124 FERC ¶ 61,199
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Enbridge (U.S.) Inc. and ExxonMobil Pipeline Company — Docket No. OR08-7-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued August 28, 2008)

1. On February 7, 2008, Enbridge (U.S.) Inc. (Enbridge) and ExxonMobil Pipeline Company (ExxonMobil) (jointly, Petitioners) filed a petition for a declaratory order seeking Commission approval of the proposed prorationing policy for Petitioners' planned Texas Access Pipeline Project (Project), which will transport crude oil from Patoka, Illinois, to the Texas Gulf Coast refinery market. The proposed prorationing policy would reserve up to 90 percent of the Project's expected monthly capacity for shippers that enter into Transportation Service Agreements (TSAs) during the pre-construction open season and agree to provide long-term volume commitments in return for negotiated discount rates. Under the proposal, the remaining 10 percent of the Project's capacity would be reserved for uncommitted shippers. The Commission grants the requested declaratory order to the extent discussed below.

Background and Description of Petition

2. Petitioners state that the approximately $3 billion Project will ensure that oil production from the western Canadian oil sands, the Williston Basin area of Montana and North Dakota, and the Rocky Mountain and Mid-Continent areas will reach the largest and most sophisticated refinery market in the United States. Petitioners explain that the Project will originate at the Patoka, Illinois hub and extend roughly parallel to the existing Mobil Pipe Line Company (MPL) Pegasus Pipeline and other MPL/ExxonMobil assets to crude oil terminals near Nederland and Houston, Texas. According to Petitioners, the Project will have two segments: (1) a 768-mile, 30-inch mainline from Patoka to Nederland, which will have an estimated monthly capacity of approximately 445,000 barrels per day (bpd), and (2) an 88-mile, 24-inch lateral line from Nederland to Houston, which will have an estimated monthly capacity of approximately 169,000 bpd.

3. Petitioners maintain that the increased supply of western Canadian crude oil will improve the U.S. energy supplies and national security by offsetting declining domestic production and reducing reliance on waterborne imports from areas of declining or potentially unreliable supply. Petitioners explain that most of the 34 refineries in the U.S. Gulf Coast Refinery District (i.e., Texas and Louisiana) will be accessible via the Project. According to Petitioners, these refineries have a collective daily refining capacity of 7.4 million barrels of crude oil, and a number of the refineries already have the ability to process heavy crude oil (up to a total of two million bpd), which is similar to the type of crude oil produced from the Canadian oil sands. Currently, continue Petitioners, approximately 94 percent of the supply to these refineries comes from waterborne imports.

4. Petitioners contend that substantial shipper support is necessary, given the sizable capital commitment and the risk associated with such a large-scale project. Petitioners state that they conducted a multi-phased and widely-publicized open season. However, Petitioners explain that potential shippers conditioned their 15-year commitments of large volumes on their need for assurance that their committed volumes will not be reduced by prorationing when uncommitted shippers seek to use the Project. Further, state Petitioners, these prospective committed shippers sought a discounted rate for their committed volumes (i.e., less than the rate for uncommitted shippers) in return for their substantial commitment to the Project.

5. Petitioners propose to reserve 400,000 bpd or 89.9 percent of the Patoka-to-Nederland mainline capacity for firm priority service (large volumes with15-year ship-or-pay commitments at a discounted rate and not subject to apportionment). Additionally, Petitioners propose that the remaining 45,000 bpd or 10.1 percent of total mainline capacity will be reserved for uncommitted shippers at a rate determined in accordance with an accepted Commission rate methodology (likely to be the Opinion 154-B methodology), which rate will be subject to the Commission's indexing regulations. However, Petitioners state that, if firm commitments received in the open season exceed the anticipated volumes cited above, they will maintain the 90-percent limit on firm capacity by reducing those commitments *pro rata* so that they can maintain the 10-percent reservation for uncommitted movements.

