

138 FERC ¶ 61,035  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

ETC Tiger Pipeline, LLC

Docket Nos. RP11-1432-000  
RP11-1432-001

ORDER ON CONTRACT DISPUTE, DENYING REQUESTS FOR REHEARING  
AND ACCEPTING NON-CONFORMING AGREEMENTS

(Issued January 19, 2012)

1. On October 25, 2010, ETC Tiger Pipeline, LLC (ETC Tiger) filed in the instant docket seven non-conforming, negotiated rate service agreements that it stated potentially materially deviate from ETC Tiger's Form of Service Agreements, and a tariff section listing the agreements.<sup>1</sup> ETC Tiger's filing was made in compliance with the Commission's April 7, 2010 Order Issuing Certificates in Docket No. CP09-460-000.<sup>2</sup> In the Compliance Filing, ETC Tiger requested that the Commission accept and approve the filed agreements<sup>3</sup> and tariff section effective December 1, 2010, the date that ETC Tiger

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<sup>1</sup> ETC Tiger Compliance Filing dated October 25, 2010 (Compliance Filing). FERC Gas Tariff, First Revised Volume No. 1, Part 6, Section 37, Non-Conforming Agreements, Version 1.0.0.

<sup>2</sup> *ETC Tiger Pipeline, LLC*, 131 FERC ¶ 61,010 (2010) (Certificate Order).

<sup>3</sup> ETC Tiger filed five non-conforming, negotiated Rate Schedule FTS Agreements with the Compliance Filing resulting from five precedent agreements that it filed as part of its certificate application. Those agreements were with (1) Chesapeake Energy Marketing, Inc. (Chesapeake) for 1,000,000 dekatherms per day (Dth/d); (2) Encana Marketing (USA) Inc. (Encana) for 400,000 Dth/d; (3) Shell Energy North America (U.S.), LP (Shell) for 300,000 Dth/d; (4) BG Energy Merchants, LLC (BG) for 200,000 Dth/d; (5) Questar Exploration and Production Company (Questar) for 100,000 Dth/d. ETC Tiger also filed a separate non-conforming, negotiated rate FTS Agreement with Shell for Interim Period Service and Perryville Service as those terms are defined in its tariff. ETC Tiger also filed a negotiated rate agreement for service under Rate Schedule ITS.

estimated that it would be able to place its pipeline facilities into service to meet its firm service obligations. On November 12, 2010, Shell filed a protest, and on November 17, 2010, Encana filed comments, both objecting to ETC Tiger's proposed December 1, 2010 effective date for their FTS agreements. On November 30, 2010, the Commission accepted the non-conforming agreements and tariff section subject to further review of the filing and further briefing on the matter of the parties' contractual dispute with respect to the commencement of the primary term of certain agreements.<sup>4</sup> On December 30, 2010, Shell and Encana filed requests for rehearing of the November 2010 Order. In this order we resolve the contractual dispute in favor of ETC Tiger, deny the requests for rehearing, and accept the non-conforming agreement provisions, with one exception, effective December 1, 2010.

### **I. Procedural Background**

2. On October 31, 2009, ETC Tiger filed an application in Docket No. CP09-460-000, 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 and associated facilities from east Texas near Carthage to a terminus near Delhi, Louisiana (ETC Tiger Pipeline).<sup>5</sup> ETC Tiger stated in its application that it had entered into certain precedent agreements with future shippers that spelled out shipper requirements and that such shippers had elected to pay negotiated rates. On April 7, 2010, the Commission issued the Certificate Order, which addressed certain of the non-conforming provisions of the precedent agreements and approved the deviations. The Commission stated that its determinations on the agreements 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, 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."<sup>6</sup>

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<sup>4</sup> *ETC Tiger Pipeline, LLC*, 133 FERC ¶ 61,187 (2010) (November 2010 Order).

<sup>5</sup> As part of the project, ETC Tiger also proposed to construct four new mainline compressor stations, the Carthage Compressor station in Panola County, Texas; the Cannisnia Compressor Station in Red River Parish, Louisiana; the Bienville Compressor Station in Bienville Parish, Louisiana; and the Chatham Compressor Station in Jackson Parish, Louisiana.

<sup>6</sup> Certificate Order, 131 FERC ¶ 61,010 at P 78 and Ordering Paragraph (I).

3. As noted above, on October 25, 2010, in compliance with the Certificate Order, ETC Tiger filed the seven non-conforming, negotiated rate service agreements referenced above and the proposed tariff section listing the agreements. ETC Tiger requested that the Commission accept the proposed tariff sections and non-conforming agreements effective December 1, 2010, so that ETC Tiger could commence service on the ETC Tiger Pipeline on that date. Because ETC Tiger did not file the non-conforming agreements and tariff sheet at least 60 days before its requested effective date, it sought a waiver of that Certificate Order requirement. ETC Tiger asserted that it had expended considerable resources to accelerate the submission of its tariff and non-conforming agreements in accordance with its commitment to commence transportation service at the earliest date possible and that the Commission has readily granted such waiver requests in the past.

4. On November 1, 2010, ETC Tiger requested authorization in the certificate proceeding to place in-service the 175 miles of 42-inch-diameter natural gas pipeline, the Carthage and Chatham Compressor Stations and all receipt and delivery meter stations, taps, and ancillary facilities on or before December 1, 2010. ETC Tiger noted that it intended to file a subsequent request in the first quarter of 2011 to place in-service the remaining compression facilities comprising the ETC Tiger Pipeline. By letter dated November 23, 2010, the Director of the Commission's Division of Gas – Environment and Engineering, approved ETC Tiger's request.

5. Shell and Encana filed pleadings in this proceeding objecting to ETC Tiger's proposed December 1, 2010 effective date for their FTS agreements.<sup>7</sup> As discussed more fully below, both shippers' opposition to ETC Tiger's proposed effective date for those contracts were based primarily on the fact that certain upstream receipt points and other facilities to be constructed by CenterPoint Energy Field Services, Inc (CEFS) would not be connected by December 1, 2010. Shell also protested that ETC Tiger's requested effective date was in violation of its FTS agreement.

6. In the November 2010 Order, the Commission granted ETC Tiger's request to waive the requirement to file the non-conforming service agreements and tariff sheet at least 60 days prior to the in-service date of the pipeline, and accordingly accepted ETC Tiger's tariff sections and the non-conforming agreements effective on the later of December 1, 2010 or ETC Tiger's in-service date. The Commission found that Shell and Encana had not shown that ETC Tiger's failure to file the non-conforming service agreements at least 60 days before its in-service had adversely affected them or that a filing by ETC Tiger 60 days before December 1, 2010 would have enabled CEFS to

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<sup>7</sup> Shell's protest related to its FTS Agreement No. 300003, and Encana's comments related to its FTS Agreement No. 300001.

complete the construction of its facilities by that date. The Commission made the grant of waiver subject to a future ruling on the contractual dispute as to the commencement date of the primary term of the Shell and Encana FTS agreements, and directed the parties to file briefs on that issue. The Commission also noted that it had not completed its review of the non-conforming provisions of the service agreements and thus conditioned its acceptance of the subject service agreements and tariff sections on a further review of ETC Tiger's filing.

7. On December 20, 2010, ETC Tiger, Shell and Encana filed initial briefs as directed by the November 2010 Order. On December 30, 2010, Shell and Encana filed separate requests for rehearing of the November 2010 Order, both asserting that the Commission erred by accepting the subject FTS agreements effective December 1, 2010 without suspending the effective dates of such contracts. On January 11, 2011, the three parties filed answering briefs on the primary term commencement date dispute.

## **II. Contractual Dispute**

### **A. Initial Briefs**

8. In its initial brief, ETC Tiger claims that the express language of the Shell and Encana FTS agreements established an effective date for those agreements of December 1, 2010. According to ETC Tiger, the completion date of Shell's and Encana's non-jurisdictional, upstream facilities is irrelevant to a determination of the effective date of the FTS agreements because those facilities are not a part of ETC Tiger's certificate application, the Commission's certificate authorization, or the parties' contractual obligations under the FTS and precedent agreements with respect to the effective date of the FTS agreements. Rather, ETC Tiger contends such provisions expressly require that the effective date of the FTS agreements be determined based on whether ETC Tiger's pipeline facilities are ready to provide service, irrespective of the status of Shell and Encana's upstream facilities.

