

138 FERC ¶ 61,078
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kern River Gas Transmission Company

Docket Nos. RP11-2328-000
RP04-274-000,
RP04-274-023,
RP04-274-029,
RP11-2031-000,
RP11-2031-001,
RP11-2356-000,
RP11-2356-001.

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued February 1, 2012)

1. On December 7, 2011, Kern River Gas Transmission Company (Kern River) filed a settlement to resolve issues in the captioned proceeding. As discussed below, the Commission approves the proposed uncontested settlement as fair and reasonable and in the public interest.

Background

2. On July 29, 2011, Kern River filed revised tariff records to amend several provisions under certain firm rate schedules, which it referred to as the “Self-Contained Rate Schedules.”¹ Kern River proposed to limit service under these rate schedules exclusively to the currently effective contracts of shippers taking service under those rate schedules. Kern River also proposed to include in its tariff a *pro forma* agreement applicable to rollover service under the subject rate schedules.

¹ The Rate Schedules subject to the July 29, 2011 filing were Rate Schedules CH-1, MO-1, SH-1, and UP-1.

3. Kern River asserted that the Self-Contained Rate Schedules were established as a result of firm service agreements that were negotiated with a small group of large oil producers engaged in enhanced oil recovery in California at the time Kern River's original system was certificated in 1990. Subsequently, the Commission directed Kern River to incorporate the terms of such agreements into the General Terms and Conditions (GT&C) of its tariff so all shippers that requested such service might receive service under the same terms and conditions that were available under the terms of the service agreements.² Kern River then filed Rate Schedules CH-1, SH-1, MO-1, and UP-1 to reflect the terms of the Self-Contained service agreements, making such terms available to others on an open access basis.

4. In its July 29, 2011 filing, Kern River pointed out that Opinion No. 486-E addressed Kern River's general rate case proceeding in Docket No. RP04-274-023,³ and discussed Kern River's proposed eligibility requirements for firm service under the stepped down Period Two rates.⁴ Included in this discussion was Kern River's proposal to require all shippers that wished to contract for Period Two rates to obtain service under its standard firm open access transportation Rate Schedule KRF-1. The Commission found that while it could not approve Kern River's proposal in that NGA section 5 proceeding, such a finding was without prejudice to Kern River making such a proposal under section 4 of the NGA.⁵

² *Kern River Gas Transmission Co.*, 53 FERC ¶ 61,172, at 61,632-3 (1990), *order on reh'g*, 55 FERC ¶ 61,089, at 61,270 (1991); *Kern River Gas Transmission Co.*, 60 FERC ¶ 61,128, at 61,456 (1992).

³ *Kern River Gas Transmission Co.*, Opinion 486-E, 136 FERC ¶ 61,045 (2011).

⁴ As the Commission explained in the August 29, 2011 order, Kern River's firm shippers pay levelized rates, which are designed to recover 70 percent of Kern River's investments in its Original System and in various subsequent expansions over the terms of the shippers' initial contracts for service on each project (Period One). Because this rate design allows Kern River to recover more invested capital during Period One than it would under ordinary straight-line depreciation, the Commission has required Kern River to return that excess recovery by offering its firm shippers stepped-down "Period Two" rates, after the initial Period One contracts expire. *Kern River Gas Transmission Co.*, 136 FERC ¶ 61,140 at n.5 (2011), (citing *Kern River Gas Transmission Co.*, Opinion 486, 117 FERC ¶ 61,077, at P 37 (2006), *order on reh'g*, Opinion 486-A, 123 FERC ¶ 61,056, at P 61 (2008). Opinion No. 486-E generally affirmed an Administrative Law Judge's initial decision concerning the Period Two rates).

⁵ Opinion 486-E, 136 FERC ¶ 61,045 at P 120.

5. In its July 29, 2011 filing, Kern River proposed to close the Self-Contained Rate Schedules to new shippers while stating that the Self-Contained Rate Schedules would remain available to the existing shippers until their current contracts expire. Several parties to the proceeding, including the Self-Contained Contract Shippers⁶ (SCRS Shippers), Nevada Power Company d/b/a NV Energy (NVE), and BP Energy Company (BP), protested the July 11, 2011 filing, setting forth a variety of reasons that Kern River should not be permitted to implement its proposal and arguing that the proposal would adversely affect the quality of service available to them because Rate Schedule KRF-1 did not encompass all of the conditions of service contained in their individual Self Contained Contracts.

