

134 FERC ¶ 61,248
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.

Rockies Express Pipeline LLC

Docket No. RP11-1844-000

ORDER ACCEPTING AND SUSPENDING CERTAIN TARIFF RECORDS SUBJECT
TO REFUND AND CONDITIONS, AND REJECTING OTHER TARIFF RECORDS

(Issued March 30, 2011)

1. On March 1, 2011, Rockies Express Pipeline LLC (REX) filed revised tariff records to update its fuel lost and unaccounted for (FL&U) percentages pursuant to section 38 of the General Terms and Conditions (GT&C) of its FERC Gas Tariff, Third Revised Volume No. 1. REX has proposed two alternative sets of revised tariff records, Option A, which REX states is its preferred option, and Option B, an alternative set of tariff records.¹ As discussed below, the Commission rejects the tariff records comprising Option A. The Commission accepts and suspends the alternate tariff records in Option B, to be effective April 1, 2011, subject to refund and conditions, and further Commission review. The Commission grants, subject to further Commission review, waiver of section 38.5C of REX's GT&C to permit a five-year amortization of the deferred account balance.

I. Background

2. REX explains that pursuant to section 38 of its GT&C, REX is required to file updated FL&U percentages by March 1 of every year to become effective the following April 1. The FL&U percentages are comprised of two parts, the Current FL&U Reimbursement and the Unrecovered FL&U Reimbursement, a true-up for cumulative over- or under-recoveries under REX's fuel tracker mechanism.² REX states that the proposed FL&U percentages to be effective April 1, 2011, have increased over the percentages effective during the April 1, 2010, through March 30, 2011 period. REX asserts that this increase reflects a decline in the index price of natural gas tendered by

¹ See Appendix.

² The over- or under-recovery of costs is adjusted prospectively through the operation of section 38.5 of REX's GT&C and REX's Volumetric Amortization Percentage (VAP).

shippers and used by REX to pay electric power costs. REX also states that it has accumulated an under-recovery of \$20.3 million through December 31, 2010.

3. In its filing, REX included two separate sets of revised tariff records. Option A allows REX to recover certain quantities related to reduced fuel recovery resulting from a negotiated rate agreement with Encana Marketing (USA) Inc. (Encana). The negotiated rate agreement with Encana provides that Encana's fuel rate may not exceed three percent in zones two and three.³ However, because REX proposes fuel reimbursement percentages in zones two and three that, when combined, exceed three percent, REX states that the negotiated rate with Encana will result in an under-recovery.⁴ Thus, REX proposes in Option A to calculate FL&U rates with an upward adjustment utilizing an iterative methodology to account for the lower negotiated rate paid by Encana, by recovering the shortfall from its other shippers. REX claims that sections 38.4F⁵ and 38.5B(3)⁶ of its GT&C support these surcharge adjustments on other shippers to account for Encana's negotiated three percent fuel rate cap.

4. If the Commission does not accept the tariff records in Option A or suspends the tariff records in Option A for more than the minimum period, REX requests implementation of the tariff records in Option B, effective April 1, 2011. Option B does not adjust the rate percentages of other shippers to recoup the shortfall resulting from Encana's negotiated rate contract.

5. REX requests waiver of section 38.5C of the otherwise applicable one-year amortization period, and proposes a five-year amortization of the calendar 2010 deferred account balance. REX states that the five year amortization mitigates the compound effect of the increased FL&U rates and the true-up adjustment for the under-recovery of

³ The negotiated rate contract with Encana, Contract # 553078, was accepted by delegated order in Docket No. RP06-200-051 on March 18, 2009.

⁴ The tariff records submitted in Option B, which do not adjust for Encana's negotiated three percent fuel cap, propose a Fuel Reimbursement Percentage of 2.14 percent for zone 2 and 1.55 percent for zone 3, for a total Fuel Reimbursement Percentage of 3.69 percent.

