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VanNess Feldman

FERC Order Permits Rockies Express Pipeline LLC to Move Forward with East to West Transportation of Shale Gas Production

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The Federal Energy Regulatory Commission ("FERC" or "Commission") issued an order on November 26, 2013 determining that Most Favored Nations rights of Anchor and Foundation shippers on the Rockies Express Pipeline LLC ("Rockies Express") system would not be triggered by potential transactions for firm transportation which would have (1) an east to west primary path, (2) a term of one year or longer, and (3) service in only one rate zone. Van Ness Feldman, LLP represented Rockies Express in the proceeding.

BACKGROUND

Rockies Express, a 1,679-mile-long, 1.8 billion-cubic-feet-per-day natural gas pipeline, traversing eight states from Wyoming to Ohio, was originally constructed to bring natural gas eastward from the Rocky Mountain region of the U.S. The displacement of Rockies supply by recent increases in Marcellus and Utica shale gas production and market interest in utilizing Rockies Express to move that gas west led Rockies Express to file a Petition for Declaratory Order ("Petition") on June 6, 2013. The Petition asked FERC to confirm that Most Favored Nations clauses in Foundation and Anchor Shipper negotiated rate agreements and the Rockies Express tariff would not be triggered if Rockies Express entered into firm transportation agreements to transport gas on an east-to-west primary path from Ohio to markets in the Midwest entirely within its easternmost rate zone. Rockies Express emphasized the importance of the potential transactions to meet shifting market conditions and its ability to do so with existing infrastructure. Rockies Express requested a decision on the Petition by December 1, 2013.

The Most Favored Nations clauses entitle the Foundation and Anchor Shippers to the lowest negotiated reservation rate applicable to other firm transportation shippers under certain circumstances. Rockies Express asked FERC to affirm its understanding that the potential transactions would not trigger the clauses because the potential transactions would be limited to transportation within one rate zone for service on an east-to-west primary path. Rockies Express contended that this position is consistent with provisions in its tariff, which limit the Most Favored Nation rights to transactions covering the same rate zones and/or facilities. Protesting shippers asserted that the language in the parties' service agreements did not support this position and that the clauses would be triggered if any Rockies Express shipper received a lower rate for firm transportation service. Protestors also argued that the FERC should decline asserting jurisdiction and leave the questions of contract interpretation to the courts.

COMMISSION RULING

Citing its special expertise interpreting pipeline tariffs, the Petition's impact on regulated rates and FERC's regulatory responsibilities, and the need for uniformity of interpretation, FERC exercised its primary jurisdiction over the contract dispute. It granted the Petition, holding that the potential transactions do not trigger the Most Favored Nation rights of Foundation or Anchor Shippers because the potential transactions are for transportation

entirely within one rate zone and, therefore, do not apply to the same rate zones or facilities as the Anchor and Foundation Shipper agreements, which are for service utilizing multiple rate zones. FERC relied on standard cannons of contract interpretation to settle the dispute. FERC concluded that for the Anchor and Foundation Shipper Most Favored Nations clauses to be triggered, the transaction must cover the "same rate zones and/or facilities" as the Anchor and Foundation Shipper service agreements, which the proposed single-zone, east-to-west transactions would not. FERC found that the tariff "merely adds additional detail to the more generic Most Favored Nations provisions" in the Anchor and Foundation Shipper agreements. Otherwise, the specific tariff language would be in conflict with the service agreements, which incorporate the tariff by reference.

IMPLICATIONS

The order will permit Rockies Express to enter into transactions to transport shale gas east-to-west within its easternmost zone without triggering a rate reduction for its Foundation and Anchor Shippers. Rockies Express' ability to enter into such transactions will provide a new source of gas supply for Midwestern markets and an attractive outlet for Marcellus and Utica production.

Because FERC's rulings on petitions for declaratory order are limited to the specific facts before it, FERC was careful to confine its interpretation of the Most Favored Nations clauses to the four corners of the contracts and the specific language in Rockies Express' tariff. However, the order has larger implications for other pipelines seeking new ways to bring shale gas to market. It shows a willingness by FERC to assert its primary jurisdiction over contract disputes with larger policy consequences for the natural gas industry.

FOR MORE INFORMATION

Van Ness Feldman's nationally recognized Natural Gas and LNG Practice is experienced in addressing complex legal and federal policy questions that often arise in the development and operation of natural gas pipelines. For additional information, please contact the authors of this alert or any member of the firm's Natural Gas practice group at (202) 298-1800.

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