169 FERC ¶ 61,085
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Kinetica Deepwater Express, LLC — Docket Nos. RP19-53-000, RP19-1634-000

ORDER ACCEPTING AND SUSPENDING TARIFF RECORD SUBJECT TO REFUND, ESTABLISHING HEARING PROCEDURES, AND TERMINATING FERC FORM NO. 501-G PROCEEDING

(October 30, 2019)

1. On September 30, 2019, in Docket No. RP19-1634-000 Kinetica Deepwater Express, LLC (Kinetica) filed a revised tariff record[1] pursuant to section 4 of the Natural Gas Act (NGA) and Part 154 of the Commission's regulations. Kinetica proposes a general rate increase for its firm and interruptible transportation services, effective November 1, 2019. As discussed below, we accept and suspend the referenced tariff record to be effective April 1, 2020, subject to refund and the outcome of a hearing. We also terminate Kinetica's FERC Form No. 501-G proceeding in Docket No. RP19-53-000.

I. Background

2. Kinetica states that it transports natural gas from pipelines and offshore platforms, located primarily in the Eugene Island and South Marsh Island areas in the Gulf of Mexico as well as federal and Louisiana State waters, to onshore facilities in St. Mary Parish, Louisiana. Kinetica states that it has no shippers committed to firm contracts and that all of its current customers are solely subscribed to interruptible service under Rate Schedule IT.[2]

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[1] Kinetica Deepwater Express, LLC, FERC NGA Gas Tariff, TC Offshore Tariffs, 4.1 - Statement of Rates, Rate Schedules FTS-1, ITS, TTS and IPLS, 3.0.0.

[2] Statement P, Ex. KDE-KJC-1 at 3-4.

3. Kinetica states that on April 1, 2016, Kinetica Partners, LLC purchased TC Offshore LLC, from ANR Pipeline Co., and subsequently changed the company's name from TC Offshore LLC (TC Offshore) to Kinetica Deepwater Express, LLC. Kinetica asserts that its current rates are holdovers from the prior owner of its facilities, TC Offshore. Those rates are the initial rates TC Offshore implemented after the Commission granted TC Offshore a certificate to operate the facilities.[3] The Commission approved those rates in Docket No. RP12-908-001 in 2013.[4]

4. On August 25, 2017, Kinetica filed in Docket No. CP17-488-000 pursuant to NGA section 7(b) to abandon its jurisdictional facilities (known as the Patterson System), and on August 30, 2017, Kinetica's affiliate Kinetica Energy Express, LLC (Kinetica Energy) filed in Docket No. CP17-489-000 pursuant to NGA section 7(c) to acquire those facilities. In its certificate application, Kinetica Energy proposes an incremental recourse initial rate applicable only to service on the Patterson System. Kinetica Energy asserts that Kinetica was substantially under-recovering the costs of the Patterson system. Accordingly, it proposes an incremental recourse rate of $0.49/Dth, as compared to the $0.0535/Dth recourse rate in Kinetica's tariff for service on the Patterson system.

5. On July 18, 2018, the Commission issued Order No. 849,[5] a final rule adopting procedures for determining which jurisdictional natural gas pipelines may be collecting unjust and unreasonable rates in light of (1) the income tax reductions provided by the Tax Cuts and Jobs Act and (2) the Commission's Revised Policy Statement[6] and Opinion No. 511-C[7] establishing a policy that master limited partnerships (MLPs) may not recover an income tax allowance in response to the decision of the United States Court of

[3] *TC Offshore LLC*, 139 FERC ¶ 61,238 (2012).

[4] *TC Offshore LLC*, 144 FERC ¶ 61,018 (2013).

[5] *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031 (2018), *reh'g denied*, Order No. 849-A, 167 FERC ¶ 61,051 (2019) (adding 18 C.F.R. § 260.402).

[6] *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, Revised Policy Statement, 162 FERC 61,227 (2018), *order on reh'g*, 164 FERC ¶ 61,030 (2018).

[7] *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228, at P 9 (2018).