6. Petitioners have not proposed any rates in this filing. They contend that, because the Project is a new greenfield project, there is no historical rate structure or existing group of shippers, and the costs of the new pipeline will be incurred at one time, rather than by adding expansion costs to lower historical costs. Therefore, continue Petitioners, the Project cannot be undertaken without firm shippers bearing the risk and making long-term ship-or-pay commitments. In exchange, state Petitioners, because constrained capacity is of particular concern to these prospective shippers, the proposal allows these shippers to receive a firm priority service with discounted rates for 15 years and with the guarantee that their ship-or-pay volumes will never be prorated.

7. Petitioners seek Commission approval of three proposed TSA provisions: (1) the proposed prorationing policy dedicating 90 percent of the Project's planned monthly capacity to committed shippers; (2) the proposal to offer the initial firm shippers discounted rates for their committed volumes; and (3) the proposal that committed volumes at the discounted rates will not be prorated.

8. Petitioners maintain that the Interstate Commerce Act (ICA) and Commission precedent support their request for a declaratory order prior to construction of the pipeline, as well as the dedication of 90 percent of the new pipeline's capacity to firm service for committed shippers.[1] Petitioners assert that the Commission has accepted discounted rates for shippers that are not similarly situated (such as these prospective committed shippers), so long as all prospective shippers are given a fair opportunity to make the necessary commitment.[2] Petitioners further contend that the proposal to offer a discounted rate rather than a premium rate to committed shippers should not be a bar to the Commission's acceptance of this proposal.

Notice, Interventions, and Comments

9. Notice of the filing was issued February 27, 2008. Interventions and protests were due on March 7, 2008.

10. The Canadian Association of Petroleum Producers filed a timely motion to intervene. Flint Hills Resources, LP (Flint Hills) and TransCanada Keystone Pipeline, LP (Keystone US) also filed timely motions to intervene and comments that generally support the Petitioners' proposal. Petitioners filed a response to the comments of Flint Hills and Keystone US, asserting that they have not raised any issues that would prevent the Commission from granting the petition.

11. Flint Hills is an upstream shipper on Enbridge Energy's Lakehead System. It does not oppose dedicating 90 percent of the Project's capacity for firm service, nor does it

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[1] *Citing, e.g., CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007); *Enbridge Pipelines (North Dakota) LLC*, 120 FERC ¶ 61,025 (2007); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073 (2007); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078 (2006), *reh'g denied*, 119 FERC ¶ 61,183 (2007); *Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040 (2006) (*MAPL*); *Enbridge Energy Co., Inc*., 110 FERC ¶ 61,211 (2005); *Plantation Pipe Line Co*., 98 FERC ¶ 61,219 (2002); *Express Pipeline Partnership*, 77 FERC ¶ 61,188 (1996).

[2] *Citing Plantation Pipe Line Co*., 98 FERC ¶ 61,219 (2002); *Express Pipeline Partnership*, 76 FERC ¶ 61,245 (1996).

oppose a discounted rate mechanism for committed shippers that sign TSAs. However, Flint Hills states that it understands that the Project will be a stand-alone project, and it would object if this Project would affect upstream Enbridge Energy shippers. For example, explains Flint Hills, it would object to Enbridge proposing to use any firm capacity reservation on the Project for any other portion of the existing Enbridge or other pipeline systems. Further, states Flint Hills, it would object to a requirement that upstream shippers make a commitment, directly or indirectly, in the form of a subsidy or backstop, to the Project. Flint Hills contrasts this proceeding with the proceeding in Docket No. OR08-1-000, in which the Commission denied Enbridge's request for subsidies in advance of construction from Enbridge Energy (Lakehead) shippers for the Southern Access Extension. Flint Hills adds that it would be particularly concerned if Petitioners were to attempt to reduce the surcharge credit that it and other upstream shippers receive for volumes transported on the Southern Access facilities.

