

133 FERC ¶ 61,187
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ETC Tiger Pipeline, LLC

Docket No. RP11-1432-000

ORDER ON COMPLIANCE TARIFF SECTION AND NON-CONFORMING
AGREEMENTS AND WAIVER

(Issued November 30, 2010)

1. On October 25, 2010, ETC Tiger Pipeline, LLC (ETC Tiger) filed in compliance with the Commission's April 7, 2010 Order Issuing Certificates in Docket No. CP09-460-000,¹ and pursuant to section 154.1(d) of the Commission's regulations,² seven non-conforming, negotiated rate service agreements that potentially materially deviate from its Form of Service Agreements, along with a tariff section listing the agreements.³ ETC Tiger moves that the Commission accept the proposed tariff sections and non-conforming agreements effective December 1, 2010, so that ETC Tiger may commence service on that date, and requests any waivers necessary to do so. As discussed below, the Commission grants the request for waiver, and accepts the non-conforming agreements and tariff section, to be effective on the later of December 1, 2010, or the in-service date of the Project, subject to conditions and without prejudice to further Commission ruling on the matter of the parties' contractual dispute with respect to the commencement of the primary term of the agreement.

Background

2. In the Certificate Order in Docket No. CP09-460-000, the Commission issued a certificate of public convenience and necessity authorizing ETC Tiger pursuant to section 7(c) of the Natural Gas Act (NGA) to construct and operate an approximately 175-mile long, 42-inch diameter natural gas pipeline, compression facilities, and other associated

¹ *ETC Tiger Pipeline, LLC*, 131 FERC ¶ 61,010 (2010) (Certificate Order).

² 18 C.F.R. § 154.1(d) (2010).

³ *See* Appendix.

facilities (Project) with a firm design capacity of up to 2.0 billion cubic feet per day.⁴ The Project pipeline begins in east Texas near Carthage and continues in an easterly direction to the terminus near Delhi, Louisiana. ETC Tiger stated that it entered into certain precedent agreements spelling out certain shipper requirements and that these shippers elected to pay negotiated rates.

3. In the Certificate Order, the Commission addressed non-conforming provisions of the precedent agreements and approved the deviations on the basis that they reflect unique circumstances involved with the construction of new infrastructure because they provide the needed security that the Project may be built. However, the Commission stated that its determinations related only to the items described by ETC Tiger in its application and not the entirety of the precedent agreements or the language contained in the precedent agreements. Accordingly, in the Certificate Order, the Commission directed ETC Tiger “to file its negotiated rate agreements” and “an executed copy of each non-conforming agreement reflecting the non-conforming language and a tariff sheet identifying these agreements as non-conforming agreements at least 60 days and no more than 90 days prior to the commencement of interstate service.”⁵

Summary of the Instant Filing

4. In the instant filing, ETC Tiger seeks Commission approval of seven non-conforming, negotiated rate service agreements, one for interruptible service and six for firm service, which contain certain non-conforming provisions that were not addressed in the Certificate Order. All of the filed non-conforming agreements are with shippers who made commitments to long-term service in advance of the Project’s commencement date. ETC Tiger argues these financial commitments were necessary in order to secure funding for the Project’s construction. ETC Tiger classifies such shippers as Foundation, Anchor, and Standard Shippers, and argues that all three classes may receive rights above and beyond those of any other shippers that may contract with ETC Tiger for firm capacity at a future date without being considered unduly discriminatory, since any differences would be of the sort that the Commission has previously found to be permissible between

⁴ Certificate Order, 131 FERC ¶ 61,010 at Ordering Paragraph (A).

⁵ Certificate Order, 131 FERC ¶ 61,010 at P 78 and Ordering Paragraph (I). The Commission also directed ETC Tiger to file actual tariff sheets that comply with the requirements of that order no less than 60 days nor more than 90 days prior to the commencement of service. *Id.* at Ordering Paragraph (G). On October 1, 2010, in Docket No. RP11-53-000, as rejected and re-filed on October 8, 2010, ETC Tiger filed to comply with that directive, and requested a December 1, 2010 effective date for its tariff. That filing will be acted on by separate order.

different classes of shippers.⁶ ETC Tiger states that its sole Foundation Shipper, Chesapeake Energy Marketing, Inc., (Chesapeake or Foundation Shipper) in particular has a unique status, because it committed to a minimum of 900,000 Dth/day of firm transportation capacity for at least fifteen years. ETC Tiger points to certain additional non-conforming provisions and discusses why it believes they should be accepted.

