulations and policies, we accept this provision, however, we remind FEP and Chesapeake Energy Marketing that capacity assignments among affiliates must be consistent with the Commission's capacity release policies. In particular, a shipper may

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<sup>13</sup> *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats. & Regs., Regulation Preambles 2001-2005 ¶ 31,191 (2005) (*Policy Statement on Creditworthiness*).

<sup>14</sup> *Gulfstream Natural Gas System*, 100 FERC ¶ 61,036, at P 18 (2002), *reh'g denied*, 101 FERC ¶ 61,368 (2002).

only assign its capacity to an affiliate, without going through the capacity release program, in limited situations associated with internal organization within the same corporate family.<sup>15</sup> Assuming that FEP shall honor this and other Commission policies as the non-conforming section expressly provides, we find that this provision addresses the unique concern of a Foundation Shipper in a manner that does not result in undue discrimination to any of FEP's other shippers, and is therefore acceptable.

### **Provisions in Exhibits A and B**

21. All of the firm non-conforming agreements contain certain non-conforming provisions in Exhibits A and B which clarify the shipper's aggregate primary receipt and delivery point capacity limitations, which we address individually.

22. First, for each firm agreement, Exhibit A provides, "Except as authorized by the provisions of FEP's Tariff governing segmentation, in no event shall Shipper's aggregate primary receipt point capacity exceed Shipper's corresponding Contract MDQ," and Exhibit B provides the same for primary delivery point capacity. We find these provisions merely elaborate on the language already contained in sections 2.3 and 3.2 of FEP's existing Rate Schedule FTS which contain the same limits on aggregate point capacity, and accept them accordingly.

23. Second, in Exhibit A, XTO Energy's agreement provides for MDQ to be gradually ramped up over the first few months of the Primary Term. We find that these capacity limitations address situations unique to XTO Energy in the early months of FEP's operations. We accept them accordingly.

24. Third, Exhibit A of the Southwestern Energy Services agreement contains several provisions which were specifically agreed to in order to provide that Foundation Shipper with the desired level of contractual certainty concerning the minimum meter capacities and flow rates at each of its contracted primary receipt points. Southwestern Energy Services' Exhibit A also sets forth certain quantity limitations applicable to its receipts at certain locations on the pipeline and certain primary receipt point reallocation limitations. FEP argues that these provisions were an integral and necessary part of the Southwestern Energy Services agreement, given the very large amount of capacity contracted for, the hydraulic considerations associated with the design of the initial system, and the shipper's contractual fuel cap. Exhibit A of the Southwestern Energy Services agreement also clarifies the shipper's related rights to have FEP construct additional receipt point capacity on its behalf, consistent with the relevant provisions of FEP's Tariff. Similarly,

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<sup>15</sup> See *CenterPoint Energy - Mississippi River Transmission Corporation*, 115 FERC ¶ 61,013, at P 5 (2006).

Chesapeake Energy Marketing's agreement clarifies the minimum and maximum pressure with regard to the Arkansas Receipt Points. We find that these provisions address unique operational conditions related to the shippers in question, and do not adversely affect other shippers. In addition, GT&C Section 18.1<sup>16</sup> explicitly allows shippers to agree by contract to specific pressure terms, and accept these non-conforming provisions accordingly.

25. Fourth, Exhibit B to the Southwestern Energy Services and Chesapeake Energy Marketing firm agreements also clarifies these Foundation Shippers' rights to change their respective primary delivery points, and their right to deliver on any day up to 125 percent of their point MDQ at a given primary delivery point. FEP argues that this is consistent with the rights provided to all firm shippers under Section 2.3(b) of Rate Schedule FTS, which provides, "each Shipper has the right to deliver on any Day, on a primary firm basis, up to one hundred and twenty-five percent (125%) of the Point MDQ, at any Primary Delivery Point under Shipper's Agreement, subject to Shipper's total deliveries on any such Day not exceeding the Contract MDQ." We accept the deviations accordingly.

#### **Segmentation Rights**

26. Section 1.7 of Exhibit C to the Southwestern Energy Services and Chesapeake Energy Marketing firm agreements state that these Foundation Shippers have "segmentation rights on the Pipeline in accordance with FEP's tariff," and that their negotiated rates shall continue to apply in the event of segmentation. This provision was originally included in the Foundation Shipper Precedent Agreements to specify the segmentation rights which would be included in FEP's Tariff to be filed with the Commission. FEP argues that this provision, while a deviation from the form of service agreement, is consistent with the segmentation rights available to all shippers under FEP's Tariff, and clarifies the applicability of the Foundation Shipper's negotiated rate in the event of segmentation.

27. We find that this provision merely clarifies the applicability of the shippers' negotiated rates if they segment their capacity and otherwise reflects the segmentation rights available to all shippers under FEP's Tariff, and accept it accordingly.

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<sup>16</sup> GT&C Section 18.1 states, "**Unless otherwise agreed by contract**, for receipts on the Supply Leg, Shipper shall deliver Gas to FEP at a pressure sufficient to enter FEP; provided however, such pressure shall not be less than 1100 psig, or exceed 1167 psig. **Unless otherwise agreed by contract**, for receipts downstream of the Supply Leg, Shipper shall deliver Gas to FEP at pressures sufficient to enter FEP's pipeline, not to exceed the Maximum Allowable Operating Pressure (MAOP)." (emphasis added)

### **Rollover and Right of First Refusal Provisions**

28. FEP also urges the Commission to approve rollover and right-of-first-refusal provisions in section 4.4 of Exhibit C of each of the firm non-conforming agreements. FEP states that, while its *pro forma* service agreement does not contain blanks for adding these provisions to its negotiated rate contracts, section 16.3 of its GT&C authorizes it to negotiate such provisions with negotiated rate shippers. Accordingly, the Commission finds that these are permissible deviations from the form of service agreement. As discussed above, however, these provisions should have been included in the body of the shippers' service agreements, rather than in Exhibit C, because they go beyond simply setting forth the shippers' negotiated rates.

### **Tariff Record**

29. FEP's filing is not in compliance with the Commission's regulations and Order No. 714 with regard to what constitutes a tariff filing. Order No. 714 requires regulated entities to include the contents of any new tariffs or rate schedules in its electronic tariff once its baseline filing was established.<sup>17</sup> For this purpose, contracts are considered part of the electronic tariff.<sup>18</sup> In the instant filing, FEP has filed a revised tariff record which lists the agreements as non-conforming. FEP should have also filed the negotiated rate agreements in their entirety as tariff record(s) to be included in its FEP Tariff Database. Including non-conforming agreements in a pipeline's tariff will allow for greater transparency and the ability to search one database for all tariff-related concerns. Therefore, we condition acceptance on FEP filing the non-conforming agreements and related transactions that it included in Appendix D as a tariff record to its FEP Tariff Database, within 15 days of the date of this order.

By direction of the Commission.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>17</sup> *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 93 (2008).

<sup>18</sup> *Dominion Transmission, Inc.*, 132 FERC ¶ 61,179 (2010). *See also Columbia Gas Transmission, LLC*, 132 FERC ¶ 61,147, at P 14 (2010).