12. Keystone US states that it owns the U.S. portion of a pipeline from Hardisty, Alberta, to Patoka, Illinois, that will commence service in 2009, with a projected further extension to Cushing, Oklahoma, to commence service in 2010. According to Keystone US, long-term transportation and service agreements are in place to support construction of its pipeline, and the agreements provide shippers with firm, unapportioned access to capacity. While Keystone US supports Petitioners' request for a declaratory order, it asks the Commission not to establish an arbitrary requirement that 10 percent of a pipeline's capacity must be reserved for uncommitted shippers in a similar situation.

13. In their response, Petitioners state that neither Flint Hills nor Keystone US offers a reason to deny the requested declaratory order. Petitioners express concern that the comments of Keystone US could be read as an attempt to broaden the issues in this case. Petitioners clarify that their proposal relates solely to the Project from Patoka to the Gulf Coast and that they do not seek approval for firm service on any existing pipeline, including those upstream from the Project. Petitioners further clarify that they do not seek approval for an arrangement by which costs or revenues on any other pipeline would affect the rates paid by shippers on the Project. Finally, Petitioners emphasize that they do not seek a Commission ruling that the proposed 10-percent reservation of capacity for uncommitted shippers must be applied to other pipeline projects.

14. The Commission finds that Petitioners have sufficiently addressed the concerns expressed by Flint Hills and Keystone US. Accordingly, the issues raised by these two intervenors do not present a bar to Commission approval of the terms proposed by Petitioners. However, as discussed below, the Commission finds that the discounted rate proposal, in combination with the other terms for which Petitioners seek approval, is not just and reasonable.

15. On April 1, 2008, a group of landowners, citizens, and other entities (self-styled as Pliura Intervenors) filed a late motion to intervene and a protest. Pliura Intervenors state that they intervened in a contested matter before the Illinois Commerce

Commission, Case #07-446, involving the Enbridge Southern Access Extension project between Flanagan and Patoka, Illinois.[3] Because they maintain that the Project that is the subject of this proceeding is closely intertwined with the Southern Access pipeline infrastructure, Pliura Intervenors assert that they have a significant interest in this proceeding.

16. The Petitioners filed a response to the Pliura Intervenors on April 7, 2008, asking the Commission to deny the untimely motion to intervene because the Pliura Intervenors do not claim any specific interest in the relief sought by the Petitioners. Petitioners urge the Commission to deny the motion to intervene and protest because: (1) Pliura Intervenors' filing is untimely and fails to demonstrate good cause for their failure to intervene at an earlier time, (2) they do not state any cognizable interest in this proceeding, and (3) their intervention is unnecessary because Petitioners' response provides the clarification sought by Pliura Intervenors.

17. The Commission denies Pliura Intervenors' motion to intervene and protest because Pliura Intervenors have failed to demonstrate a cognizable interest in this proceeding. They assert that this Project is intertwined with a project addressed in another proceeding involving Enbridge's Southern Access Extension Pipeline, Docket No. OR08-1-000, in which they also sought intervention. In an order issued May 7, 2008, in that proceeding, the Commission denied their motion to intervene and protest, finding that, "Pliura Intervenors have not shown that their status as landowners gives them an interest in the rate treatment of the transportation of crude oil on the Extension Pipeline."[4] Likewise, Pliura Intervenors' claim of interest based on their status as landowners is insufficient to serve as the basis for intervention in this proceeding.

Discussion

18. The Commission has recognized the need for new pipeline and other energy infrastructure and has expressed its support for such projects to meet the nation's growing demand for energy.[5] The Commission also has recognized that certain rate treatments are appropriate to encourage this needed investment in infrastructure.[6] However, in

[3] *Enbridge Energy Company, Inc*., 123 FERC ¶ 61,130 (2008).

[4] *Id.* P 16.

[5] Federal Energy Regulatory Commission Strategic Plan FY2006-FY2011 at 7 (September 2006) ("Goal 1: Energy Infrastructure – Promote the Development of a Strong Energy Infrastructure").