Request for Waiver

5. As noted above, the Certificate Order required ETC Tiger to file both its actual tariff provisions and its non-conforming agreements at least 60 days and no more than 90 days prior to the commencement of interstate service.⁷ ETC Tiger submitted the instant non-conforming service agreements on October 25, 2010, and states that it expects to commence service on December 1, 2010. Accordingly, ETC Tiger states that, pursuant to section 154.7(a) of the Commission's regulations,⁸ it seeks waiver to allow its new and revised tariff sections be placed into effect on December 1, 2010, as requested. ETC Tiger notes that it filed the rest of its tariff, which the Certificate Order also required to be submitted 60 to 90 days prior to the in-service date, on October 8, 2010, or on 53 days' notice, in a separate docket. ETC Tiger asserts that it has expended considerable resources to accelerate the submission of both its tariff and the instant filing in accordance with its commitment to its shippers to commence transportation services at the earliest date practical. ETC Tiger further argues that good cause exists to grant waiver of the 60 to 90 days' notice requirement, because section 154.207 of the Commission's regulations only requires 30 days' notice,⁹ and, it asserts, the Commission readily grants requests to waive this regulation.¹⁰

Notice of Filing and Interventions

6. Notice of ETC Tiger's filing was issued on October 26, 2010. Interventions and protests were due November 8, 2010 as provided in section 154.210 of the Commission's

⁶ ETC Tiger transmittal at 8.

⁷ Certificate Order, 131 FERC ¶ 61,010 at Ordering Paragraphs (H) and (I).

⁸ 18 C.F.R. § 154.7(a) (2010).

⁹ 18 C.F.R. § 154.207 (2010).

¹⁰ ETC Tiger filing at 13-14 (citing *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996) (*Alternatives*)).

regulations.¹¹ Pursuant to Rule 214,¹² 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.

Shell Protest and ETC Tiger Answer

7. Shell timely intervened, and on November 12, 2010, filed a protest. Shell objects to ETC Tiger's proposal that the full-service, FTS Agreement No. 300003, become effective as of December 1, 2010. Shell states that it would not oppose the proposed December 1, 2010 effective date for FTS Agreement No. 300002, which would provide Shell with Interim Service from the date that it is declared effective until the effective date of the full-service contract. Shell also objects to ETC Tiger's request for waiver of the requirement to file its negotiated rate agreements between 60 and 90 days before commencing service. Shell argues that ETC Tiger's requested effective date is in violation of its contract. Section 1.7 of Exhibit C of its full-service contract states (emphasis added):

“Effective Date” shall mean the first Day of the Month following notice from TIGER to Anchor Shipper that **the Pipeline is ready**, as of the Day of delivery of such notice, **to provide firm service** from the Carthage Interconnect to the SESH Interconnect, **including firm service** to Anchor Shipper under the FTS Agreement, of Anchor Shipper's Contract MDQ, **from the Eligible Primary Receipt Points initially set forth on Exhibit A of the FTS Agreement** to the Eligible Primary Delivery Point(s) initially set forth on Exhibit B of the FTS Agreement.

8. Shell claims that the primary receipt points under the full-service contract will not be physically connected by December 1, 2010. Shell has two primary receipt points under its firm contract, Clear Lake and Magnolia, which are to connect to an upstream gathering system being constructed by CenterPoint Energy Field Services, Inc. (CEFS). Shell reports that the CEFS system will not be connected until January 1, 2011 for one point, and its other primary receipt point will not be physically connected until February 1, 2011.¹³ Shell alleges that ETC Tiger failed to inform the third-party interconnecting

¹¹ 18 C.F.R. § 154.210 (2010).