9. According to ETC Tiger, any dispute regarding the effective date of the Shell and Encana FTS agreements "should begin and end" on the fact that on November 30, 2010, ETC Tiger provided notice to Shell and Encana that ETC Tiger's pipeline was "ready to provide firm service from the Carthage Interconnect to the [Southeast Supply Header, LLC] (SESH Interconnect), including firm service to Shell and Encana of their respective [maximum daily quantities] (MDQ) from their primary receipt points on ETC Tiger's pipeline to their primary delivery points on ETC Tiger's pipeline."<sup>8</sup> ETC Tiger states

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<sup>8</sup> ETC Tiger Initial Brief at 4.

that by contract its November 30 notice to Shell and Encana unambiguously triggered an “Effective Date” of December 1, 2010 for their FTS agreements.

10. ETC Tiger’s contractual argument relies primarily on three provisions contained in Shell’s and Encana’s FTS agreements, including Exhibit C to each agreement,<sup>9</sup> which ETC Tiger claims establishes the Effective Date of the agreements. The first is the term provision of each agreement:

TERM: The term of this FTS Agreement shall commence on the earlier to occur of (i) the date upon which any Interim Period Service or any Perryville Interconnect Service becomes available and (ii) the Effective Date, as defined in Exhibit C hereto, and shall continue thereafter, whether in the case of clause (i) or (ii) above, for a period of ten (10) Years from and after such Effective Date (such ten (10) year period the “Primary Term” ... ETC Tiger Initial Brief at 15 (quoting Shell FTS Agreement at 1).<sup>10</sup>

11. The second contractual provision relied on by ETC Tiger is the definition of “Effective Date,” which for both the Shell and Encana FTS agreements is contained in the negotiated rate Exhibit C to each contract. The “Effective Date” provision for both contracts states:

“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. Section 1.7 of Exhibit C to Shell’s FTS agreement; Section 1.5 of Exhibit C to Encana’s FTS agreement.

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<sup>9</sup> The Exhibit Cs to the FTS agreements are the negotiated rate agreements.

<sup>10</sup> The Encana FTS contains a similar section 3 that also provides that the agreement commences on the “Effective Date.”

The Effective Date provision of the Shell FTS agreement continues with the following language:

provided, however, that the Effective Date shall occur regardless of (i) whether any Receipt Point on the Pipeline, other than Shipper's Eligible Primary Receipt Points initially set forth on Exhibit A of the FTS Agreement and the Carthage Interconnect, is unavailable as of such Effective Date, and/or (ii) whether any Delivery Point on the Pipeline, other than Shipper's Eligible Primary Delivery Points initially set forth on Exhibit B of the FTS Agreement and the SESH Interconnect, is unavailable as of such Effective Date.

*See* ETC Tiger Initial Brief at 16 (quoting Shell FTS agreement, Exhibit C at 1).

12. Third, ETC Tiger relies on section 1.19 of Exhibit C to the Shell FTS agreement and section 1.22 of Exhibit C to the Encana FTS agreement, which define "Pipeline" as referenced in the Effective Date definition above.

Pipeline shall mean TIGER's interstate natural gas pipeline system consisting of approximately one-hundred eighty (180) miles of mainline 42-inch pipeline originating at a point of interconnection with Houston Pipe Line Company in Panola County, Texas, (Carthage Interconnect) and extending to a point of interconnection pipeline in Richland Parish, Louisiana, with the interstate pipeline system owned by Southeast Supply Header, LLC (the "SESH Interconnect"), with related compression facilities and the Receipt Point interconnects and Delivery Point interconnects identified on Appendix A to this [negotiated rate agreement], as owned, installed and operated by TIGER in accordance with the FERC certificate authorization in FERC Docket No. CP09-460-000. ETC Tiger Initial Brief at 17.

ETC Tiger notes that this contractual definition of "Pipeline" includes only ETC Tiger facilities, including receipt and delivery points owned, installed, and operated by ETC Tiger in accordance with its NGA section 7 certificate, and that the reference to receipt and delivery points in the FTS agreements is to facilities "on the Pipeline."<sup>11</sup> ETC Tiger also states that the "Effective Date" provisions of the FTS Agreements are similar to the

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<sup>11</sup> *See* ETC Tiger Initial Brief at 17 and contract provisions quoted therein.

language that establishes the effective date of the precedent agreement with Encana in that the determination of the effective date is based solely on ETC Tiger's facilities, and not on upstream non-jurisdictional facilities.

13. As noted above, ETC Tiger states that on November 30, 2010, it provided notice to Shell and Encana that the ETC Tiger Pipeline was ready to provide firm service from the Carthage Interconnect to the SESH Interconnect and firm service to Shell and Encana under their FTS Agreements, up to their contract MDQ, from their Primary Receipt Point(s) as set forth in their agreement to the Primary Delivery Point(s) on their Agreements.<sup>12</sup> ETC Tiger contends that pursuant to the express language of the provisions above, the notice that ETC Tiger was ready to provide firm service as provided by the contractual definition of effective date triggered an "Effective Date" of the FTS Agreements of December 1, 2010, "the first Day of the Month following notice from [ETC] TIGER."<sup>13</sup>

14. Thus, ETC Tiger contends, Shell and Encana should not be allowed to avoid their contractual obligations under the agreements based on the fact that the upstream gathering facilities, for which Shell and Encana were responsible, were not completed at the time the ETC Tiger Pipeline was ready to provide service. ETC Tiger argues that the agreements define Effective Date solely in terms of ETC Tiger facilities and thus the status of upstream third party facilities is not a part of the contractual determination of the Effective Date of the FTS Agreements. ETC Tiger claims that if completion of the third party facilities were part of the test for determining the effective date, then language to that effect would have been included in the agreements, which it is not. ETC Tiger asserts that Shell and Encana cannot unilaterally read such language into the agreements and cannot use their failure to negotiate such a provision as grounds for evading their contractual obligations based on the express language of the contracts. ETC Tiger also states that as large, sophisticated international enterprises, Shell and Encana have no basis to argue they did not understand the language contained in the agreements and thus that those companies executed the agreements as written with full knowledge of the associated obligations and risks.

15. In its Initial Brief, Shell also contends that the contractual dispute between ETC Tiger and Shell can and should be based upon the "plain meaning of the language" of Shell's FTS agreement.<sup>14</sup> According to Shell, Texas law governs the construction and interpretation of the Shell FTS agreement, and pursuant to that law, in construing the

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<sup>12</sup> See ETC Tiger Initial Brief at 19-20, and Attachment 10.

<sup>13</sup> ETC Tiger Initial Brief at 19-20.