[6] *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310, at P 12 (2007).

seeking authorization of a long-term discounted rate for committed volumes that are not subject to prorationing, Petitioners' proposal goes beyond proposals previously approved by the Commission and may not be consistent with the requirements of the ICA. Therefore, the Commission rejects it in part, as discussed below.

A. Discounted Rates

19. Petitioners assert that the terms of their proposed firm service are similar to those previously approved by the Commission. They contend that their widely-publicized open season gave all prospective shippers an opportunity to commit volumes for firm service at a discounted rate. Petitioners maintain that shippers that execute TSAs containing the terms proposed here will not be similarly situated with the uncommitted shippers. Petitioners argue that it is appropriate for shippers providing financial security for constructing a pipeline to receive the benefit of firm service and a discounted rate. However, Petitioners emphasize that, while shippers that do not provide such financial backing will not receive the benefits of firm service, they will have other shipping options, including the approximately 10 percent reserved for uncommitted shippers on which they can ship from month-to-month at a rate established in accordance with a Commission-approved methodology.

20. Citing *Texas Deepwater Port Authority*,[7] Petitioners contend that it has long been recognized that shippers that are not similarly situated need not be treated identically by a pipeline, and this has been the basis for the Commission's acceptance of discounted rates for shippers that are not similarly situated.[8] Petitioners also rely on *Sea-Land Serv., Inc. v. ICC*,[9] in which the court stated:

> [C]urrent law no longer considers contract rates to be *per se* violations of the common carrier duty of non-discrimination. . . . Since 1978 . . . the Interstate Commerce Commission has held that contract rates are not

[7] 6 FERC ¶ 61,211 (1979).

[8] *Citing Plantation Pipe Line Co.*, 98 FERC ¶ 61,219, at p. 61,866 (2002) ("With regard to discounted rates, the Commission has permitted nondiscriminatory, discounted rates to attract a particular type or group of shipper(s) who are amenable to committing substantial volumes and/or to committing to substantial periods of time.").

[9] 738 F.2d 1311 (D.C. Cir. 1984). *See also Express Pipeline Partnership*, 76 FERC ¶ 61,245, at p. 62,254 (1996) ("We reject the protesters' contention that they are being discriminated against because they do not have the same rates or services as those shippers who signed term contracts with Express since the protesters declined the opportunity to take advantage of the rates and service options offered by Express.").

> inherently discriminatory, provided that the carrier offering them makes them available to all similarly situated shippers of like commodities.
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> . . .
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> [C]ontract rates can still be accommodated to the principle of non-discrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms. If those terms result in lower costs or respond to unique competitive conditions, then shippers who agree to enter into the contract are not similarly situated with other shippers who are unwilling or unable to do so.[10]

Petitioners further contend that the Commission rejected a claim of discrimination and accepted a firm service arrangement with volume incentive discount rates in the *MAPL* proceeding.[11]

21. *Commission Analysis*. The Commission has approved numerous volume incentive programs to support pipelines' efforts to attract shippers that will make long-term volume commitments to support the construction of new facilities. In the instant case, the Commission finds that Petitioners' discount rate proposal does not violate the antidiscrimination or undue preference provisions of the ICA because all prospective shippers had the opportunity during the open season to sign 15-year TSAs with rates that will be lower than the rates for uncommitted shippers.

22. This aspect of Petitioners' proposal is consistent with *Express Pipeline Partnership*, where the Commission stated as follows:

> Without the rate incentives essential to attract those willing to make term commitments, the project might not be built at all. The proposed term rate structure of Express does not violate the antidiscrimination or undue preference provisions of the Interstate Commerce Act because such term rates were made available to all interested shippers and reflect relevant differences among term shippers, and between term shippers and uncommitted shippers.[12]

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[10] *Id*. at 1316-17.

[11] 116 FERC ¶ 61,040, at P 23 (2006) ("[T]he program offers all shippers the same *low* rates that Williams is receiving under the existing volume incentive program. . . .") (emphasis added).

[12] 77 FERC ¶ 61,188, at p. 61,756 (1996).