6. On August 29, 2011 the Commission accepted Kern River's proposed tariff records and suspended them to become effective February 1, 2012, subject to refund, and the outcome of a technical conference.⁷ The technical conference was held on October 4, 2011. Subsequently on December 7, 2011, Kern River filed the instant settlement proposal.

Settlement Proposal

7. Kern River states that the instant settlement proposal is the result of settlement discussions and resolves all issues related to Kern River's July 29, 2011 filing.⁸ A summary of several Settlement provisions follows.

8. Kern River states in overview that the Settlement addresses the continuation of certain contract provisions in eighteen of Kern River's original system contracts, including all contracts subject to Rate Schedules MO-1, SH-1, UP-1, and CH-1. Further, the Settlement provides that these Rate Schedules will be closed to new shippers and then eliminated. Within thirty days of the effective date of the Settlement, all of Kern River's firm mainline shippers will be served under a single rate schedule, Rate Schedule KRF-1. Kern River asserts that the Settling Shippers agree to execute restatements of their currently effective contracts that may contain certain nonconforming provisions as

⁶ The SCRS shippers include Aera Energy LLC, Anadarko E&P Company LP and Anadarko Petroleum Corporation, Chevron U.S.A. Inc., and Shell Energy North America (US) L.P.

⁷ *Kern River Gas Transmission Co.*, 136 FERC ¶ 61,140.

⁸ Kern River states that as specifically noted in Article I.B.5., the settlement also resolves certain issues related to the rate schedules and contracts at issue herein that were also raised in Docket Nos. RP04-274-000, RP04-274-023, RP04-274-029, RP11-2031-000, RP11-2031-001, RP11-2356-000, and RP11-2356-001.

described in the Settlement. Kern River states that such restatements will be subject to Rate Schedule KRF-1 and if a Settling Shipper elects Period Two service, the new Period Two contracts executed by such shipper will contain certain nonconforming provisions, as described by the Settlement. Kern River also points out that all non-conforming Restated Agreements will be filed with the Commission for acceptance and included in Kern River's Tariff.

9. Article I, section A provides an overview of the Settlement, identifies the Settling Shippers, the contracts affected by the Settlement and the transitional contractual provisions. Section A.5 provides that if BP is successful in gaining eligibility for the Period Two rate related to service under its contract that expired September 30, 2011, BP may elect to take its Period Two service in accordance with this Settlement or, instead, may elect to take whatever relief is granted by the Commission, if any.

10. Article I, Section B to the Settlement provides that the shippers agree to restate their current agreements within 30 days of the effective date of the Settlement and that each Restated Agreement will retain the priority of service date of the shipper's currently-effective agreement and that such restated agreement will terminate on September 30, 2016, which is the expiration date of the primary term of all of the currently-effective agreements. Section B also states that certain rollover provisions are available for continued service. Section B provides that temporary and permanent replacement shippers may obtain all the provisions in the Restated Agreements. Section B also states that all Settling Shippers that elect service under Period Two rates will execute a new Period Two contract under Rate Schedule KRF-1 that will, where applicable, contain the material deviations set forth in the Settlement and that all non-conforming Restated Agreements will be filed with the Commission and included in Kern River's Tariff.⁹

11. Article I, Section B also provides that all protests in Docket No. RP11-2328 will be deemed withdrawn. Moreover, as applicable, Settling Shippers' claims in Docket Nos. RP11-2328-000, RP04-274-000, RP04-274-023, RP04-274-029, RP11-2031-000, RP11-2031-001, RP11-2356-000, and RP11-2356-001, related to the following shall be deemed withdrawn: (i) requests that Kern River be ordered to provide service under any of the Self Contained Rate Schedules and (ii) requests that Kern River be ordered to provide service under any contract provisions contained in any Attachment A or B

⁹ Article I.B.1 of the Settlement notes that provision of the Settlement marked with an asterisk are material deviations from the Rate Schedule KRF-1 *pro forma* agreement. Such material deviations are found at Article I.b.1 (d)-(g) and Article I. b. 2(a)-(c).

contract that are inconsistent with the Rate Schedule KRF-1 *pro forma* agreement, except as expressly provided in the Settlement. No Settling Shipper shall make either such claim in any future proceeding. Article I section B also provides that BP may elect to participate with regard to future service if (i) a Commission or court order is issued that permits BP to enter into a Period Two Contract based in whole or in part upon Kern River's provision of service under its Attachment B contract during Period One, and (ii) on or after the date this Settlement was filed, BP did not, in any Commission docket, contest or file comments opposing either this Settlement or the closing or elimination of the Self Contained Rate Schedules. Upon the occurrence of these conditions precedent, BP may, if it chooses, elect either to participate in the Settlement as set forth herein or obtain such relief as is granted by the Commission, if any.