<sup>14</sup> Shell Initial Brief at 5.

language of an unambiguous written agreement, the primary concern is to ascertain and give effect to the intentions of the parties as expressed in their written contract. Shell contends that pursuant to Texas law contract terms are given their “plain and ordinary meaning” unless the contract indicates that the parties intended a different meaning. To Shell, the agreements relative to the determination of the contractual issue herein are the Shell FTS agreement, Shell’s August 26, 2009 Precedent Agreement with ETC Tiger, and a separate FTS Interim Service Agreement dated April 21, 2010.<sup>15</sup> Like ETC Tiger, Shell relies primarily on the Term, Effective Date, and Pipeline provisions of the FTS agreements for its position that December 1, 2010 is not the “Effective Date” of its FTS agreement with ETC Tiger and thus, Shell has no obligation to pay for firm transportation service beginning on that date.<sup>16</sup>

16. Shell’s main argument for its claim that December 1, 2010 is not the Effective Date of its FTS agreement is that contrary to ETC’s Tiger’s November 30, 2010 notice, ETC Tiger’s “Pipeline,” as defined in section 1.19 of Exhibit C to Shell’s FTS agreement, was not ready for firm service on December 1, 2010. According to Shell, ETC Tiger’s request to begin service on the pipeline, and the resultant Commission Letter Order, was only for “partial” service as certain compression facilities were not yet installed or ready for service. Shell thus concludes that the Pipeline could not have been ready because “by definition it did not yet exist.”<sup>17</sup>

17. Following on that point, Shell also argues that Shell’s primary receipt point and delivery point “interconnects” were not completed and ready for operation on December 1, 2010. According to Shell, the definition of Pipeline in its FTS agreement does not just refer to receipt and delivery points but specifically encompasses the word “interconnects,” language not included in the other shippers’ FTS agreements.<sup>18</sup> Shell contends that the definition of Pipeline in its FTS agreement therefore requires that its receipt and delivery points be operational with actual interconnects in place. According to Shell, while the definition of Pipeline in Exhibit C of its FTS agreement requires that

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<sup>15</sup> The Interim FTS agreement (Contract No. 300002) is attached to ETC Tiger’s Initial Brief as Attachment 3. Shell states in its Initial Brief that it has no dispute with Tiger concerning the Interim FTS agreement.

<sup>16</sup> In addition, Shell contends that a “Whereas” clause and a provision stating the anticipated in-service date of the ETC Tiger Pipeline, contained in the Precedent Agreement, are relevant as well as certain parts of sections 6 and 7 of the FTS agreement. Shell Initial Brief at 6-7.

<sup>17</sup> Shell Initial Brief at 8.

<sup>18</sup> Shell Initial Brief at 8-9 & n.18.

all ETC Tiger's receipt and delivery points be interconnected before the Pipeline is ready, a proviso was added to the Effective Date provision in Shell's FTS agreement (see additional language mentioned above) that only required ETC Tiger to be interconnected at the Carthage Interconnect and Shell Energy primary receipt points interconnects and at the SESH Interconnect and Shell's primary delivery point interconnects.<sup>19</sup> Shell further asserts that an "interconnection" is a physical connection with another upstream or downstream pipeline facility, and thus, by definition, cannot be ready when only one side of that physical connection has been installed.

18. In its initial brief, Encana focuses first on its Precedent Agreement with ETC Tiger. Encana asserts that certain sections of that agreement provide "useful information" about Encana's FTS agreement. Encana first discusses section 1.1 of the Precedent Agreement, which contains language regarding the effective date of that agreement, and mirrors section 1.7 of the FTS agreement with regard to the Effective Date of the FTS agreement being the first day of the calendar month following notice from ETC Tiger that the pipeline is ready to provide firm service from the Carthage Interconnect to the SESH interconnect, up to the shipper's MDQ, from its primary receipt point to its primary delivery point.<sup>20</sup> Encana further references the sections of the Precedent Agreement that set forth the Primary Term (10 years), the primary receipt and delivery points, and timing. With respect to the timing section, Encana notes that section states ETC Tiger "anticipates having the Pipeline in service from the Carthage Interconnect to the SESH interconnect by June 30, 2011. However, Transporter will proceed with due diligence to commence the transportation service at the earliest date practicable."<sup>21</sup>

19. According to Encana, these sections of the Precedent Agreement show that (i) the Primary Term of the FTS Agreement would commence on the Effective Date, but (ii) the Effective Date would not be deemed to have arrived until ETC Tiger had placed the Pipeline into service from all of the Primary Receipt Points designated in the Precedent Agreement, up to Encana's MDQ. Encana further notes that with respect to timing, although the main part of the ETC Tiger Pipeline was not projected to be in service until June 30, 2011, ETC Tiger pledged to do what it could to start performing the transportation service for Encana as of the earliest date "practicable."

20. Encana states that it executed its FTS agreement on April 14, 2010, and in its brief quotes section 1.5 of Exhibit C to its FTS agreement with ETC Tiger (the Effective Date

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<sup>19</sup> *Id.*

<sup>20</sup> Encana Initial Brief at 4.

<sup>21</sup> Encana Brief at 5 (*quoting* section 6 of the Encana Precedent Agreement).

provision), which is virtually identical to the same section of Shell's Exhibit C (except Encana's does not include the "provided, however" clause contained in Shell's agreement). Encana further asserts that that FTS agreement contains no further information about the projected in-service date for the ETC Tiger Pipeline or the Effective Date of its FTS Agreement, and thus section 6 of the Precedent Agreement, stating that ETC Tiger anticipated the Pipeline would go into service no later than June 30, 2011, but earlier if practicable, was the "last official word on the subject."<sup>22</sup> Encana also asserts the Precedent Agreement anticipated that some portions of the ETC Pipeline might be placed in service before others,<sup>23</sup> and discusses certain correspondence between Encana and ETC Tiger regarding draft interconnect agreements as support for its claim that ETC Tiger was aware that Encana would not be ready to match a December 1, 2010 in-service date.<sup>24</sup>

21. Against this backdrop, Encana states that contrary to ETC Tiger's position, "because ETC Tiger was not physically capable of receiving [Encana's] MDQ at two [of three] primary receipt points on December 1, 2010, it was not in a position to perform its full contract obligations for [Encana] as of that date, with the result that the Effective Date was not achieved and the Primary Term [had] not commenced."<sup>25</sup> Encana asserts that in order for the Commission to decide which of the parties' positions is correct, the Commission must discern the intent of the parties to the transaction by going outside "the four corners" of the Precedent Agreement and FTS agreement. In that regard, Encana claims that in so doing the Commission has historically engaged in a "facts-and-circumstance analysis" based on an interpretation and application of the provisions in the relevant agreements and the Commission's certificate order. Encana further asserts that the Commission has recognized that the in-service date of a new facility should generally coincide with the date such facility becomes "commercially operational."

## **B. Answering Briefs**

22. In its answering brief, ETC Tiger focuses on its claim, and Shell's agreement therewith, that the contract language at issue is unambiguous and straightforward and thus the construction and interpretation of the Shell and Encana FTS agreements are governed by Texas law. According to ETC Tiger, Texas law requires the Commission to give effect to the unambiguous language in those agreements, based on the principles that

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<sup>22</sup> Encana Initial Brief at 6.

<sup>23</sup> Encana Initial Brief at 7.

<sup>24</sup> Encana Initial Brief at 8-11.

<sup>25</sup> Encana Initial Brief at 12.

when construing the language of a written agreement the primary concern is to give effect to the intention of the parties as expressed in the written contract, that contract terms should be given their plain and ordinary meaning unless otherwise indicated in the contract, and the fact that parties disagree over the meaning of an agreement does not make it ambiguous.<sup>26</sup> ETC Tiger argues that Encana's allegation that the Encana FTS agreement is ambiguous is wholly unsupported, and thus the Commission should ignore "Encana's extraneous arguments" and decide the issue based on the "clear and unambiguous mutual intent" expressed in the written provisions of the contracts, which determines the Effective Date based solely on ETC Tiger's notice regarding the availability of its jurisdictional pipeline facilities, not on the status of non-jurisdictional, upstream gathering facilities.<sup>27</sup>

23. Specifically, ETC Tiger claims that Shell and Encana ignore clear contractual language that establishes the Effective Date of the FTS agreements, and that the shippers' newly created "all pipeline facilities" test is directly contrary to the actual contract language. ETC Tiger states that the unambiguous language for determining the Effective Date of the FTS agreements is in section 1.7 of Shell's Exhibit C (section 1.5 of Encana's Exhibit C), which as noted above states that the Effective Date shall mean the first day of the month following notice from ETC Tiger to the 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."<sup>28</sup> According to ETC Tiger, the critical components of this test are whether the Pipeline is ready as of the date it provides notice to provide: (1) firm service from the Carthage Interconnect to the SESH Interconnect; and (2) firm service to Shell or Encana of their respective Contract MDQs from each shipper's primary receipt to its primary delivery points. ETC Tiger contends that it provided the contractually required notice on November 30, 2010, that it was ready as of that date to provide the referenced service, and thus the Effective Date of the FTS agreements is December 1, 2010.