Appeals for the District of Columbia Circuit (D.C. Circuit) in *United Airlines, Inc. v. FERC*.[8] Order No. 849 required, pursuant to sections 10 and 14(a) of the Natural Gas Act (NGA), that all interstate natural gas companies with cost-based stated rates, that filed a 2017 FERC Form No. 2 or 2-A, must file a FERC Form No. 501-G informational filing.[9] The FERC Form No. 501-G is designed to collect financial information to evaluate the impact of the Tax Cuts and Jobs Act and *United Airlines* Issuances on interstate natural gas pipelines' revenue requirements. Using the data in the pipelines' 2017 FERC Form Nos. 2 and 2-A, the form estimates (1) the percentage reduction in the pipeline's cost of service resulting from the Tax Cuts and Jobs Act and the Revised Policy Statement and (2) the pipeline's current Return on Equity (ROE) before and after the reduction in corporate income taxes and the elimination of income tax allowances for MLP pipelines.

6. Order No. 849 also provided several options each interstate natural gas pipeline may choose from to address the changes to the pipeline's revenue requirement as a result of the income tax reductions. These included (1) a limited rate reduction filing pursuant to section 4[10] of the Natural Gas Act (NGA) (Option 1), (2) a commitment to file a general section 4 rate case or a prepackaged settlement in the near future (Option 2), (3) an explanation why no rate change is needed (Option 3), and (4) no action (other than filing a report) (Option 4).

7. On October 11, 2018, Kinetica filed its FERC Form No. 501-G in Docket No. RP19-53-000 and elected Option 4 (take no action) due to its pending application seeking abandonment by sale of its only remaining jurisdictional facilities, which if accepted, would render its submission of FERC Form No. 501-G moot and superseded.[11] Kinetica's FERC Form No. 501-G indicated that it is not a separate income taxpaying

[8] 827 F.3d 122 (D.C. Cir. 2016) (*United Airlines*). For purposes of this order, the Revised Policy Statement, *United Airlines*, and Opinion No. 511-C will collectively be referred to as "*United Airlines* Issuances."

[9] The One-time Report on Rate Effect of the Tax Cuts and Jobs Act may be referred to interchangeably as "One-time Report" or "FERC Form No. 501-G."

[10] 15 U.S.C. § 717c (2012).

[11] Kinetica's application seeking abandonment by sale and the companion application to acquire these facilities in Docket Nos. CP17-488-000 and CP17-489-000, respectively, are currently pending.

entity. Therefore, its FERC Form No. 501-G eliminated both its tax allowance and its Accumulated Deferred Income Taxes (ADIT) consistent with the *United Airlines* Issuances. Kinetica's FERC Form No. 501-G showed a Total Estimated ROE of negative 41.1 percent after adjusting for the income tax reduction.[12] Kinetica's FERC Form No. 501-G also showed an indicated cost-of-service reduction of 2.4 percent.

II. Proposal

8. In the instant NGA section 4 filing, Kinetica proposes substantial rate increases for its firm and interruptible transportation services, effective November 1, 2019. Specifically, Kinetica proposes to increase its firm reservation charge by 160.26 percent (from $1.5683/Dth to $4.016/Dth) and its overrun and interruptible commodity rates by 155.33 percent (from $0.0535/Dth to $0.1366/Dth). Kinetica states that its revenues have been inadequate to recover its current operating costs and that the purpose of this rate proceeding is to stem these losses and provide an opportunity to recover its cost of service and earn a reasonable return.[13] Kinetica explains that its proposed rates are based on a cost of service reflecting base period data for 12 months of actual experience ending June 30, 2019, as adjusted through a test period ending March 31, 2020.[14] Kinetica proposes to design rates based on an overall annual cost of service of $14,378,642 and a rate base of $10,430,190.[15] Kinetica states that its proposed cost of service reflects an ROE of 13.08 percent,[16] a cost of debt of 5.00 percent, and a capital structure of 31.61 percent debt and 68.39 equity.[17] Based on these components, Kinetica states that

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[12] Total Estimated ROE is the ROE as calculated in Kinetica's FERC Form No. 501-G on page 3, line 26, col. D.

[13] Statement P, Ex. KDE-KJC-1 at 3.

[14] *Id.* at 3.

[15] Statement P, Ex. KDE-RGS-1 at 6.

[16] Kinetica states that its proposed 13.08 percent ROE stems from the analysis and testimony performed by the Commission staff's cost of capital expert, Mr. Edward Alvarez III, in Northern Natural Gas Company, Docket No. RP19-59-000. *See* Statement P, KDE-RGS-1 at 12-13.

