131 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Flint Hills Resources, LP Docket Nos. OR10-11-000

v.

Mid-America Pipeline Company, LLC

Flint Hills Resources, LP OR10-2-000

v.

Mid-America Pipeline Company, LLC

ORDER ON COMPLAINT AND CONSOLIDATING PROCEEDINGS

(Issued June 1, 2010)

1. On March 26, 2010, Flint Hills Resources, LP (Flint Hills) filed a complaint against Mid-America Pipeline Company, LLC (Mid-America). Flint Hills challenges Mid-America's rates for transporting butane, isobutane, natural gasoline, naphtha, and refinery grade butane (collectively, heavies) on Mid-America's Northern System as unjustly discriminatory versus the rates Mid-America charges its propane shippers for what it claims is substantially similar service. Flint Hills asks the Commission to order Mid-America to cease and desist from such unjust discrimination, and it further asks the Commission to prescribe non-discriminatory rates. Additionally, Flint Hills asks the Commission to consolidate this complaint with its pending complaint against Mid-America in Docket No. OR10-2-000.

2. Mid-America filed an answer to the complaint asking that it be dismissed because Flint Hills has failed to demonstrate that the challenged rates are unduly discriminatory.

3. As discussed below, the Commission will accept the complaint, set it for hearing, hold the hearing in abeyance, and consolidate this proceeding with the ongoing complaint

proceeding in Docket No. OR10-2-000. In that proceeding, the parties currently are engaged in settlement discussions under the auspices of a Settlement Judge.

Background

4. Mid-America states that its Northern System consists of an East Leg and a West Leg, each of which in turn includes two lines. According to Mid-America, the East Leg Blue Line runs from Conway, Kansas, to Janesville, Wisconsin, and transports primarily propane, while the East Leg Red Line runs from Conway to Iowa City, Iowa, and Morris, Illinois, and transports ethane/propane mix. Mid-America further explains that the West Leg Blue Line runs from Conway to Mankato, Minnesota, and is dedicated to propane service, while the West Leg Red Line runs from Conway to Pine Bend, Minnesota, and transports mostly propane as well as some heavies (currently, butane, isobutane, and natural gasoline). Mid-America states that the rates challenged in this complaint involve the movements of heavies from Conway to Pine Bend on the West Leg Red Line.

5. Flint Hills states that it is an independent refining and chemical company that operates refining complexes in three states, including a refinery in Pine Bend. Flint Hills further states that it is a shipper of butane, isobutane, natural gasoline, naphtha, and refinery grade butane on Mid-America's Northern System from Conway to Pine Bend.

Previous Related Proceedings

6. Mid-America states that its Northern System rates were the subject of an investigation in Docket No. IS05-216-000, *et al*., which commenced with a Mid-America tariff filing on March 31, 2005.[1] Mid-America explains that the portion of that case relating to its Northern System ultimately was resolved by a settlement requiring it to establish new rates for propane movements on the Northern System (Propane Settlement). However, continues Mid-America, the Propane Settlement did not change the rates for the movement of heavies. Mid-America emphasizes no shipper of heavies (or other products not covered by the Propane Settlement), including Flint Hills, protested any of the rates at issue in the case. Mid-America observes that the Commission approved the Propane Settlement on October 23, 2009,[2] and on December 30, 2009, Mid-America filed new propane rates consistent with the Propane Settlement. Mid-America explains that, absent a protest, the settlement rates took effect without suspension or investigation on January 1, 2010.

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[1] *See Mid-America Pipeline Company, LLC*, 124 FERC ¶ 63,016, at P 1-6 (2008).

[2] *Mid-America Pipeline Company, LLC*, 129 FERC ¶ 61,061 (2009).

7. According to Mid-America, on November 5, 2009, Flint Hills filed a complaint in Docket No. OR10-2-000, challenging the justness and reasonableness of Mid-America's rates for movements of heavies from Conway to Pine Bend. Mid-America states that the Commission issued an order on February 2, 2010, setting the complaint for hearing;[3] however, the Commission held the hearing in abeyance pending the outcome of settlement judge procedures, which are ongoing.