23. In the *MAPL* proceeding, the Commission determined that the proposed volume incentive program containing discounted rates was not discriminatory, stating that, "MAPL is entitled to offer incentive rates tied to volume and term requirements under its new program, as it has chosen to do."[13] The Commission finds that Petitioners' offer of discount rates to committed shippers is consistent with similar programs previously approved by the Commission and is not unduly discriminatory. However, when Petitioners file initial rates for the Project, the Commission will determine at that time whether the proposed initial rates are just and reasonable and consistent with the Commission's policies.

B. Reserved Capacity

24. Petitioners point out that the Commission previously has approved prorationing policies dedicating a portion of a pipeline's capacity to firm service when the Commission found such policies to be reasonable. Petitioners assert that the Commission has allowed pipelines to use open seasons as a means of offering firm service to some shippers, first addressing this process in proceedings involving offshore pipelines subject to the Outer Continental Shelf Lands Act.[14]

25. Petitioners again cite the *MAPL* decision, stating that the case involved the use of an open season for on-shore interstate pipelines subject to the ICA. According to Petitioners, in that case, MAPL sought approval of a volume incentive rate that would reward those who provided long-term volume commitments to an expansion of the facilities.[15] Petitioners claim that the *MAPL* case is comparable to the instant case in that the proposal provided that shippers making volume commitments would receive a discounted rate along with a favorable prorationing policy. Petitioners state that the Commission rejected a claim that the program was discriminatory, emphasizing that it was available to all shippers willing to sign up for the program. Petitioners contend that the Commission recognized that neither historical shippers nor new shippers would be denied access even if they did not sign long-term volume dedications. Petitioners further

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[13] *Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040, at P 23 (2006).

[14] *Citing Proteus Oil Pipeline Co., LLC*, 102 FERC ¶ 61,333, at P 35 (2003); *Caesar Oil Pipeline Co., LLC*, 102 FERC ¶ 61,339, at P 37 (2003). *See also Enbridge Offshore Facilities, LLC*, 116 FERC ¶ 61,001 (2006). The disposition of prorationing and other issues under the Outer Continental Shelf Lands Act, however, is not relevant to the disposition of prorationing issues under the ICA, inasmuch as the former is not a common-carriage statute.

[15] *Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040, at P 8 (2006).

assert that the Commission affirmed this principle in *Enbridge Pipelines (North Dakota) LLC.*[16]

26. Petitioners state that, in *CCPS Transportation, LLC* (*CCPS*),[17] the Commission stated that it had not mandated a percentage of capacity to be reserved for uncommitted shippers, but it had never approved anything less than a 10-percent set-aside for uncommitted shippers to preserve the common carrier obligation.[18] Petitioners argue that, because the Project is an entirely new pipeline to be built and not merely an expansion of an existing pipeline, it entails substantial risk and requires substantial financial commitments. Petitioners argue that these factors justify the 90-percent set-aside for committed shippers, while preserving a 10-percent set-aside for uncommitted shippers. In Petitioners' view, the committed shipper/uncommitted shipper arrangement is non-discriminatory, and no shipper will be disadvantaged by it.

27. *Commission Analysis*. Petitioners argue that all prospective shippers on the Project have had the same opportunity to enter into a TSA for firm transportation service, and they also point out that no prospective shipper has argued to the contrary. In *Express Pipeline Partnership* (*Express*),[19] the Commission described committed shippers and uncommitted shippers as follows:

> [A]ll prospective shippers had an equal, non-discriminatory opportunity to enter into a 5, 10, or 15 year contract. No protester has argued that it did not have an opportunity to enter into a term contract with Express if it so desired. Further, in this case, term shippers are not similarly situated with uncommitted shippers, and the various term shippers are not similarly situated with each other. Term shippers are not similarly situated with uncommitted shippers because in any given month, uncommitted shippers may choose to ship on Express or not. Uncommitted shippers have the maximum flexibility to react to changes in their own circumstances or in market conditions. Uncommitted shippers do not provide the revenue assurances, planning assurances, and a basis for constructing the pipeline that term shippers provide.[20]

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[16] 120 FERC ¶ 61,025, at P 22 (2007).