¹² 18 C.F.R. § 385.214 (2010).

¹³ Shell Answer at 1.

upstream pipelines in an effective and timely manner that ETC Tiger would be completing the Project more than a month ahead of schedule. Shell argues that the proper legal standard is the ability to “substantially satisfy its shipper MDQs” at the appropriate receipt points, which would require a physical connection.¹⁴

9. On November 12, 2010, ETC Tiger filed an answer defending its proposed effective date against Shell’s protest.¹⁵ ETC Tiger claims that its precedent agreement with Shell obligated it to “proceed with due diligence to commence the transportation service at the earliest date practicable.”¹⁶ ETC Tiger interprets this clause as obligating it to complete construction and enter into service “on a timely basis, even while other interstate pipeline companies continue to report delays in project start-up.”¹⁷ ETC Tiger further argues that it has completed its half of the interconnection, and that any blame lies with the CEFS system. ETC Tiger states that not only is the CEFS system not part of the certificated facilities at issue, but it is also outside the Commission’s jurisdiction.

10. ETC Tiger alleges that “Shell lacks any genuine opposition to the proposed effective date ... [because] it does not oppose placing any of the other filed agreements, including its own ... agreement for interim service, Contract No. 300002, into effect on December 1, 2010.”¹⁸ Rather, ETC Tiger suggests, Shell is misusing the present proceeding in order to litigate the meaning of its service agreement. ETC Tiger argues that Shell is a sophisticated company that should not be let out of its contract, and recommends that Shell “move its primary point capacity ... either temporarily or permanently” until the CEFS interconnections are ready.¹⁹

¹⁴ Shell Answer at 7 (citing *XTO Energy, et al. v. Midcontinent Express Pipeline*, 132 FERC ¶ 61,201, at P 25 (2010)).

¹⁵ Under Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), answers to protests are prohibited unless otherwise ordered by the decisional authority. We will accept ETC Tiger’s answer because it has provided information that will assist us in our decision-making process.

¹⁶ ETC Tiger November 12, 2010 Answer at 2.

¹⁷ *Id.*

¹⁸ *Id.* at 3.

¹⁹ *Id.*

Encana Comments and ETC Tiger Answer

11. Encana timely intervened, and on November 17, 2010, filed comments opposing ETC Tiger's proposed December 1, 2010 effective date for FTS Agreement No. 300001. Encana states that, until reviewing the present filing, it had been led to believe that the Project would have a single effective date in the first quarter of the 2011 calendar year, partly because it was unaware of the details of the Chesapeake contract, which allow ETC Tiger to ramp up service with Chesapeake over the first two years. Two of Encana's four primary receipt points are the Clear Lake and Magnolia points; Encana, like Shell, reports that these CEFS system points will not be connected until after December 1, 2010.

12. Encana proposes that the Commission resolve this conflict by accepting ETC Tiger's filing, but denying the associated request for waiver to assign the tariff record an effective date of December 1, 2010. Encana states that, by denying the waiver to implement the tariff record on less than 60 days' notice, the permitted effective date would become December 24, 2010. Encana predicts that this date "should afford CEFS time enough to place its ... interconnection into commercial service and avoid the train wreck that is otherwise approaching."²⁰

13. On November 18, 2010, ETC Tiger filed an answer defending its proposed effective date against Encana's adverse comments.²¹ ETC Tiger clarifies that it "is *not* seeking Commission approval to commence the primary term of Shell's or EnCana's respective firm service agreements in this proceeding."²² Rather, ETC Tiger argues, the commencement date is a contract issue outside the scope of this proceeding. ETC Tiger also disputes Encana's factual assumptions, stating that Encana should have been generally aware of the Chesapeake contract since the certificate proceeding began. ETC Tiger also states that its precedent agreement with Encana obligates it to commence full service as soon as practicable. Accordingly, ETC Tiger argues that there is no merit in Encana's argument that the Commission should deny ETC Tiger's request for waiver.

²⁰ Encana Comments at 2.