8. Next, continues Mid-America, on March 11, 2010, it filed Supplement No. 2 to FERC Tariff No. 67 in Docket No. IS10-168-000 cancelling transportation service for naphtha and refinery grade butane, as well as all remaining seasonal discount rates, on the Northern System. Although Flint Hills protested the filing, Mid-America points out that, in an order issued April 9, 2010, the Commission accepted the filing and allowed it to take effect April 12, 2010, without suspension or investigation.[4]

9. Mid-America states that on March 26, 2010, Flint Hills filed the complaint that is at issue here, challenging as discriminatory Mid-America's rates for the movement of heavies on the Northern System. Mid-America again observes that the Commission's April 9, 2010 Order in Docket No. IS10-168-000 permitted it to cease moving naphtha and refinery grade butane. Thus, Mid-America emphasizes that its current Northern System heavies rates include only movements of butane, isobutane, and natural gasoline.

Summary of the Complaint

10. Flint Hills contends that section 2 of the Interstate Commerce Act (ICA) prohibits a carrier from charging different rates for "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions,"[5] and section 3 prohibits the granting of "any undue or unreasonable preference or advantage."[6]

11. Flint Hills states that, following the Propane Settlement, the previously identical rates for transportation of propane and heavies on the Northern System diverged, with propane shippers paying a general commodity rate of $2.2189 per barrel and shippers of heavies paying a higher, although still discounted, rate of $2.6783 per barrel. Flint Hills further states that Mid-America's Supplement No. 2 to FERC Tariff No. 67 cancelled the

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[3] *Flint Hills Resources, LP v. Mid-America Pipeline Company, LLC*, 130 FERC ¶ 61,086 (2010) (February 2, 2010 Order).

[4] *Mid-America Pipeline Company, LLC*, 131 FERC ¶ 61,012 (2010).

[5] 49 U.S.C. app. § 2 (1988).

[6] *Id*. § 3.

seasonal discounted rates for heavies and thereby increased the charges for Flint Hills' transportation between Conway and Pine Bend from $2.6783 to $3.1248 per barrel, a 16-percent increase.

12. Flint Hills maintains that ICA section 2 does not require the services or products at issue to be identical. Even recognizing the technical differences between these natural gas liquids (NGL), Flint Hills argues that propane and heavies are like kinds of products inasmuch as they are all NGLs that Mid-America transports using the same facilities under the same tariff. At most, continues Flint Hills, the minor technical differences between propane and heavies might justify some small rate differential attributable to these technical differences (e.g., incremental fuel and power costs associated with pumping heavies).

13. According to Flint Hills, Mid-America currently charges 45.94 cents (21 percent) more per barrel to transport heavies (even on a discounted basis) than it charges to transport propane between Conway and Pine Bend. Flint Hills claims that this disparity will increase to 90.59 cents per barrel (41 percent more than the propane rate) with the implementation of the tariff changes in Docket No. IS10-168-000. Flint Hills expresses doubt that there is any cost justification for such a large rate disparity for substantially identical services, even assuming that there are some identifiable differences in variable costs between transporting propane and transporting heavies. Indeed, contends Flint Hills, any claim that there is a large difference between the cost to transport heavies and the cost to transport propane on Mid-America's Northern System is inconsistent with Mid-America's historical practice of charging the same or substantially the same rates for shipments of propane and heavies between Conway and Pine Bend. Moreover, continues Flint Hills, as detailed in the complaint in Docket No. OR10-2-000, Mid-America's current rates (even as discounted) for transporting heavies between Conway and Pine Bend are not justified on a fully-allocated cost basis.

14. Flint Hills also filed an answer to Mid-America's answer contending that Mid-America's assertion that the complaint should be dismissed is without merit. Flint Hills reiterates its request that the Commission consolidate the complaint with the proceedings in Docket No. OR10-11-000.

Notice and Interventions

15. Notice of the complaint was issued March 29, 2010, providing for interventions, protests, and Mid-America's answer to be filed by April 15, 2010. No other person intervened in the proceeding.