[17] Kinetica notes that its proposed capital structure is hypothetical because neither Kinetica nor its parent maintain any long-term debt. Kinetica maintains that this hypothetical capital structure has been previously accepted in approved initial rates under

its overall rate of return would be 10.53 percent.[18] Kinetica also proposes a depreciation rate of 1.597 percent for onshore transmission, a depreciation rate of 0.228 percent for offshore transmission, and a negative salvage rate of 1.199 percent.[19]

9. Kinetica claims that it can be considered a pass-through entity because it is a wholly owned subsidiary of another organization.[20] Kinetica asserts that Commission policy dictates that pass-through entities be treated like MLPs, and thus not recover an allowance for income taxes or reflect an allowance for deferred income taxes.[21] Consequently, Kinetica states that it has excluded income tax expense from its cost of service and ADIT from its rate base.[22]

10. Kinetica states all of its transportation is provided through interruptible service and that the billing determinants underlying its proposed rates are based on its actual throughput for the base period, adjusted for certain known discount activity, including the impact of agreed-upon rate caps (i.e., the assurance of rate discounts if the recourse rate rises above the capped level) that affect its ability to charge the proposed rates to some shippers. The overall rate design billing determinant level, all interruptible, is 105,223,527 Dth. Kinetica maintains that only the impact of the rate caps is included in its test period adjustments and that prospective losses from other factors are not included.[23]

11. Kinetica claims that since March 2019, Kinetica, Kinetica Energy, and their shippers, including the parties in the pending certificate proceedings, have been engaged in settlement talks to resolve all the pending rate and certificate issues on the two pipelines. Kinetica states that a settlement of Kinetica's pending cases would not moot the instant rate proceeding. However, Kinetica asserts that final unconditioned Commission approval of a settlement would allow the termination of this proceeding, and

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the prior system owner, TC Offshore, and in the subsequent three-year cost and revenue study. *See* Statement P, Ex. KDE-RGS-1 at 11-12.

[18] *Id.*

[19] *Id*. at 18-19.

[20] Statement P, Ex. KDE-KJC-1 at 4.

[21] *Id.* at 5.

[22] *Id*.

[23] Transmittal at 5.

upon such approval, Kinetica would immediately move to withdraw the instant filing. In the meantime, Kinetica requests that the Commission defer initiating any formal procedural schedule or settlement judge procedures for a reasonable period, pending an update.[24]

III. Notice of Filing, Interventions, and Protests

12. Public notice of Kinetica's filings in Docket Nos. RP19-53-000 and RP19-1634-000 was issued on October 15, 2018, and October 03, 2019, respectively. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[25] Pursuant to Rule 214,[26] all timely motions to intervene and any unopposed motions to intervene filed out-of-time 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.

13. On October 23, 2018, Castex Energy, Inc. (Castex); Texas Petroleum Investment Co. (Texas Petroleum); Walter Oil & Gas Corporation; W&T Offshore, Inc. (W&T); Anadarko Energy Services Company; Chevron U.S.A. Inc.; ExxonMobil Gas & Power Marketing Company, a division of Exxon Mobil Corporation; Fieldwood Energy LLC; Hess Corporation; and Shell Offshore, Inc. submitted protests or made adverse comments to Kinetica's FERC Form No. 501-G filing in Docket No. RP19-53-000. The protestors cited concerns regarding Kinetica's use of its pending abandonment application to examine rates and claimed that Kinetica eliminated its income tax allowance and ADIT without explanation.

14. On October 15, 2019, Arena Energy, LP, Castex, Cox Operating LLC, Enven Energy Ventures, LLC, M21K LLC, Talos Production LLC, Texas Petroleum, W&T, Walter Oil Corporation (collectively, Producer Coalition) and Indicated Shippers[27] filed protests in response to Kinetica's NGA section 4 rate filing in Docket No. RP19-1634-000. The protesters assert that Kinetica's proposal presents issues of material fact that must be further examined and, thus, request that the Commission suspend the rates for the maximum

[24] *Id.* at 2-3.

[25] 18 C.F.R. § 154.210 (2019).

[26] 18 C.F.R. § 385.214 (2019).

[27] For purposes of this filing the Indicated Shippers include: Anadarko Energy Services Company, Chevron U.S.A. Inc., ExxonMobil Upstream Oil & Gas Company, a division of Exxon Mobil Corporation, Hess Corporation, Fieldwood Energy LLC, and Shell Offshore, Inc.

statutory period of five months, subject to refund and hearing procedures. Protesters further argue that Kinetica has not demonstrated that its proposed rates are just and reasonable.