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<sup>26</sup> ETC Tiger Answering Brief at 4-5 (*citing Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003); *Kelley-Coppedge, Assoc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998); *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009).

<sup>27</sup> ETC Tiger Answering Brief at 5.

<sup>28</sup> *Id.* at 6-7.

24. ETC Tiger claims that Shell attempts avoid its obligations under its FTS agreement by advancing the test that would require all the facilities proposed in ETC Tiger's certificate application to be completed before the agreement is effective. ETC Tiger argues that such a test is contrary to the unambiguous contract language and essentially ignores the critical language noted above. According to ETC Tiger, instead of relying on the plain meaning of the contractual provisions, Shell's position would abrogate the existing agreement and replace it with a new one dictated by Shell alone because there simply is no requirement in the Shell FTS agreement that requires all of ETC Tiger's pipeline facilities to be complete before the FTS agreement becomes effective. ETC Tiger further argues that Shell's interpretation is inconsistent with the fundamental principle of Texas law that contracts should not be read in a manner that renders language meaningless or surplusage.<sup>29</sup> ETC Tiger claims that if the parties had intended to agree to the Shell's "completeness" test, they could have simply defined the Effective Date as the date on which the Pipeline is complete, which they did not. Moreover, if Shell's interpretation was what the parties intended, then there would have been no reason for the parties to include the language regarding the Carthage and SESH interconnects.

25. ETC Tiger also claims that Shell's arguments that the ETC Pipeline was not ready because certain compression facilities were not ready for service as of the date ETC Tiger gave notice is meritless. ETC Tiger states that in accordance with the contract it had sufficient compression facilities to provide firm service, up to each shipper's MDQ, from the Carthage Interconnect to the SESH Interconnect, including service from the respective primary receipt to primary delivery points. ETC Tiger argues the fact that certain compressor facilities, not required for ETC Tiger to provide the agreed upon service, were not ready for service on November 30, 2010, is irrelevant to determining the Effective Date of the agreements.

26. ETC Tiger also asserts Shell is simply wrong in its claim that the non-jurisdictional upstream gathering facilities are included in the section 1.19 definition of jurisdictional facilities. ETC Tiger claims that Shell's reading of that section, which focuses solely on the word interconnects, ignores the language stating that "Pipeline shall mean TIGER's interstate natural gas pipeline system ... as owned, installed and operated by TIGER in accordance with the FERC certificate authorization in FERC Docket No. CP09-460-000." ETC Tiger claims that this language demonstrates that the reference to interconnects in the agreement is to ETC Tiger's jurisdictional facilities only, and not the gathering facilities to be constructed by CEFS, which are not a part of the definition of

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<sup>29</sup> ETC Tiger Answering Brief at 11 (citing *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635, 645 (5th Cir. 1991); *Lyons v. State Farm Lloyds and Nat. Cas. Co.*, 41 S.W.3d 201, 206 (Tex.App. – Houston [14<sup>th</sup> Dist.] 2001.))

Pipeline upon which Shell relies. ETC Tiger states that while Shell would like the Commission to read the Shell FTS agreement to mean that the primary term of the agreement commences when Shell's upstream facilities were ready to provide service, the agreement contains no such language.<sup>30</sup>

27. With regard to Encana's arguments, ETC Tiger asserts that Encana's resort to previous Commission orders as to the definition of the in-service date of facilities is irrelevant and meritless because it ignores the actual language in the Encana FTS agreement. ETC Tiger asserts that contrary to Encana's claims, the Commission has never found that the language of firm service and precedent agreements should be ignored and replaced with a blanket rule that "the in-service date of a new facility should generally coincide with the date a new facility becomes commercially operational," meaning when a "present measurable benefit [accrues] to the consumer through a tangible service from the new facility."<sup>31</sup> According to ETC Tiger, Encana's resort to these "principles and precedents" is simply a part of Encana's attempt to evade the contractual obligations that Encana voluntarily assumed.

28. ETC Tiger also contends that there is no basis for Encana's attempt to go outside the "four corners" of Encana's precedent and FTS agreements. ETC Tiger notes that while Encana suggests that ambiguity exists in the FTS and precedent agreements, it fails to specify any ambiguous language in those agreements. ETC Tiger claims that despite Encana's intentions and communications regarding its desire to complete the upstream gathering facilities coincidentally with the completion of the ETC Tiger pipeline, its failure to do so does not alter its contractual obligations or change the Effective Date of the FTS agreement. ETC Tiger states that the language of the FTS agreement is unambiguous, and thus Encana's resort to arguments concerning allegations outside the agreement, including the Interim Period Service, filter separators, e-mails and other pre-contractual correspondence, Encana's indecision as to the location of the gathering facilities and its failure to obtain right-of-way agreements, are irrelevant and should not be allowed as a basis for Encana to evade its obligations under the Encana FTS agreement.<sup>32</sup>

29. In its Answering Brief, Shell notes that it and ETC Tiger agree on the basic "framework" for the Commission to make a determination on the contractual issue in dispute in this proceeding, namely that the FTS agreements are unambiguous and thus the dispute should be decided based on the plain meaning of the language contained in the

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<sup>30</sup> ETC Tiger Answering Brief at 16-20.

<sup>31</sup> ETC Answering Brief at 22.

<sup>32</sup> ETC Answering Brief at 24-38.

Shell FTS agreement. According to Shell, however, its reading of the plain language includes a straightforward reading of all the language in the agreements and its exhibits, while ETC Tiger glosses over or ignores the wording and import of several of the defined terms of Shell's Exhibit C to conclude that December 1, 2010 is the Effective Date of that agreement. Specifically, Shell argues that the proper interpretation of the term "Pipeline" is critical to a determination of the correct Effective Date, that ETC Tiger ignores key words in the definition of Pipeline in section 1.19 of Shell's Exhibit C, and that omission leads to a misinterpretation of "Effective Date" in the agreement and renders ETC Tiger's November 30, 2010 notice ineffective.

30. Shell reiterates the arguments it made in its Initial Brief on this point, namely that the definition of "Pipeline" in section 1.19 of Exhibit C to Shell's FTS agreement expressly includes the primary receipt point and delivery point interconnects identified in that agreement. According to Shell, because the term interconnect contemplates the joining of one pipeline with another, and CEFS's gathering facilities were not yet connected to ETC Tiger's pipeline facilities on the date that ETC Tiger provided notice, the primary receipt point interconnects did not exist and thus ETC Tiger could not have been ready to provide service to Shell as of that date. Shell contends that ETC Tiger's attempts to define the terms "Receipt Point and Delivery Point" in Shell's Exhibit C to include only ETC's Tiger's facilities, ignores the term "interconnects" that the parties expressly included in the agreement to reflect the parties' intent that ETC Tiger's pipeline had to be physically connected to the upstream gathering facilities before the Effective Date under the Shell FTS agreement could occur.<sup>33</sup> Shell concludes that ETC Tiger's notice that it was ready to provide service as provided for in the Shell FTS agreement was therefore premature.

31. In its Reply Brief, Encana also asserts that ETC Tiger's arguments as set forth in ETC Tiger's Initial Brief misinterpret the relevant agreements, and ignore events critical to the proper determination of Effective Date under Encana's FTS agreement. According to Encana, the words of its agreements with ETC Tiger alone do not support ETC Tiger's claim that December 1, 2010 is the Effective Date of the Encana FTS agreement. Restating the language of section 1.5 of Exhibit C to that agreement, Encana claims that on November 30, 2010, ETC Tiger was not in a position to receive gas at two of Encana's primary receipt points.

32. Encana also reiterates its position that the service commencement date must be flexible and that its Precedent Agreement required the parties to work together to achieve a date that was the "earliest date practicable for all involved," and that requires taking into account where entities other than ETC Tiger were in the development activity.

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<sup>33</sup> Shell Answering Brief at 4-7.