⁵ Section 38.4F states, "Transactions that are not assessed the maximum FL&U Reimbursement Percentage(s) hereunder shall not be included in the calculations of the FL&U Reimbursement Percentage(s)." Rockies Express Pipeline LLC, Tariffs, FERC NGA Gas Tariff, PRA FL&U REIMBURSEMENT, Section 38 - PRA - FL&U Reimbursement, 0.0.0.

⁶ Section 38.5B(3) states, "Transactions that are not assessed the maximum FL&U percentage hereunder shall not be included in the calculations of the actual under- or over-recovered FL&U sub-account." *Id.*

\$20.3 million through December 31, 2010. REX states that, assuming its requested waiver is granted, it will forego carrying charges on the unamortized deferred account balance.

II. Notice and Interventions

6. Public notice of the filing was issued on March 1, 2011. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2010)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2010)), 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. BP America Production Company and BP Energy Company (collectively BP), Shell Energy North America (US), L.P. (Shell), Ultra Resources, Inc. (Ultra), Williams Gas Marketing, Inc. (Williams), and Yates Petroleum Corporation (Yates) filed protests. On March 21, 2011, REX filed an answer. On March 25, 2011, Ultra filed a reply to REX's answer, and on March 29, 2011, BP also filed a reply. The Commission accepts REX's answer and the replies submitted by BP and Ultra because they have provided information that assisted our decision-making process.

III. Discussion

A. Tariff Records Comprising Option A

7. The protestors urge the Commission to reject the tariff records comprising Option A. The protestors state that the discount adjustment reflected in the FL&U percentages in Option A shifts costs away from Encana and to other shippers. BP, Ultra, and Shell assert that the discounted adjustment is contrary to section 33.8 of REX's GT&C, which they state provides that REX will assume any risk of under-recovery of costs or fuel retention from negotiated rate shippers. BP states that sections 38.4F and 38.5B (3) do not justify REX's proposal and rather apply to transactions that are not typically charged for fuel, such as displacement transactions, including backhauls. BP emphasizes that to the extent sections 38.4F and 38.5B (3) are ambiguous, these provisions must be interpreted in conjunction with the language requiring REX to assume the risk of under-recoveries in section 33.8 of REX's GT&C. Likewise, Ultra asserts that sections 38.4F and 38.5B (3) do not support REX's proposed Option A. REX, for its part, states that this adjustment is consistent with its tariff and the Commission's negotiated rate policy.⁷

⁷ Transmittal at 4 n.10 (citing *Wyoming Interstate Co.*, 117 FERC ¶ 61,150, at P 14 (2006) (*WIC*)).

8. BP, Shell, Ultra, and Yates further contend that Commission policy requires a pipeline to absorb the under-recovery of fuel costs due to negotiated rates.⁸ BP and Yates state that REX's reliance on *WIC*⁹ is misplaced because that order addressed a tariff change setting forth circumstances in which a pipeline may seek a discount type adjustment for negotiated rates in a section 4 rate case. They emphasize that, in contrast, REX is here proposing a discount type adjustment in a fuel tracker filing. Ultra further notes that subsequent orders following *WIC* have emphasized that the pipeline remains at risk for under-recoveries due to negotiated fuel rates.¹⁰

9. In its answer, REX states that Encana was a Foundation Shipper and without Encana's commitment, Rockies Express Pipeline would not have been built. REX argues that its filing is consistent with section 154.403(c)(8) of the Commission regulations and the iterative discounting methodology approved for other pipelines. REX states that sections 38.4F and 38.5B(3) support its filing and do not apply merely to backhauls and displacement transactions as posited by BP. REX contends that the protestors' interpretation of tariff sections 38.4F and 38.5B(3) deprives these provisions of any meaning and thus violates standard rules of contract interpretation.

