

136 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Flint Hills Resources Alaska, LLC

Docket No. OR11-8-000

ORDER DISMISSING PETITION FOR DECLARATORY ORDER

(Issued July 7, 2011)

1. On May 3, 2011, Flint Hills Resources Alaska, LLC (Flint Hills) filed a petition seeking an order declaring that an anticipated, but as-yet unfiled, revision to the documents governing transportation of crude oil on the Trans Alaska Pipeline System (TAPS)¹ will be unjust, unreasonable, and unduly discriminatory or preferential in violation of the Interstate Commerce Act (ICA). Flint Hills states that the possible revision could impose a minimum temperature requirement of 105°F for residual crude oil returned to TAPS following removal of certain hydrocarbons following the refining process at Flint Hills' North Pole Refinery. Flint Hills states that it receives the crude oil stream from TAPS at 40°-55° F and returns the residual stream to TAPS at approximately 125-140° for continued transportation to Valdez, Alaska.
2. Flint Hills maintains that a ruling on this issue in advance of an actual filing by TAPS is necessary to allow Flint Hills to implement its plan to install an energy-saving heat exchange facility at its refinery to capture and reuse heat that Flint Hills must add to the 40° crude oil stream received from TAPS. According to Flint Hills, the added heat is necessary for the refining process, and as of now, the added heat remains in the crude oil stream returned to TAPS. Flint Hills wishes to begin construction by the 2011 summer

¹ The governing documents include the TAPS tariff, the Amended and Restated Agreement for the Operation and Maintenance of the Trans Alaska Pipeline System (TAPS Operating Agreement), and the Interconnection Agreement between Alyeska Pipeline Service Company (Alyeska) and Golden Valley Electric Association, Inc. (GVEA).

season; therefore, it asks the Commission to issue a ruling on its petition by June 30, 2011.

3. The Indicated TAPS Carriers (Indicated Carriers)² filed a protest, contending that the Commission should dismiss Flint Hills' petition as premature, or, if the Commission addresses the petition on its merits, it should rule that a uniformly-applied minimum temperature requirement will not be discriminatory. If the Commission does not dismiss the petition, Indicated Carriers ask the Commission to refer the matter to a settlement judge.

4. Flint Hills filed a response to the protest, arguing that its request is not premature and that there are no disputed factual issues related to the legal question it raises. Flint Hills asserts that the Commission should not delay a decision by referring the matter to a settlement judge.

5. As discussed below, the Commission dismisses the petition as premature.

I. Background

6. Flint Hills states that its North Pole Refinery is interconnected with TAPS by a short intrastate pipeline operated by GVEA. Flint Hills explains that crude oil is shipped from TAPS origins at Prudhoe Bay to the TAPS terminus in Valdez, Alaska; however, a portion of the crude oil is diverted to the North Pole Refinery, where Flint Hills processes it into petroleum products. Flint Hills further explains that the barrels extracted from the crude oil stream are purchased and shipped by Flint Hills to the GVEA interconnection pursuant to the TAPS Intrastate Tariff. Flint Hills states that it compensates the owners of the residual stream for any diminution in value pursuant to the TAPS Quality Bank and that it utilizes the GVEA pipeline to return the residual stream to TAPS.

7. Flint Hills states that its only source for heating the crude oil to the temperature required for the refining process is liquid fuel, which is more costly than the natural gas typically used to heat crude oil in refineries. Flint Hills asserts that recent price increases for liquid fuels has increased the disparity with natural gas prices, causing Flint Hills to explore opportunities to reduce the amount of energy consumed at its North Pole Refinery. Flint Hills points out that Petro Star, which owns and operates a competing refinery adjacent to Flint Hills' North Pole Refinery, has installed a heat exchange device

² The Indicated TAPS Carriers are BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Company, and Unocal Pipeline Company. These carriers own undivided joint interests in the TAPS system. Koch Alaska Pipeline Company, which is affiliated with Flint Hills, also owns an undivided joint interest in TAPS.

that captures for Petro Star's own reuse a significant amount of the heat from the post-refinery petroleum stream before its return to TAPS. Flint Hills plans to construct a similar heat exchange system at the North Pole Refinery.