Encana asserts that it and CEFS took reasonable steps to have their facilities ready at the earliest date practicable, and that its Initial Brief demonstrates why their inability to meet what it considers ETC Tiger's "ambitious" December 1, 2010 start-up date was as much ETC Tiger's fault as it was Encana's. Encana claims that ETC Tiger knew from certain correspondence between the parties that Encana and CEFS would not be able to match a December 1, 2010 start-up date, especially because ETC Tiger allegedly failed to provide the assistance necessary to secure certain rights-of-way to complete the interconnection facilities by that date.<sup>34</sup> Encana also claims that ETC Tiger had informed Encana in October of 2010 that service was not expected to occur until the first quarter of 2011.<sup>35</sup> Encana also claims that, despite ETC Tiger's position that it had no contractual obligation to construct non-jurisdictional facilities for Encana, ETC Tiger had an "obligation to provide reasonable and customary assistance to its shippers and their agents to facilitate their ability to complete the necessary interconnection facilities."<sup>36</sup> Encana asserts that the Commission should not reward ETC Tiger for failing to provide such assistance.

### C. Discussion

33. The Commission finds that pursuant to the unambiguous language of ETC Tiger's FTS agreements with Shell and Encana, ETC Tiger's November 30, 2010 notice to those shippers that it was ready to provide service as required under those agreements was valid, and thus December 1, 2010 is the proper Effective Date for the primary term of the Shell FTS agreement and for the primary term of the Encana FTS agreement. As discussed below, the relevant provisions of those agreements required that ETC Tiger provide notice that its jurisdictional facilities, as approved by the Commission in the certificate proceeding, were ready to provide service to the shippers on those facilities as provided for in the agreements. The plain meaning of those contractual provisions does not require that all of the facilities for which ETC Tiger received certificate authorization to construct be completed as a condition of ETC Tiger's being ready to provide the contracted service. Further, the status of non-jurisdictional upstream facilities for which the shippers were responsible is irrelevant to a determination of the readiness of ETC Tiger's jurisdictional facilities as it relates to the Effective Date of those agreements. There is no provision in the subject contracts that conditions the Effective Date of the subject FTS agreements on the completion of Shell and Encana's upstream facilities." The contractual provisions relevant to the determination of the commencement date of the primary term of the Shell and Encana FTS agreements are the Term (section 3 of the

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<sup>34</sup> Encana Reply Brief at 5-6.

<sup>35</sup> Encana Reply Brief at 6 (*citing* Exhibit G to its Initial Brief).

<sup>36</sup> Encana Reply Brief at 6-7.

FTS agreements), Effective Date (section 1.7 of Exhibit C to Shell's FTS agreement, section 1.5 of Exhibit C to Encana's FTS agreement), and the definition of Pipeline (section 1.19 of the Shell Exhibit C and section 1.22 of the Encana Exhibit C) provisions.<sup>37</sup> Our review of these sections indicates, as ETC Tiger and Shell agree, that the language is unambiguous, and thus, the determination of the proper Effective Date of the subject FTS agreements should rely on the plain language of the referenced provisions. As to the Term provision of the Shell and the Encana FTS agreements, it states that the primary term of 10 years commences on the Effective Date, as defined in Exhibit C of the FTS agreements. None of the parties dispute this interpretation.

34. The crux of the contractual dispute is the appropriate interpretation of the term "Effective Date" in Exhibit C of the subject FTS agreements. Pursuant to section 1.7 of the Shell Exhibit C and section 1.5 of the Encana Exhibit C, the Effective Date is defined as the

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.<sup>38</sup>

Based on this language, the Effective Date of the FTS agreements is triggered by ETC Tiger's providing notice that the Pipeline as defined in Exhibit C to the FTS agreements is ready to provide firm transportation service from the shippers' primary receipt points at the Carthage Interconnect to the shippers' primary delivery points at the SESH interconnect, at a volume up to each shippers' MDQ. There is no dispute that ETC Tiger sent a letter to Shell and Encana on November 30, 2010, that gave precisely such notice. Moreover, the record indicates that ETC Tiger was ready on that date to provide the referenced service to Shell and Encana and that it had been authorized by the

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<sup>37</sup> While Encana also discusses section 1.1 of its precedent agreement, the language it quotes in its Initial Brief is nearly identical to the "Effective Date" language in section 1.5 of Exhibit C to its FTS agreement.

<sup>38</sup> Shell's agreement also includes the "however, provided" provision quoted above.

Commission to do so. Accordingly, to the extent that ETC Tiger's notice was valid, the Effective Date of the FTS agreements is December 1, 2010.

35. Shell contends that ETC Tiger's notice was not valid because the entire pipeline was not ready to provide service on December 1, 2010. In making this argument, Shell relies on the definition of "Pipeline" in Exhibit C of its FTS agreement. According to Shell, a determination as to when the Effective Date occurs depends on whether the "Pipeline," as defined in its Exhibit C, is ready for firm service. Shell notes that the definition of "Pipeline" encompasses all of ETC Tiger's facilities, including compression facilities and receipt and delivery point interconnects as owned, installed and operated by ETC Tiger in accordance with its certificate.<sup>39</sup> Shell thus contends that because the "entire 'Pipeline'" was not ready on November 30, 2010, as evidenced by ETC Tiger's November 1, 2010 request for authorization to commence "partial" service that did not involve certain compression facilities, ETC Tiger's notice was premature.

36. While Shell's argument focuses on whether the "Pipeline" was ready, in terms of all the facilities being constructed and authorized for service, it ignores the plain language of the Effective Date provision that states the "Pipeline" must be "ready... to provide *firm service from the Carthage Interconnect to the SESH Interconnect...*(emphasis added)." As noted by ETC Tiger, Shell's interpretation is strained because Shell would essentially delete the portion of the provision that specifies what the Pipeline must be ready to do – provide firm service from the Carthage Interconnect to the SESH Interconnect, including service up to Shell's MDQ from its primary receipt points to Shell's primary delivery points. Nothing in this contractual provision, however, requires that the entire Pipeline be completed in order to provide that service. A plain reading of the provisions indicates only that the Pipeline must be ready to provide the requisite service. Further, the proviso language added to Shell's Exhibit C "Effective Date" provision undercuts Shell's argument. That language states:

provided, however, that the Effective Date shall occur regardless of (i) whether any Receipt Point on the Pipeline, other than Shipper's Eligible Primary Receipt Points initially set forth on Exhibit A of the FTS Agreement and the Carthage Interconnect, is unavailable as of such Effective Date, and/or (ii) whether any Delivery Point on the Pipeline, other than Shipper's Eligible Primary Delivery Points initially set forth on Exhibit B of the FTS Agreement and the SESH Interconnect, is unavailable as of such Effective Date.

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<sup>39</sup> Shell Initial Brief at 8.

The plain meaning of this language is that not all of the facilities contained in the definition of Pipeline had to be completed before the Effective Date provision of Shell's could be triggered. Thus, while Shell contends that the definition of Pipeline in its Exhibit C encompasses all of ETC Tiger's facilities including receipt and delivery points, the additional language in its Effective Date provision is directly contrary to that assertion. The Pipeline definition specifically refers to compression facilities and receipt and delivery points that are excluded by the Shell proviso in the Effective Date provision.

37. Shell's reliance on the fact that its Exhibit C definition of "Pipeline" includes not just receipt points and delivery points but also specifies "interconnects" also fails. As noted, Shell's contention is that "interconnect" means a physical connection with another upstream or downstream facility, and thus an interconnect is not ready when only one side of the physical connection is installed. Again, however, Shell's interpretation requires ignoring pertinent language contained in the contract. The definition of Pipeline in Shell's Exhibit C states as follows:

Pipeline shall mean TIGER's interstate natural gas pipeline system consisting of approximately one-hundred eighty (180) miles of mainline 42-inch pipeline originating at a point of interconnection with Houston Pipe Line Company in Panola County, Texas, (Carthage Interconnect) and extending to a point of interconnection in Richland Parish, Louisiana, with the interstate pipeline system owned by Southeast Supply Header, LLC (the "SESH Interconnect"), with related compression facilities and the Receipt Point interconnects and Delivery Point interconnects identified on Appendix A to this [negotiated rate agreement], *as owned, installed and operated by TIGER in accordance with the FERC certificate authorization in FERC Docket No. CP09-460-000* (emphasis added).