12. Article II provides that the Settlement will be effective upon Commission approval without material modification by a final order, and that approval of the Settlement by the Commission constitutes acceptance by the Commission of the material deviations referenced above.

13. Article III sets forth certain reservations applicable to the settlement and provides that Kern River or any shipper may withdraw from the Settlement if it is adversely affected by any material modification. Article III also reserves Kern River's rights to file for proposed changes to its Tariff that are not inconsistent with its specific obligations under this Settlement. Settling Shippers also retain their rights to protest any such change and/or propose other tariff changes, insofar as such actions are not inconsistent with their obligations under this Settlement. Section E to this article contains a specific reservation of rights related to certain claims of BP.

Comments

14. On December 23, 2011, the Indicated Shippers¹⁰ and Kern River filed comments in support of the settlement. Subsequently, on December 27, 2011, Southern California Gas Company filed comments in support of the Settlement. No comments were filed in opposition to the Settlement.

¹⁰ In the instant proceeding, the Indicated Shippers are comprised of; Aera Energy LLC; Anadarko E&P Company LP and Anadarko Petroleum Corporation; Chevron U.S.A. Inc.; Shell Energy North America (US), L.P.; Southwest Gas Corporation; and, WPX Energy Marketing, LLC. All these shippers are also Settling Shippers under the Settlement.

Discussion

15. The Commission approves the instant settlement. The Settlement simplifies and consolidates Kern River's tariff and contracting procedures, and permits all of its firm shippers to be served under one rate schedule, while allowing shippers to retain certain benefits originally agreed to during Kern River's optional expedited certificate proceeding.¹¹ The settlement also avoids the burden and expense of further litigation concerning the settled issues.

16. The Commission finds that approval of the material deviations to be included in individual service agreements pursuant to the Settlement is appropriate in light of the fact these deviations allow the continuation of longstanding contractual provisions relied upon by the parties in making investment decisions concerning the construction of Kern River's Original System.¹² As the Commission has recently stated:

a central issue in approving an application for an optional certificate was whether the pipeline's proposed rates reflected an appropriate allocation of the risks of the project as between the pipeline, its customers, and other interested parties. As the Commission held in *Mojave*, once the Commission has issued the certificate, 'the Commission will not lightly change the allocation of risk inherent in the optional certificate as granted,' absent some 'overarching policy reason.'¹³

The material deviations agreed to in the settlement allow the continuation of contractual provisions agreed to between Kern River and its shippers during its optional expedited certificate proceeding. Accordingly, the Commission specifically approves the above

¹¹ *Kern River Gas Transmission Co.*, 50 FERC ¶ 61,069, at 61,150 (1990). *Kern River Gas Transmission Co.*, 58 FERC ¶ 61,073, at 61,242-44, *order on reh'g*, 60 FERC ¶ 61,123, at 61,437 (1992).

¹² *See Transcontinental Gas Pipe Line Co.*, 136 FERC ¶ 61,104, at P 11-12 (2011), (citing *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,010 (2001); *see also Texas Eastern Transmission, LP*, 119 FERC ¶ 61,337, at P 11 (2007) (*Texas Eastern*)).

¹³ *Kern River Gas Transmission Co.*, 123 FERC ¶ 61,056, at P 19 (2008) (citing *Mojave Pipeline Co.*, 81 FERC ¶ 61,150, at 61,682-83 (footnote omitted)).

delineated material deviations, as longstanding contractual provisions that maintain the original bargain contemplated on this system and finds that such deviations do not pose a substantial risk of undue discrimination.¹⁴

17. Accordingly, the Commission also finds that the instant Settlement appears to be fair and reasonable and in the public interest and therefore approves it pursuant to Rule 602(g) of the Commission's Rules of Practice and Procedure.¹⁵ The Commission's approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. Consistent with Kern River's request and Article I.B.5 (b) of the instant settlement, the Commission finds that the tariff sheets filed in Kern River's July 29, 2011 filing are moot as of the effectiveness of the instant settlement.

The Commission orders:

The instant Settlement is approved as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁴ Article II of the Settlement states that the Commission's approval of the Settlement will constitute Commission acceptance of the subject material deviations.

¹⁵ 18 C.F.R. § 385.602 (g) (2011).