10. REX further contends that section 33.8 of its GT&C does not bar the adjustment proposed in Option A. Rather, REX asserts that this provision merely imposes on REX "the risk that an adjustment will not be approved by the Commission because it places an uncompensated, unfair burden on recourse rate shippers."¹¹ Likewise, REX states that the cases cited by protestors merely stand for the proposition that a pipeline may not improperly shift costs from negotiated rate shippers to the pipeline's recourse rate shippers. REX claims that the proposed FL&U percentages presented in Option A do not effectuate such an improper cost shift.

Commission Determination

11. The Commission rejects the tariff records comprising Option A. The tariff section listing REX's FL&U rates requires that for negotiated fuel rates, "[t]ransporter shall bear the risk of any under-recovery of FL&U, consistent with the provisions of section 33

⁸ BP March 14, 2011 Protest at 8 (citing *Saltville Gas and Storage Co.*, 123 FERC ¶ 61,107 (2008); *Algonquin Gas Transmission, LLC*, 124 FERC ¶ 61,195, at P 4 (2008)); Shell March 14, 2011 Protest at 3 (citing *Columbia Gas Transmission Corp.*, 101 FERC ¶ 61,337, at 62,393 (2002)).

⁹ BP March 14, 2011 Protest at 8 (citing *WIC*, 117 FERC ¶ 61,150, at P 14).

¹⁰ Ultra March 14, 2011 Protest at 4 (citing *Algonquin*, 124 FERC ¶ 61,195 at P 4).

¹¹ REX March 21, 2011 Answer at P 17.

(Negotiated Rates) of the [GT&C] of this tariff.”¹² Similarly, section 33.8 of REX’s GT&C provides:

If Transporter negotiates surcharge or fuel retention percentage rate components at lower than the maximum rate level for those components as part of a Negotiated Rate Agreement, it will assume any risk of under-recovery of costs or Fuel retention from Negotiated Rate Shippers in order to ensure that its FL&U Recourse Rate Shippers are not adversely affected due to Negotiated Rate Agreements with individual Shippers.

Thus, REX’s tariff requires REX to assume “any” risk that a negotiated fuel rate will result in an under-recovery. Under the terms of its tariff, REX cannot use its fuel tracker mechanism to shift fuel costs to other shippers for under-recoveries resulting from a negotiated fuel rate that is below the maximum fuel percentage recovery needed to recover the costs of compressor fuel or electricity.

12. REX erroneously relies upon sections 38.4F and 38.5B(3) of its GT&C in order to justify Option A. The sections identified by REX provide that “[t]ransactions that are not assessed the maximum FL&U percentage hereunder shall not be included in the calculations of the actual under- or over-recovered FL&U sub-account.”¹³ Thus, sections 38.4F and 38.5B(3) require that negotiated rate transactions (specifically here the contract with Encana) that are not at the maximum FL&U percentage may not cause an increased true-up in the rates assessed to other shippers. Consequently, these provisions require that an under-recovery due to a negotiated fuel rate may not be used to impose an additional fuel cost upon other shippers.¹⁴

¹² Rockies Express Pipeline LLC, Tariffs, FERC NGA Gas Tariff, Currently Effective Rates – ITS/FTS FL&U, 0.0.0., n.3.

¹³ Section 38.5B(3). Section 38.4F similarly provides that transactions assessed at something other than the maximum FL&U Reimbursement Percentage “shall not be included in the calculations of the FL&U Reimbursement Percentage(s).”

¹⁴ Furthermore, a pipeline may only impose a true-up that is consistent with the pipeline’s tariff at the time the costs were incurred. *E.g., High Island Offshore System, L.L.C.*, 113 FERC ¶ 61,280, at P 18 (2005); *see also* 18 C.F.R. § 284.10(c)(5)(iii) (2010) (providing that “the pipeline may not file a revised or new rate designed to recover costs not recovered under rates previously in effect.”). Because REX’s tariff effective at the time these under-recoveries were incurred did not permit the adjustment proposed in option A, REX’s proposal in option A violates the prohibition against retroactive ratemaking for any true-up incorporated into REX’s FL&U rate.