38. The definition of Pipeline in the Shell Exhibit C specifically refers only to the facilities "owned, installed and operated" by ETC Tiger in accordance with its FERC certificate. This provision does not mention interconnecting upstream or downstream facilities that are to be owned, installed or operated by the shippers. Further, as ETC Tiger points out, neither ETC Tiger's certificate application nor the Certificate Order requested authority for, or authorized, any non-jurisdictional gathering facilities that were to be connected to the ETC Tiger Pipeline. Thus Shell's argument that the term "interconnects" was specifically included in Shell's Exhibit C to signify that the ETC Tiger Pipeline had to be physically connected to the upstream facilities to be constructed by CEFS fails based on the plain language of that provision. The Pipeline definition specifically and straightforwardly limits its application to ETC Tiger's jurisdictional facilities. Accordingly, the use of "interconnect" in the Shell FTS agreement does not change the fact that ETC Tiger's facilities as defined in the Shell Exhibit C were

completed as of the date it provided notice and that ETC Tiger was ready to provide the requisite service on those facilities.

39. We also reject Encana's arguments regarding the proper commencement date of the primary term of its FTS agreement. Encana claims, similar to Shell's argument, that ETC Tiger was not ready to provide such service because ETC Tiger "was not physically capable of receiving [Encana's] MDQ" at two of its primary receipt points and thus the Effective Date provision was not triggered.<sup>40</sup> Encana's argument is similarly based on the fact that the upstream facilities, for which CEFS was responsible to construct and install, were not yet ready on the date that ETC Tiger provided notice. As discussed above, we reject this argument.

40. We also find unfounded Encana's suggestion that the contractual provisions at issue are ambiguous and thus that the Commission must look outside the "four corners" of the contract to resolve the dispute between the parties. As stated above we find the relevant contractual provisions to be straightforward and unambiguous and thus we must give effect to the unambiguous language in those agreements, based on the plain and ordinary meaning of the terms of the agreement. Further, Encana does not point to any specific terms of the relevant agreements that it finds ambiguous. Rather, Encana asserts that it and ETC Tiger have "divergent views" as to whether ETC Tiger was ready to provide firm service under the Encana FTS agreement. As ETC Tiger notes, the fact that parties disagree over the meaning of an agreement does not make it ambiguous.<sup>41</sup> Accordingly, the extraneous non-contractual negotiations, events, and various correspondence and alleged understandings presented by Encana, including whether or not ETC Tiger knew that the upstream facilities would not be ready, are irrelevant to the interpretation of the controlling written contracts. Encana's references to provisions contained in its precedent agreement are immaterial at this stage because the operative provision for determining the proper interpretation of the Effective Date of its FTS agreement are now included in its executed FTS agreement. Nothing in the materials discussed by Encana suggests a different interpretation of that FTS agreement.

41. The subject agreements provided that the primary term of those agreements would commence upon notice to the shippers that ETC Tiger was ready to provide service as delineated in those agreements. Those agreements do not condition the Effective Date of

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<sup>40</sup> Encana Initial Brief at 12.

<sup>41</sup> See *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003); *Kelley-Coppedge, Assoc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998); *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009).

those contracts on whether the shippers' non-jurisdictional connecting facilities were completed. As large sophisticated companies with extensive experience in the natural gas business, Shell and Encana could have specifically and straightforwardly included such a requirement in their respective agreements. They did not. Shell and Encana must be presumed to understand, and be held to, the responsibilities and obligations of the agreements that they voluntarily executed with ETC Tiger.

### **III. Requests for Rehearing**

42. On December 30, 2010, Shell and Encana filed requests for rehearing of the November 2010 Order. Those requests both generally assert that the Commission erred in accepting the Shell and Encana FTS agreements, and the ETC Tiger tariff provision listing those and other non-conforming negotiated rate agreements, effective December 1, 2010, without suspension. As explained above, upon review of the relevant terms of those agreements, we conclude that December 1, 2010 is the appropriate Effective Date for the subject FTS agreements. Accordingly, the requests for rehearing are denied.

### **IV. Non-Conforming Agreements**

43. In its Compliance Filing, ETC Tiger requested Commission approval of certain non-conforming, negotiated rate service agreements, one for interruptible transportation service and six for firm transportation service.<sup>42</sup> In its Compliance Filing, ETC Tiger contends that all of the filed non-conforming agreements are with shippers who made commitments to long-term service in advance of the ETC Tiger Pipeline's commencement date and that those financial commitments were necessary to secure funding for the pipeline. ETC Tiger further classified such shippers as Foundation, Anchor, and Standard Shippers, and asserted that those classes may receive rights above those granted future ETC Tiger shippers without being considered unduly discriminatory because any differences are of the sort that the Commission has previously found to be permissible between different classes of shippers. In the November 2010 Order accepting the filed agreements, the Commission stated that it had not completed its review of the non-conforming agreements that deviate from ETC Tiger's tariff *pro forma* service agreements and thus conditioned acceptance of those agreements and related tariff sections to further review. We provide the results of that review below.

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<sup>42</sup> The filed non-conforming agreements are FTS Agreement No. 300000 with Chesapeake, FTS Agreement No. 300001 with Encana, FTS Agreement No. 300002 with Shell, FTS Agreement No. 300003 with Shell, FTS Agreement No. 300004 with BG, FTS Agreement No. 300005 with Questar, and ITS Agreement No. 300006 with BG.

44. ETC Tiger seeks approval of certain non-conforming provisions that are included in the Foundation Shipper, Anchor Shipper and Standard Shipper FTS agreements that were not specifically addressed in the Certificate Order, asserting the provisions should be permissible as they (1) do not present a risk of undue discrimination; (2) do not affect the operational conditions of providing service; and (3) do not result in any shipper receiving a different quality of service from that available to ETC Tiger's other shippers.<sup>43</sup>

45. Section 154.1(d) of the Commission's regulations requires pipelines to file with the Commission contracts that materially deviate from the pipeline's form of service agreements.<sup>44</sup> In *Columbia Gas*, the Commission explained 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.<sup>45</sup> The Commission prohibits negotiated terms and conditions of service that result in a shipper receiving a different quality of service than that offered other shippers under the pipeline's generally applicable tariff or that affect the quality of service received by others.<sup>46</sup> However, not all material deviations are impermissible. As the Commission 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>47</sup> Moreover, if the Commission determines the contract contains a material deviation that is permissible, the Commission's regulations require the pipeline to file, as tariff records (1) the service agreements that materially deviate from the form of service agreement,<sup>48</sup> and (2) a list of those non-conforming service agreements.<sup>49</sup>

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<sup>43</sup> ETC Tiger states that the Commission previously approved non-conforming provisions relating to fuel caps, rights to available in-service capacity, and expansion rights and future capacity in the Certificate Order.

<sup>44</sup> 18 C.F.R. § 154.1(d) (2011).

<sup>45</sup> *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001). (*Columbia Gas*). See also *ANR Pipeline Co.*, 97 FERC ¶ 61,224, at 62,022 (2001) (*ANR*).

<sup>46</sup> *Monroe Gas Storage Co., LLC*, 130 FERC ¶ 61,113, at P 28 (2010).

<sup>47</sup> *Columbia Gas*, 97 FERC ¶ 61,221 at 62,003; *ANR*, 97 FERC ¶ 61,224 at 62,024.

<sup>48</sup> 18 C.F.R. § 154.4(a) and (c) (2011).

<sup>49</sup> 18 C.F.R. § 154.112(b) (2011).