²¹ Rules 213(a)(3) and 213(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.213(a)(3), (d), permit all timely answers to comments.

²² ETC Tiger November 18, 2010 Answer at 2.

ETC Tiger asserts that the Commission “routinely authorizes” newly certificated pipelines to file their non-conforming agreements 30 days in advance instead of 60 days.²³

Discussion

14. As discussed below, the Commission grants ETC Tiger’s request for waiver of the Certificate Order’s requirement that the non-conforming agreements be filed at least 60 days in advance of the in-service date of the Project pipeline and, consistent with that ruling, will therefore accept all the service agreements and the related tariff section effective the later of December 1, 2010, or the in-service date of the Project, subject to further review and conditions, as set forth below.

Requested Effective Date and Request for Waiver

15. ETC Tiger requests to place all of its proposed tariff sections into effect as of December 1, 2010, because, it asserts, “[b]ased on the process of construction..., ETC Tiger currently anticipates that it may be able to place its facilities into service to meet its firm service obligations as early as December 1, 2010.”²⁴ ETC Tiger submitted its filing on October 25, 2010, which is only 37 days’ prior to the expected in-service date. In so doing, ETC Tiger failed to comply with the Certificate Order which required ETC Tiger to file its “non-conforming agreements at least 60 days and no more than 90 days prior to the commencement of interstate service.”²⁵ Accordingly, ETC Tiger retroactively seeks a waiver of that requirement. ETC Tiger claims that it has a good-faith obligation to provide full service as soon as practicable and that it has expedited its construction and its filing of the tariff sections and service agreements necessary to commence service. Encana and Shell respond that, based on the construction reports of the Tiger Pipeline, they anticipated a first quarter of 2011 commercial operation date. Encana and Shell’s service agreements with ETC Tiger (FTS Agreement No. 300001 with Encana and FTS Agreement No. 300003 with Shell) establish as primary points of receipt two points of interconnection with CEFS, Clear Lake and Magnolia, which will not be in service by the requested effective date of December 1, 2010. Encana and Shell state that if ETC Tiger is granted an effective date of December 1, 2010, they will not be in a position to effect deliveries at either of these points.

²³ *Id.* at 3 (citing *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224, at P 48 (2009); *Midcontinent Express Pipeline, LLC*, 124 FERC ¶ 61,089, at Ordering Paragraph (H) (2008)).

²⁴ ETC Tiger Transmittal at 2.

²⁵ Certificate Order, 131 FERC ¶ 61,010 at Ordering Paragraphs (H) and (I).

16. The Commission grants ETC Tiger's request to waive the Certificate Order's requirement that it file the non-conforming service agreements at least 60 days before the pipeline starts service. Accordingly, the Commission accepts ETC Tiger's tariff sections and all the non-conforming service agreements effective on the later of December 1, 2010 or ETC Tiger's in-service date. Encana and Shell have not shown that ETC's Tiger's failure to file the non-conforming service agreements at least 60 days before its in-service date has adversely affected them. They do not allege that a filing by ETC Tiger 60 days before December 1, 2010 could have enabled CEFS to complete the construction of its facilities. Nor do they allege that ETC Tiger's delayed filing has affected their ability to protest the filing. In addition, in its answer to Encana, ETC Tiger clarifies that it is not seeking Commission approval to commence the primary term of Shell's or Encana's respective firm service agreements in this proceeding. ETC Tiger states that the commencement date of these contracts is a contract interpretation issue unaffected by its request for waiver of the Certificate Order's 60-day filing requirement and that Shell and Encana will retain their "full contractual rights to dispute the start of the primary term under [their] firm service agreement[s] and the FERC Gas Tariff, whether on or after December 1, 2010, regardless of the granting of the waiver."²⁶

17. In these circumstances, we grant ETC Tiger's waiver request to permit the proposed December 1, 2010, effective date, subject to further Commission ruling on the matter of the parties' contractual dispute with respect to the commencement of the primary term of the agreements. Within 20 days of the date of this order, ETC Tiger, Shell, and Encana shall file initial briefs supporting their respective interpretations of the two service agreements concerning the commencement date of their primary terms. ETC Tiger is further directed to file the precedent agreements and any other agreements with Shell and Encana relevant to the resolution of this issue. Other parties that have timely intervened in this proceeding may, but are not required to, file further comments or briefs regarding the disputed in-service date within 20 days of the date of this order. Answers to the initial briefs will be due within 35 days of the date of this order.