13. Moreover, Commission policy prohibits REX from recouping under-recoveries that result from negotiated rate fuel contracts that do not recover all of a shipper's fuel usage. For a pipeline with a fuel tracking mechanism that offers negotiated rates for fuel at less than the maximum rate, the Commission has emphasized that the pipeline "is at risk for any under-recovery of fuel charges not collected from its negotiated rate shippers to ensure that there will be no subsidy by recourse rate shippers."¹⁵ The Commission has further emphasized that a pipeline offering such an under-recovering negotiated fuel rate "should be prepared in its annual tracking proceedings to show that no costs associated with negotiated rate shippers have been shifted to recourse rate shippers."¹⁶ REX's proposal in Option A is contrary to Commission policy.

B. Tariff Records Comprising Option B

14. The protestors also raise concerns regarding REX's calculation of its FL&U percentages in Option B. Yates requests that the Commission reject REX's filing. Shell, Ultra, and Williams request that the Commission convene a technical conference. Yates also urges a technical conference as an alternative to a rejection. Yates and Ultra urge the maximum five-month suspension.

15. Yates alleges that REX's filing fails to demonstrate that increased FL&U rates are necessary to pay electric power costs or why its commodity risk should be born solely by shippers. Yates recommends that the Commission require REX to show why its formula for converting electricity costs into the fuel reimbursement percentage is still valid.

16. Ultra states that a technical conference could provide additional information regarding REX's disposition of the gas obtained via the FL&U percentages, including whether REX disposed of the gas using arm's length transactions and whether the actual price received exceeded the index prices utilized by REX. Ultra states that a technical conference could provide information regarding the basis and reasonableness of the forecasts used in REX's computation of its FL&U rates. Ultra also suggests that a technical conference could address alternatives to using the retention of fuel to reimburse REX for electric compression costs.

¹⁵ *Algonquin*, 124 FERC ¶ 61,195 at P 4.

¹⁶ *Id.* Moreover, the prohibition against transferring cost under-recoveries resulting from a negotiated rate, including fuel under-recoveries, is consistent with the Commission's policy involving discounted rates, which prohibits discounts for fuel rates. *E.g.*, *Mississippi River Transmission Corp.*, 98 FERC ¶ 61,119, at 61,352 (2002); *see also* 18 C.F.R. §§ 284.10 (c)(4), (5) (2010). Thus, contrary to REX's contentions, section 154.403(c)(6) of the Commission regulations, which refers to discounted rates, does not support REX's proposal.

17. Shell poses several questions regarding REX's filings. Among other issues, Shell seeks further information as to how REX would implement the amortization, such as whether an over-collection during a future period could be used to reduce the primary balance of the 2010 under-collection. Shell states that in Appendix F to REX's filing there is a discrepancy between the physical transmission receipts and deliveries and the nominated receipts and deliveries. Shell also notes that the volumes listed in Appendix H to REX's filing are labeled 2009 rather than 2010. Shell seeks clarity regarding the gas sales and electricity costs incorporated into the fuel rates.

18. BP alleges that REX understated the throughput levels used to calculate the fuel percentages because REX failed to include any Zone 2 receipts or any expansion volumes. BP also asks the Commission to obtain information as to whether REX or an affiliate hedged the gas price used to calculate the recovery of electricity costs through REX's Fuel Reimbursement Percentage.

19. In its answer, REX states that a technical conference is unnecessary. REX states that while its answer does not respond to all of the questions raised by the protestors, the data presented in its answer demonstrates that the electric and compression costs used to derive its rates are within 2-4 percent of the actual costs experienced in the last three months of 2010. REX states that the throughput used to derive the FL&U percentages was derived based upon firm contract quantities on the system through each of the zones. REX denies BP's contention that REX miscalculated the throughput levels used to derive the fuel percentages. Rather, REX states that BP double-counts certain Encana contracts. REX alleges that many of the issues raised by the protestors are collateral attacks upon longstanding provisions in section 38 of REX's tariff governing the fuel tracker. REX also clarifies that the volumes listed in Appendix H are from 2010 and were inadvertently mislabeled as 2009 volumes.