15. The Producer Coalition expresses particular concern with Kinetica's proposed rate increase to its interruptible service. Specifically, the Producer Coalition takes issue with Kinetica's proposed rate of return, ROE, depreciation rates, capital structure, and negative salvage rates. The Producer Coalition also challenges the rationale behind the discount adjustments applied to interruptible service, the proposed system abandonment costs, and the recurring operation and maintenance expenses in Kinetica's cost of service. Finally, the Producer Coalition asserts that Kinetica failed to justify the estimated remaining life expectancy of its system with an actual study.

16. Indicated Shippers question Kinetica's proposed ROE, stating that recent analyses by Commission staff, including the one Kinetica uses to support its proposed ROE, have recommended lower ROEs. Furthermore, Indicated Shippers express concern over the appropriateness of utilizing Commission staff's analysis involving another pipeline in this proceeding, as well as Kinetica's justification for its cost of debt. Indicated Shippers take issue with Kinetica's proposed depreciation rates, negative salvage rate, and estimated system life expectancy citing limited support for these figures. In addition, Indicated Shippers oppose Kinetica's exclusion of income tax expense and ADIT from its cost of service by alleging that Kinetica has reported ADIT in prior years. Indicated Shippers also request further exploration of Kinetica's rate design.

17. The Producer Coalition and Indicated Shippers filed comments supporting Kinetica's request to defer the initiation of formal procedural schedules or settlement judge procedures for a reasonable period of time pending further updates. All parties cited the progress of ongoing settlement negotiations as the basis for this request.

IV. Discussion

18. We accept and suspend for five months, subject to refund, Kinetica's proposed tariff record, to be effective April 1, 2020, subject to the outcome of the hearing procedures established below.

19. We note that the Producer Coalition and Indicated Shippers filed comments in support of Kinetica's request to defer any formal procedural schedule or settlement judge procedures for a reasonable period pending a further update from the parties on the status of the settlement negotiations. We will afford the Chief Judge the discretion to determine whether to defer any formal schedule or settlement judge procedures.

A. Hearing Process

20. Kinetica's instant NGA section 4 filing raises many issues that warrant further investigation. We find that there are material issues of fact in dispute concerning, among

other things, cost of service, rate of return, depreciation and negative salvage rates, cost allocation, and rate design. Accordingly, we will establish a hearing before an Administrative Law Judge to explore the issues arising from the filing, including, but not limited to, those summarized above and set forth in the protests.

21. Kinetica must adhere to section 154.303(c)(2) of the Commission's regulations which provides that at the end of the test period, the pipeline must remove from its rates costs associated with any facility that is not in service or for which certificate authority is required but has not been granted.[28]

B. Suspension

22. Based upon a review of the filing, we find that the proposed tariff record has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, we shall accept such tariff record for filing and suspend its 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.[29] 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.[30] Such circumstances do not exist here. Therefore, we exercise our discretion to suspend the rates to take effect on April 1, 2020, subject to the conditions set forth in the body of this order and in the ordering paragraphs below.

C. FERC Form No. 501-G

24. Order No. 849 required all interstate natural gas companies with cost-based stated rates to file the FERC Form No. 501-G.[31] Because Kinetica has now filed a rate case under NGA section 4, the justness and reasonableness of its rates can be investigated in

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[28] 18 C.F.R. § 154.303(c)(2) (2019).

[29] *See Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension).

[30] *See Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension).

[31] Order No. 849, 164 FERC ¶ 61,031 at P 30.

that proceeding. Therefore, we terminate Kinetica's FERC Form No. 501-G proceeding in Docket No. RP19-53-000.

The Commission orders:

(A) The proposed tariff record listed in footnote 1 is accepted and suspended to be effective April 1, 2020, subject to refund and the conditions described in the body of the order and the ordering paragraphs below.

(B) The captioned FERC Form No. 501-G proceeding in Docket No. RP19-53-000 is terminated, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the NGA, particularly sections 4, 5, 8, 9, and 15 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the NGA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of Kinetica's filing in Docket No. RP19-1634-000, as discussed in the body of this order.

(D) A presiding judge, to be designated by the Chief Judge for that purpose, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.