18. Finally, ETC Tiger has presented the Commission with numerous non-conforming provisions that deviate from ETC Tiger's tariff pro-forma service agreements. The Commission has not completed its review of these service agreements, including whether ETC Tiger's transmittal letter accurately and completely describes all of the deviations found in the filed agreements. Accordingly, acceptance of the subject service agreements and related tariff sections is subject to further review of the filing.

²⁶ November 18, 2010 Answer of ETC Tiger at 3 n. 9.

The Commission orders:

(A) Waiver of the filing requirements of the April 6, 2010 Certificate Order issued in Docket No. CP09-460-000 is granted as discussed in this order.

(B) The filed agreements and related tariff section are accepted for filing, to become effective the later of December 1, 2010, or the in-service date of the Project, subject to further review and the conditions of this order, as discussed in this order.

(C) Within 20 days of the date of this order, ETC Tiger, Shell, and Encana shall file initial briefs detailing their positions regarding the commencement of the primary terms of their service agreements, along with any necessary documentation. Within 35 days of the date of this order, parties may file answers to the initial briefs.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix**ETC Tiger Pipeline, LLC
TIGER Tariff Database
FERC NGA Gas Tariff*****Accepted Effective December 1, 2010***

37., Non-Conforming Agreements, 1.0.0

Tariff, Filed Agreements, 0.0.0

Agreement, K 300000 (Chesapeake Energy Marketing, Inc.), 0.0.0

1., K 300000 - Exh A (Chesapeake Energy Marketing, Inc.), 0.0.0

2., K 300000 - Exh B (Chesapeake Energy Marketing, Inc.), 0.0.0

3., K 300000 - Exh C Part 1 (Chesapeake Energy Marketing, Inc.), 0.0.0

4., K 300000 - Exh C Part 2 (Chesapeake Energy Marketing, Inc.), 0.0.0

Agreement, K 300001 (EnCana Marketing (USA) Inc.), 0.0.0

1., K 300001 - Exh A (EnCana Marketing (USA) Inc.), 0.0.0

2., K 300001 - Exh B (EnCana Marketing (USA) Inc.), 0.0.0

3., K 300001 - Exh C (EnCana Marketing (USA) Inc.), 0.0.0

Agreement, K 300002 (Shell Energy North America (US), L.P.), 0.0.0

1., K 300002 - Exh A (Shell Energy North America (US), L.P.), 0.0.0

2., K 300002 - Exh B (Shell Energy North America (US), L.P.), 0.0.0

3., K 300002 - Exh C (Shell Energy North America (US), L.P.), 0.0.0

Agreement, K 300003 (Shell Energy North America (US), L.P.), 0.0.0

1., K 300003 - Exh A (Shell Energy North America (US), L.P.), 0.0.0

2., K 300003 - Exh B (Shell Energy North America (US), L.P.), 0.0.0

3., K 300003 - Exh C (Shell Energy North America (US), L.P.), 0.0.0

Agreement, K 300004 (BG Energy Merchants, LLC), 0.0.0

1., K 300004 - Exh A (BG Energy Merchants, LLC), 0.0.0

2., K 300004 - Exh B (BG Energy Merchants, LLC), 0.0.0

3., K 300004 - Exh C (BG Energy Merchants, LLC), 0.0.0

Agreement, K 300005 (Questar Exploration and Production Co.), 0.0.0

1., K 300005 - Exh A (Questar Exploration and Production Co.), 0.0.0

2., K 300005 - Exh B (Questar Exploration and Production Co.), 0.0.0

3., K 300005 - Exh C (Questar Exploration and Production Co.), 0.0.0

Agreement, K 300006 (BG Energy Merchants, LLC), 0.0.0