Commission Determination

20. The Commission accepts and suspends REX's Option B filing subject to further Commission review. REX's answer did not fully address the concerns raised by the parties. Accordingly, the Commission directs REX to file a complete and detailed response within 30 days to the questions and concerns raised by the protestors, including, but not limited to concerns regarding REX's proposed five-year amortization of fuel costs, the volumes used to calculate the FL&U rates, and the electricity costs incorporated into the FL&U rates. In this response, REX must provide a more detailed explanation as to why it has not understated the throughput levels used to calculate the FL&U percentages as alleged by BP. Furthermore, consistent with Commission policy, REX must also within 30 days provide a detailed accounting showing that no costs associated with any negotiated fuel rate below the maximum rate has been shifted to

recourse FL&U rate shippers.¹⁷ Upon receipt of REX's complete detailed response to all of the questions raised, and the shippers' comments to REX's response, the Commission will determine what further, process, if any, is needed.

21. The Commission grants, subject to further Commission review as specified in this order, REX's requested waiver of section 38.5C of its GT&C to permit a five-year amortization of the deferred account balance as reflected in REX's Option B. Based upon the information presented in the current record, the five-year amortization moderates the effect of the increased FL&U rates and the true-up adjustment for the under-recovery of \$20.3 million through December 31, 2010.

22. Based upon a review of the filing, the Commission finds that the proposed Option B tariff records listed in the Appendix have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission shall accept the Option B tariff records for filing and suspend their effectiveness for the period set forth below, subject to the conditions set forth in this order.

23. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards. *See Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension). It is recognized, however, that shorter suspensions may be warranted in circumstances where suspensions for the maximum period may lead to harsh and inequitable results. *See Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension). Such circumstances exist here where REX's filing is made pursuant to an existing tariff mechanism. Therefore, the Commission shall exercise its discretion to suspend the rates to take effect on April 1, 2011, subject to the conditions set forth in the body of this order and in the ordering paragraphs below.

The Commission orders:

(A) The tariff records comprising Option A are rejected.

(B) The tariff records comprising Option B are accepted and suspended, effective April 1, 2011, subject to refund, the conditions set forth in the body of this order, and further Commission review.

¹⁷ *Algonquin*, 124 FERC ¶ 61,195 at P 4. All data and calculations must be provided in electronic format with the formulas. 18 C.F.R. § 154.4 (2010).

(C) Within thirty days of the date this order issues, REX shall file its compliance response to the questions and detailed explanation sought in the body of this order.

(D) The Commission grants, subject to further Commission review as specified in this order, REX's requested waiver of section 38.5C of its GT&C to permit a five-year amortization of the deferred account balance as reflected in REX's Option B.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX
Rockies Express Pipeline LLC
Tariffs, Third Revised Volume No. 1
FERC NGA Gas Tariff

Option A:
Rejected Tariff Sections

CURRENTLY EFFECTIVE RATES, Currently Effective Rates - ITS/FTS FL&U, 1.0.0
Incremental Fac. Rates, Cheyenne Booster Facilities, 1.0.0
Incremental Facil. Rates, Meeker Booster Facilities, 1.0.0

Option B:
Tariff Sections Accepted and Suspended to be effective April 1, 2011, Subject to Refund
and Conditions and Further Commission Review

CURRENTLY EFFECTIVE RATES, Currently Effective Rates - ITS/FTS FL&U -
Option B, 1.0.0
Incremental Fac. Rates, Cheyenne Booster Facilities - Option B, 1.0.0
Incremental Facil. Rates, Meeker Booster Facilities - Option B, 1.0.0