Summary of Mid-America's Answer

16. Mid-America responds that Flint Hills fails to establish any reasonable grounds to investigate the justness and reasonableness of the pipeline's transportation rates for

heavies or whether those rates are unduly discriminatory as compared to the transportation rates for propane. Mid-America also emphasizes that it stopped providing naphtha and refinery grade butane transportation service effective April 12, 2010.

17. Mid-America states that section 2 of the ICA prohibits a carrier from charging different rates for "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."[7] Mid-America further cites ICA section 3, which prohibits pipelines from giving an "undue or unreasonable preference or advantage to any . . . person."[8]

18. Mid-America contends that transportation of propane and heavies does not involve like kinds of traffic. Mid-America disputes Flint Hills' claim that there are only minor technical differences between propane and heavies. According to Mid-America, the mere fact that individual commodities are similar in nature does not make transportation of these products like kinds of traffic for purposes of section 2.[9] Mid-America states that its Mr. Collingsworth explained in his affidavit attached to Mid-America's response to Flint Hills' protest in Docket No. IS10-168-000, that each product currently or previously moved on the West Red Line is a distinct commodity, with different chemical structures, different physical characteristics, different uses, as well as different markets and prices. Mid-America states that it moves each product in separate batches and maintains distinct specifications to ensure that no product contaminates the other products moved on the line, and Flint Hills ignores the added costs incurred by Mid-America related to the labor involved in cutting, testing, sampling, and scheduling the additional batches of heavies. Moreover, adds Mid-America, the heavies not only require more fuel to pump them through the line, they take longer to move and therefore take up more pipeline capacity.

19. In any event, concludes Mid-America, Flint Hills also filed a complaint in Docket No. OR10-2-000, which challenges the level of Mid-America's heavies transportation rates. Mid-America states that the Commission set the complaint for investigation, and it currently is the subject of settlement judge procedures. Mid-America asserts that there is

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[7] *Id*. § 2.

[8] *Id.* § 3.

[9] *See, e.g., Staley Mfg. Co. v. Wabash Ry. Co*., 137 ICC 12, 14-15 (1930) (cornstarch and corn flour not "like traffic" under section 2 since they are used for different purposes and have different chemical compositions); *W.J. Stahlberg v. Chicago, Milwaukee & St. Paul Ry. Co*., 93 ICC 427, 431 (1924) (crude iron ore and ground iron ore not like traffic under section 2 even though "similar in general appearance and . . . the manner in which they are . . . transported").

no need for the Commission to set for investigation an additional complaint regarding the justness and reasonableness of the heavies rates.

Commission Determination

20. The existing record in this proceeding is insufficient to allow the Commission to determine whether the challenged rates are just and reasonable and not unduly discriminatory; therefore, the Commission will establish a hearing to address Flint Hills' allegations. The Commission emphasizes that the burden remains on Flint Hills to prove its allegations.

21. While the Commission is setting this complaint for a trial-type evidentiary hearing, the Commission encourages the parties to make every effort to settle their dispute before the commencement of hearing procedures. For this reason, the Commission will consolidate this complaint with the ongoing similar proceedings in Docket No. OR10-2-000. In that case, the Commission established a hearing to address Flint Hills' allegations, but held the hearing in abeyance and established settlement judge procedures to aid the parties in their negotiations.[10] The settlement judge proceedings are pending. Consolidating the instant case with Docket No. OR10-2-000 will allow the two complaints to be addressed in an orderly and efficient manner.

The Commission orders:

(A) Pursuant to the authority of the ICA, particularly sections 13(1) and 15(1) thereof, and the Commission's regulations, a hearing is established in this proceeding to address Flint Hills' complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures in the consolidated proceedings, as discussed in the body of this order.

(B) The instant complaint is consolidated with the complaint in Docket No. OR10-2-000 for purposes of settlement judge procedures and hearing, consistent with the Commission's February 2, 2010 Order in that docket.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[10] *Flint Hills Resources, LP v. Mid-America Pipeline Company, LLC*, 130 FERC ¶ 61,086 (2010).