8. Flint Hills states that, on June 29, 2010, it provided written notice to Alyeska, the operator of TAPS, that Flint Hills had commenced preliminary engineering on an energy efficient project that would retain more of the internally generated heat from the refinery. Flint Hills states that it advised Alyeska that it should assume that Flint Hills will return stream to TAPS at the same temperature of the incoming crude oil delivered by TAPS. However, Flint Hills emphasizes that it also advised Alyeska of its willingness to discuss viable economic means for its refinery to provide additional heat to TAPS.³

9. According to Flint Hills, shortly after it notified Alyeska of its plan to install heat exchange facilities, TAPS advised that it was considering an amendment to the TAPS Operating Agreement that would impose a minimum temperature requirement of 105°F on all residual petroleum returned by Flint Hills after processing. Flint Hills states that it believes that TAPS may propose this requirement to address a system-wide problem created by the declining temperature of crude oil.

10. Flint Hills' petition includes a copy of a TAPS analysis of the problems caused by declining throughput and related declines in the temperature of the TAPS crude oil stream (TAPS Plan).⁴ Flint Hills explains that the TAPS Plan identifies many of the problems caused when temperatures fall below the point where moisture begins to freeze within the pipe and that the TAPS Plan concludes that it is necessary to maintain a TAPS operating temperature limit of 38°F by adding heat, where necessary.⁵ Flint Hills reiterates that the crude oil stream it receives at Fairbanks currently is 40°F during the winter months, only 2°F above the minimum 38°F as it flows further downstream from Fairbanks. Flint Hills acknowledges that, absent the installation of in-line heaters, all shippers would face freezing problems resulting from reduced throughput levels. Flint Hills also points out that TAPS could include the prudently incurred costs of such heaters in its cost of service, but Flint Hills believes that, even with its heated residual stream, the TAPS system will require additional heaters as throughput continues to decline.

³ A copy of the June 29, 2010 letter to Alyeska, with confidential shipper data redacted, is attached to Flint Hills' Filing as Exhibit No. FHR-1.

⁴ See Trans-Alaska Pipeline System Low Flow Plan, June 3, 2009, attached to Flint Hills' petition as Exhibit No. FHR-2; see also TAPS Low Flow Study Website: www.taps-flow.com.

⁵ *Id.*

11. Flint Hills states that it understands that the connection agreements between Alyeska and the producers at various origin points on the North Slope have minimum requirements of 105°F. According to Flint Hills, these agreements apply only to the crude oil received for shipment at the North Slope origins and do not apply to crude oil returned into the TAPS system 300 miles downstream at the GVEA interconnection. In contrast, asserts Flint Hills, the GVEA interconnection agreement with Alyeska does not have a minimum temperature requirement, and similarly, the TAPS Operating Agreement contains a maximum, but no minimum temperature requirement.⁶ Flint Hills adds that it voluntarily returns heated petroleum to TAPS at the GVEA interconnection. However, Flint Hills maintains that the remedies that might be proposed by TAPS could require Flint Hills to subsidize the cost of solving a system-wide problem at the expense of destroying the economics of its own heat exchange project, as well as adversely affecting the economics of its refinery.

II. Notice, Interventions, Protest, and Answer

12. Public notice of the petition was issued on May 11, 2011, with interventions and protests due on or before May 25, 2011, in accordance with the Commission's regulations.⁷ Pursuant to Rule 214,⁸ all timely filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

13. The Indicated Carriers filed a protest, and Flint Hills filed a response to the protest. While the Commission's regulations prohibit answers to protests unless otherwise ordered by the decisional authority,⁹ the Commission will accept Flint Hills' response because it has afforded the Commission additional information on which to base its decision.

⁶ See TAPS Operating Agreement at Section 7.1(b) ("Petroleum will not be accepted for transportation in the System unless . . . (ii) its temperature does not exceed 142°F. . . .").

⁷ 18 C.F.R. §§ 385.211 and 385.214 (2011).

⁸ 18 C.F.R. § 385.214 (2011).

⁹ 18 C.F.R. § 385.213(a)(2) (2011).

III. Discussion

A. Flint Hills' Arguments

14. Flint Hills states that the question is whether TAPS can require Flint Hills to return crude oil to it at a temperature higher than that at which Flint Hills receives such crude oil from TAPS. Flint Hills emphasizes that the ICA affords shippers protection from paying unjust and unreasonable rates and provides a means for redressing the wrongs resulting from unjust discrimination and undue preference.¹⁰ Flint Hills contends that the possible TAPS proposal may be unjust, unreasonable, and unduly discriminatory because both Flint Hills and Petro Star, alone among all TAPS shippers, could be forced to subsidize the costs of heating petroleum during transportation.