46. The first deviation in the agreements filed by ETC Tiger is the Term provision in section 3 of each of the FTS agreements. ETC Tiger claims that this provision was necessary to reflect unique considerations associated with service being provided on a pipeline system that had not yet been constructed, such as defining the primary term. ETC Tiger asserts that the Commission has routinely recognized that such provisions represent a permissible method of coordinating the commencement date of shippers' service agreements with the start of service on a new pipeline.<sup>50</sup> We agree and approve the Term provisions in the subject FTS agreements.<sup>51</sup>

47. We also approve the next category of non-conforming provisions, those regarding the nature and availability of Interim Period Service and Perryville Service. As described in the subject FTS agreements, those services were generally partial services available for a time period prior to the completion of the Carthage and SESH interconnects and the Effective Date of the FTS agreements.<sup>52</sup> In its Compliance Filing, ETC Tiger states that it did not anticipate providing these services, which were designed to provide partial service prior to commencement of service on the entire ETC Tiger system. Because we determine above that December 1, 2010 is the Effective Date of the FTS agreements at issue, by the terms of those agreements the Interim Period Service and Perryville Service provisions are no longer available and thus present no risk of undue discrimination.<sup>53</sup>

48. ETC Tiger states that each of the FTS agreements contains a provision addressing the shipper's right to assign its FTS agreement prior to, and subsequent to, the Effective Date of such contract.<sup>54</sup> According to ETC Tiger, those provisions generally state that

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<sup>50</sup> Compliance Filing at 8 (citing *Egan Hub Storage, LLC*, 127 FERC ¶ 61,002, at P 4 (2009)).

<sup>51</sup> See *Algonquin Gas Transmission, LLC*, 137 FERC ¶ 61,178, at P 19 (2011) (*Algonquin*).

<sup>52</sup> The rates for those services are in Part 4, sections 4 and 5 of ETC Tiger's tariff.

<sup>53</sup> ETC Tiger states that section 6(k) of FTS Agreement Nos. 300002 and 300004 contain non-conforming revisions specifically requested by the respective shippers "to the corresponding provision found in ETC Tiger's form of Transportation Rate Schedule FTS Agreement, in order to clarify for shipper the applicability of the provision with respect to the rates, terms and conditions applicable to any Interim Period Service and/or Perryville Interconnect Service that might be provided by ETC Tiger." As noted above, based on our determination that the Effective Date of the FTS agreements is December 1, 2010, any provisions relating to Interim Service or Perryville Interconnect Service are effectively moot.

<sup>54</sup> Section 5.4 of Exhibit C to FTS Agreement Nos. 300000, 300001, 300004, and

any assignment of the FTS agreements prior to the Effective Date will be governed by the applicable Precedent Agreement, and after the Effective Date each shipper may only assign its FTS rights and release its capacity pursuant to ETC Tiger's tariff. Further, the Chesapeake and Encana agreements also provide that in the event of a permanent release of some or all of the shipper's capacity at a rate greater than the shipper's contract rate, ETC Tiger, not the shipper, will retain the difference. For Chesapeake, this provision is limited to transfers to affiliates. For permanent releases to non-affiliates, Section 5.4(a) of the Chesapeake FTS agreement provides for a limited credit to Chesapeake. In addition, ETC Tiger states that section 5.4(b) of Exhibit C to the Chesapeake FTS agreement permits Chesapeake certain contract MDQ assignment rights with respect to affiliates during the primary term of the Agreement.

49. Based on our finding that December 10, 2010 is the Effective Date of the subject FTS agreements, the provisions governing assignment of the FTS agreements prior to the Effective Date are moot. We also find the provisions that govern assignments after the Effective Date of the subject agreements are permissible, with the exception of section 5.4(a) of the Chesapeake Exhibit C. With that exception, these provisions require such assignments to be in accordance with the express applicable provisions of ETC Tiger's tariff, and by extension, our policies. We further note, however, that the post Effective Date assignment provisions in the subject FTS agreements contemplate the potential permanent release of capacity pursuant to negotiated rate agreements. In the situation where the shipper is paying a negotiated rate in excess of the applicable pipeline maximum rate, a waiver of the Commission's capacity release regulations would be necessary to allow a permanent release at the same negotiated rate being paid by the releasing shipper.<sup>55</sup> In addition, permanent releases at a rate below the maximum rate must be posted for bidding.

50. We also find permissible the deviations in the Chesapeake and Encana agreements to the effect that the pipeline will retain the difference between the release rate and the contract rate for a permanent release at greater than the shipper's contract rate. These provisions are consistent with the Commission's policy that there are no credits to a releasing shipper after a permanent release because subsequent to a permanent release there is no contract between the releasing shipper and the pipeline to serve as a basis for a

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300005, section 5.2 of Exhibit C to FTS Agreement No. 300002, and section 5.3 of Exhibit No. 300003.

<sup>55</sup>See, e.g., *Transcontinental Gas Pipe Line Co., LLC*, 133 FERC ¶ 61,242 (2010) (citing *El Paso Natural Gas Co.*, 61 FERC ¶ 61,333, at 62,311-312 (1992) (*El Paso*); *Texas Eastern Transmission Corp.*, 83 FERC ¶ 61,092 (1998); *Enogex Inc.*, 124 FERC ¶ 61,089, at P 123 (2008)).

credit.<sup>56</sup> Contrary to this policy, however, section 5.4(a) of the Chesapeake FTS agreement appears to allow for a credit to the shipper after a permanent release. ETC Tiger has provided no supporting cases or reasons why Chesapeake should be afforded this right, which is in direct contravention of Commission policy. Accordingly, we direct ETC Tiger to remove this language from the Chesapeake FTS agreement and to re-file that agreement without the offending language.

51. As to the deviations in section 5.4(b) of the Chesapeake FTS agreement allowing it to assign its capacity to its affiliates subject to certain conditions, we find the deviations permissible because any actions under that provision must by its terms be in accordance with applicable law, including Commission policy and regulations or with prior Commission approval. We remind ETC Tiger and Chesapeake, however, that capacity assignments among affiliates must be consistent with the Commission's capacity release policies. In particular, a shipper may 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>57</sup> Assuming that ETC Tiger 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 ETC Tiger's other shippers, and is therefore acceptable.

52. ETC Tiger further states that section 4.2(b) in Exhibit C to Chesapeake's FTS Agreement No. 300000 contains a non-conforming provision concerning Chesapeake's ability to change its primary receipt points. Exhibit C to Chesapeake's FTS Agreement lists primary points with a total capacity equal to its Contract MDQ. Fifty percent of its receipt point capacity is at a receipt point in Texas and the other fifty percent is at receipt points in Louisiana. Section 4.2(b) of Exhibit C provides that Chesapeake may not move more than fifty percent of its primary receipt point capacity to points located west of Louisiana State Highway 789. That same provision permits Chesapeake to use those receipt points on a secondary basis, subject to certain operational conditions. ETC Tiger stated that this provision was negotiated specifically with Chesapeake in recognition of the anticipated hydraulic design of the ETC Tiger Pipeline and anticipated fuel requirements as well as the large amount of capacity to which Chesapeake subscribed as a Foundation Shipper. ETC Tiger argues that the provisions represent a reasonable allocation of risks between it and Chesapeake regarding the design and utilization of the

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<sup>56</sup> *Rockies Express Pipeline*, 121 FERC ¶ 61,130, at P 30 (2007).

<sup>57</sup> See *CenterPoint Energy - Mississippi River Transmission Corporation*, 115 FERC ¶ 61,013, at P 5 (2006).

ETC Tiger Pipeline. We find this deviation to be permissible because it addresses a particular operational issue on ETC Tiger's system.<sup>58</sup>

53. ETC Tiger states that certain of the subject agreements contain deviations relating to its supply leg receipt pressures.<sup>59</sup> Specifically, section 4.1 of Exhibit C to FTS Agreement No. 300000 with Chesapeake contains a non-conforming provision relating to Chesapeake's obligation to tender gas to ETC Tiger between a minimum and maximum pressure in order for the gas to enter ETC Tiger's supply leg. That provision states:

All Gas which is received by TIGER from Foundation Shipper ...are to be tendered by Foundation Shipper to TIGER at a minimum receipt point pressure of 1100 pounds per square inch (psig) or the prevailing pressure of the Pipeline, not to exceed a maximum receipt point pressure of 1160 psig, which shall be the maximum allowable pressure of the pipeline facilities which comprise the Supply Leg.