15. Flint Hills reiterates that, because its refining process requires it to heat all of the petroleum that runs through its refinery, it currently returns the residual petroleum stream to TAPS at a temperature of approximately 125-140°F. According to Flint Hills, its constant interjection of heated residual petroleum into TAPS at roughly the mid-point in the transportation journey has benefitted all TAPS shippers, which the TAPS Plan confirms. In fact, adds Flint Hills, had it not been providing this benefit to TAPS, all shippers would be sharing proportionately the costs associated with heating the crude oil. Flint Hills argues that this should not be a basis for denying it the right to retain its own heat. If a new tariff provision forces Flint Hills to continue provide heat in this manner, it argues that TAPS must compensate it.

16. Flint Hills emphasizes that the relief requested by its petition for a declaratory order will have no impact on the minimum temperature requirements currently established in the various connection agreements governing the receipt of crude oil into the system at TAPS' North Slope origin points. Flint Hills acknowledges that such minimum heat requirements are an appropriate means of addressing TAPS' need to impose minimum specifications for crude oil received into the system.¹¹ However, Flint Hills asserts that requiring it to provide heat in the manner it expects TAPS to propose would violate the ICA's strictures against undue discrimination or preference by forcing Flint Hills to bear the entire cost related to one aspect of transportation service

¹⁰ *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1906); see ICA § 3(1).

¹¹ Flint Hills notes that the costs, if any, of compliance with a 105°F minimum temperature requirement at North Slope origins are mitigated, if not avoided, by virtue of the fact the crude oil is naturally produced with a surface temperature well in excess of 105° F.

that benefits all shippers, which unlawfully favors one group of shippers at the expense of another group.

B. Indicated Carriers' Protest

17. The Indicated Carriers filed a motion to intervene and a protest, arguing that the Commission should deny Flint Hills' petition because TAPS has not filed any tariff change or imposed any obligation on Flint Hills with respect to the temperature at which Flint Hills returns residual crude oil to TAPS. The Indicated Carriers maintain that they continue to review the need for such a requirement and to discuss the matter with Flint Hills. The Indicated Carriers ask the Commission to dismiss the petition as premature, without prejudice to Flint Hills' ability to refile if and when the issue becomes ripe. In the alternative, the Indicated Carriers contend that the Commission should rule that a minimum temperature requirement uniformly applied to ensure the continued operation of TAPS would not be unlawful. However, if the Commission does not dismiss the petition as premature, the Indicated Carriers ask the Commission to refer the matter to a settlement judge.

18. The Indicated Carriers argue that the Commission has discretion in considering whether to provide declaratory relief.¹² According to the Indicated Carriers, in exercising that discretion, the Commission has dismissed petitions for declaratory orders if it has found that the issues would be addressed more appropriately in other proceedings or at a later time when the facts are better known.¹³

19. The Indicated Carriers state that Flint Hills acknowledges that TAPS has not filed a tariff to adopt a minimum temperature requirement for deliveries into TAPS or otherwise imposed any obligation on Flint Hills with respect to the temperature of its deliveries to the pipeline. While the Indicated Carriers agree that additional heat likely will be necessary to maintain the operation of TAPS, they assert that the specifics of any tariff changes are not known or whether in fact a tariff modification will be necessary.

¹² The Indicated Carriers cite *Enbridge Pipelines (Toledo) Inc.*, 130 FERC ¶ 61,270, at P 26 (2010); *see also UsGen New England Inc.*, 118 FERC ¶ 61,172 (2007); *Express Pipeline Partnership*, 75 FERC ¶ 61,303, at 61,967 (1996).

¹³ The Indicated Carriers cite, *e.g.*, *Enbridge Pipelines (Toledo)*, 130 FERC ¶ 61,270, at P 26 (2010) (dismissing petition for declaratory order as moot where issues were also raised in challenge to tariff filing); *Portland General Electric Co.*, 127 FERC ¶ 61,255, at P 13 (2009) (dismissing petition for declaratory order where certain issues would potentially be resolved in another ongoing proceeding).

20. The Indicated Carriers state that pipelines generally are given discretion over operational matters such as those at issue here.¹⁴ Consistent with that general discretion, continue the Indicated Carriers, pipelines should also have the latitude to formulate and propose policies in the first instance. The Indicated Carriers emphasize that, if a carrier proposes a tariff rule change that a shipper opposes, the shipper may file a protest. Further, state the Indicated Carriers, if a shipper objects to a pipeline's current policy or practice, the shipper may file a complaint. However, the Indicated Carriers contend that it is inappropriate for Flint Hills to attempt to set policy for the pipeline by purporting to challenge rules that do not currently exist and may never exist.