54. ETC Tiger states that the deviation is consistent with Part 6, Subsection 18.1 of ETC Tiger's tariff governing Supply Leg receipt pressures. ETC Tiger further states that FTS Agreement Nos. 300002 and 300003 with Shell contain a deviation regarding the maximum receipt pressures on the Supply Leg and the fact that pressure variations on that leg will not cause Shell to incur additional charges under its FTS agreements. ETC Tiger notes that this provision does not in any way affect the shipper's obligation to comply with the Supply Leg receipt pressure requirements applicable to all shippers in ETC Tiger's tariff.

55. We find the Supply Leg receipt pressure provisions to be permissible. Section 18.1 of the General Terms and Conditions (GT&C) of ETC Tiger's tariff provides:

Unless otherwise agreed by contract, for receipts on the Supply Leg, Shipper shall deliver Gas to TIGER at a pressure sufficient to enter TIGER's System at TIGER's then-prevailing pressure; provided however, that such pressure shall not exceed 1160 psig.

Accordingly, ETC Tiger's tariff authorizes ETC Tiger to negotiate pressures for its Supply Leg with its shippers and the provision in Chesapeake's FTS agreement is consistent with this tariff provision. Moreover, this provision appears to address a unique

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<sup>58</sup> See *Algonquin*, 137 FERC ¶ 61,178 at P 21.

<sup>59</sup> Compliance Filing at 10.

operational situation on ETC Tiger's system. Finally, the provision in the Shell FTS agreements merely clarifies the maximum pressure on the Supply Leg and that any variations in pressure are covered as part of Shell's negotiated rate agreement.

56. ETC Tiger states that section 5.8 of Chesapeake's FTS agreement contains a deviation that permits Chesapeake to designate, prior to the commencement of the fifth year of the Primary Term of that agreement, the location of an additional receipt point to be constructed as part of the ETC Tiger Pipeline, subject to certain conditions. According to ETC Tiger, Chesapeake has exercised its right under this provision and thus it is no longer in effect. We thus find that this non-conforming provision is moot.

57. ETC Tiger states that there are several non-conforming provisions in Exhibits A and B to the subject FTS agreements. Exhibit A to FTS Agreement Nos. 300000, 300001, and 300003 contains a non-conforming provision in Exhibit A relating to amounts shippers will be assessed for Fuel Gas, Booster Compression Fuel and for Lost and Unaccounted For Gas, which states that shippers will be assessed the applicable reimbursement percentages "except as otherwise provided in a separate written agreement or in Exhibit C of this FTS Agreement." ETC Tiger states that this exception was necessary to clarify the Foundation and Anchor Shippers' obligations to reimburse ETC Tiger subject to the Fuel Caps in the respective shippers' FTS agreements, which were previously approved by the Commission in the Certificate Order. According to ETC Tiger, the cap on the amount of Fuel Gas and Lost and Unaccounted-For Gas that ETC Tiger may assess the shippers pursuant to those agreements was included in a negotiated rate provision in the respective Precedent Agreements.<sup>60</sup> ETC Tiger states that pursuant to Part 6, section 36 of its tariff, it will calculate its generally applicable Tariff Fuel Gas and Lost and Unaccounted-For Gas reimbursement percentages on the assumption that the tariff reimbursement percentages will be assessed to all shippers so that no other shippers will be subsidizing the Foundation and Anchor shippers' charges.

58. We find the deviations relating to the fuel caps to be permissible. The fuel caps represent a negotiated fuel arrangement for the initial shippers and are permitted by Commission policy.<sup>61</sup> The non-conforming language in the exhibits to the subject FTS agreements is consistent with the fuel caps provided for in the body of the agreements.

59. ETC Tiger states that there are several other non-conforming provisions in the exhibits to the subject FTS agreements. ETC Tiger states that Chesapeake's FTS Agreement No. 300000 contains a non-conforming provision in Exhibit B that specifies

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<sup>60</sup> Compliance Filing at 6. According to ETC Tiger the fuel caps are set forth in section 4.3 of FTS Agreement Nos. 300000, 300001, and 300003.

<sup>61</sup> See, e.g., *Florida Gas Transmission*, 93 FERC ¶ 61,203 (2000).

the shipper's primary receipt and delivery point MDQs during the first two years of the years of the primary term of the contract to correspond to phased increases in MDQs during that period.<sup>62</sup> We find that these capacity point allocations address situations unique to Chesapeake in the first two years of ETC Tiger's operations and accept them accordingly.

60. According to ETC Tiger, Exhibits A and B to Questar's FTS Agreement No. 300005 contain non-conforming provisions that cross reference the definitions of "Eligible Primary Receipt Point" and "Eligible Primary Delivery Point" from Exhibit C to the agreement.<sup>63</sup> ETC Tiger also states that Questar's FTS agreement contains a provision clarifying the shipper's right to have ETC Tiger construct additional receipt point capacity consistent with ETC Tiger's tariff. We find that these non-conforming provisions in the exhibits to the subject FTS agreements are permissible as they are provisions added by ETC Tiger at the respective shipper's request to clarify other parts of the agreements, and they do not give the shippers any rights not otherwise contained in ETC Tiger's tariff. As such, these provisions have no substantive effect on those shippers' rights under the agreements.

61. According to ETC Tiger, Chesapeake's FTS Agreement No. 300000 includes a sentence stating that Chesapeake will have segmentation rights as approved by the Commission for all ETC Tiger Pipeline shippers.<sup>64</sup> ETC Tiger states that the provision was included to provide certainty to the shipper that it would have segmentation rights consistent with Commission policy and applicable to all ETC Tiger's shippers because at the time Chesapeake executed its Precedent Agreement ETC Tiger's tariff had not been developed or approved by the Commission. We find this deviation is permissible because it merely reflects the segmentation rights available to all ETC Tiger shippers pursuant to Commission policy and ETC Tiger's tariff.<sup>65</sup>

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<sup>62</sup> While the Compliance Filing (at 10-11) states that this non-conforming provision is in Exhibit B (Primary Delivery Points), our review indicates a corresponding provision in Exhibit A (Primary Receipt Points). The parallel provisions seem logical in order to address both receipt and delivery point phased increases.

<sup>63</sup> Compliance Filing at 11.

<sup>64</sup> The non-conforming provision is in section 4.1(b) of Exhibit C to that agreement.

<sup>65</sup> ETC Tiger's currently effective tariff provides for segmentation rights in section 6.13 of the GT&C.

62. Finally, ETC Tiger states that the subject FTS and ITS agreements contain certain provisions that deviate from the tariff form of service agreements yet are minor, immaterial, or are non-conforming provisions under Commission policy because they are specifically authorized by ETC Tiger's tariff to be included in an executed service agreement. According to ETC Tiger these provisions include miscellaneous formatting and minor word changes, such as internally referencing "FTS Agreement" instead of "Agreement", and miscellaneous conforming provisions found in sections 6(a-k) of the referenced agreements, which ETC Tiger contends are permitted by its tariff form of service agreements. ETC Tiger also states that the subject agreements contain contractual rollover and ROFR provisions that were agreed upon in a not unduly discriminatory basis with respective shippers as authorized by section 3 of its Form of Service Transportation Agreements and Part 6, section 16.3 of its tariff. We find these deviations to be permissible and approve them because they represent non-substantive drafting preferences or are specifically authorized by ETC Tiger's tariff, and do not present a risk of undue discrimination.

The Commission orders:

- (A) The Effective Date of the subject FTS agreements is December 1, 2010, as discussed in the body of this order.
- (B) The requests for rehearing of Shell and Encana are denied.
- (C) The non-conforming agreements and related tariff records are accepted effective December 1, 2010, subject to ETC Tiger submitting a revised executed FTS Agreement No. 300000 with Chesapeake within 45 days of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.