21. Moreover, continue the Indicated Carriers, it actually is Flint Hills that seeks a change in the status quo. The Indicated Carriers point out that Flint Hills' refinery return stream always has been delivered to TAPS at an elevated temperature, so a minimum temperature requirement would not be a new obligation or burden on Flint Hills. The Indicated Carriers also assert that a uniform temperature requirement would not be discriminatory because it is incorrect that only Flint Hills and Petro Star would be forced to subsidize the costs of heating petroleum during transportation. In fact, claim the Indicated Carriers, Flint Hills' use of the phrase "during transportation" and the general thrust of its claims inaccurately suggest that Flint Hills believes that the heat it and Petro Star provide is more important or valuable because they provide the heat "300 miles downstream" of Pump Station No. 1. Likewise, the Indicated Carriers contend that it is incorrect to assume that Flint Hills and Petro Star are the only parties that bear the cost of heating petroleum.

C. Flint Hills' Response

22. Flint Hills responds that its petition is not premature and that the Indicated Carriers' protest makes it clear that TAPS will indeed file to include a minimum heat requirement in its tariff. Flint Hills contends that it has made a business decision to add a heat exchanger that would improve the North Pole refinery's energy efficiency and competitive position, but it cannot make a final determination with the possibility of a temperature requirement clouding the determination.

23. Flint Hills maintains that the Indicated Carriers have pointed to no additional facts lacking for the Commission to grant the petition. Further, states Flint Hills, the

¹⁴ See., e.g., *Coastal States Marketing v. Texas-New Mexico Pipeline Co.*, 24 FERC ¶ 61,145, *aff'd on reh'g*, 25 FERC ¶ 61,164 (1983) (summarily dismissing petition to require pipeline to change its sulfur content requirements); *Mid-America Pipeline Company, LLC*, 106 FERC ¶ 61,094, at 61,336 (2004) (holding that "pipelines should have some latitude in crafting capacity allocation methods to meet circumstances specific to their operations").

Commission has found that a pre-filing declaration of the legal rights related to a proposed tariff provision may be appropriate.¹⁵

24. Flint Hills also contends that the Indicated Carriers have introduced facts not included in or relevant to its petition concerning minimum temperature requirements. Flint Hills distinguishes its situation from that of producers that deliver crude oil to the TAPS system origin point. Flint Hills states that a minimum temperature requirement applied to all such producers would not be discriminatory or otherwise unlawful, but argues that Flint Hills is not similarly situated because its facility is roughly in the middle of the transportation system.

25. Finally, Flint Hills urges the Commission not to delay a decision by referring the proceeding to a settlement judge. Flint Hills states that it is committed to resolving the issues with TAPS in an amicable fashion.

D. Commission Conclusion

26. The Commission will dismiss as premature Flint Hills' petition for a declaratory order. This action is without prejudice to Flint Hills filing such a request at an appropriate time. Further, Flint Hills retains the ability to protest any future tariff filing by the TAPS carriers.

27. The TAPS carriers have not sought a tariff change to implement procedures that would affect Flint Hills in the manner that Flint Hills predicts.¹⁶ Moreover, any declaration by the Commission on the merits of what Flint Hills opines will be the provisions of such a filing would be inapplicable to a filing that differed in any respect from Flint Hills' scenario. In the exercise of its discretion, the Commission will not rule in advance on a possible tariff filing that may or may not be made. That differs from the facts of the *Express* case in which the pipeline sought Commission rulings on a rate structure that the pipeline itself proposed to implement. The Commission made it clear in that case that it would be appropriate to provide definitive guidance in advance of an actual tariff filing. Here, in contrast, there is no tariff filing proposed.

¹⁵ Flint Hills cites *Express Pipeline Partnership*, 75 FERC ¶ 61,303, at 61,967 (1996) (*Express*).

¹⁶ We note that, as currently accepted by the Commission, the TAPS governing documents do not preclude use of the heat exchange facility proposed by Flint Hills, as evidenced by Petro Star's installation of such a facility.

The Commission orders:

(A) Flint Hills' petition for a declaratory order is dismissed, as discussed in the body of this order, without prejudice to Flint Hills Filing such a petition at an appropriate time.

(B) The Indicated Carriers' request that the matter be referred to a settlement judge is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.