[17] 121 FERC ¶ 61,253 (2007).

[18] *Id*. n.33.

[19] 76 FERC ¶ 61,245 (1996).

[20] *Id*. at 62,254.

28. In the instant case, uncommitted shippers may choose to ship on the Project during a month or not to do so. These uncommitted shippers have maximum flexibility to react to changes in market circumstances or their own circumstances. Uncommitted shippers on the Project do not provide the revenue assurances, planning assurances, and basis for constructing the Project that term shippers provide. However, as the Commission further found in *Express*:

> The Commission does not believe that any specific aspect of Express' rate structure violates the provisions of the Interstate Commerce Act. All interested shippers had the ability during the open season to sign a contract. . . . We reject protesters' contention that they are being discriminated against because they do not have the same rates or services as those shippers who signed term contracts with Express since the protesters declined the opportunity to take advantage of the rates and service options offered by Express.[21]

29. The Commission finds that Petitioners' open season afforded all prospective shippers an opportunity to sign TSAs and become committed shippers. The fact that rates and terms for committed and uncommitted shippers will not be the same does not establish that they are not similarly situated. All interested shippers had the ability, during the open season, to sign term contracts to take advantage of the ability to reserve part of the 90 percent set-aside of the Project's design capacity and to receive service from Patoka, Illinois to Nederland and Houston, Texas. Accordingly, the Commission finds that the proposed differences in rates and terms for committed and uncommitted shippers generally do not violate the ICA. However, the Commission addresses below the specific question of whether the committed shippers here may be entirely exempt from prorationing.

C. Volumes Not Subject To Prorationing

30. Petitioners propose that the Project's committed shippers receive a discount rate for committed volumes and that such committed volumes not be subject to prorationing. Petitioners assert that, in the *MAPL* decision, the Commission accepted a firm service proposal that included volume incentive discount rates.[22]

31. *Commission Analysis*. In *CCPS*, the Commission approved the use of premium rates to support a guarantee that committed volumes would not be subject to

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[21] *Id*.

[22] *Citing Mid-America Pipeline Company, LLC*, 116 FERC ¶ 61,040 (2006).

prorationing.[23] However, the Commission recognized that "Spearhead's proposed proration policy is a form of historical-based prorationing that apportions 90 percent of the capacity to historical shippers based on their average movements during a rolling 12-month base period, with the remaining 10 percent set aside for new shippers, as defined in the tariff."[24] The Commission emphasized that its "approval of the original Enbridge Energy, Inc. petition was based in part on the premise that neither historical shippers nor new shippers would be denied access to the expansion capacity, thus sufficiently balancing the shippers' competing interests."[25] Specifically, new or uncommitted shippers had the ability to become regular shippers under the pipeline's prorationing policy by shipping at least nine months during the 12-month base period, and this policy applied to both base capacity and historical capacity.

32. In *MAPL*, while the Commission approved *MAPL*'s proposal that established discounted rates rather than premium rates for firm service, the Commission pointed out that prorationing was not really an issue there, and all shippers, both current and new, would be eligible to participate in MAPL's new volume incentive program, just as they were eligible to participate in the previous volume incentive program. The Commission determined that approximately 25 percent of MAPL's total capacity would be available under the new volume incentive program. Stated differently, non-volume incentive shippers would be eligible to ship on approximately 75 percent of the line. Thus, the Commission determined that there was a reasonable assurance that neither historical shippers nor new shippers would be denied access even if they did not sign long-term volume dedications.[26]

33. In *Texaco Pipeline Inc.* (*Texaco*),[27] however, the Commission rejected a tariff filing that contained reduced volume incentive rates and a guarantee that a contract shipper's volumes would not be subject to prorationing. Further, Texaco proposed that up to 80 percent of total system throughput capacity would be available for this contract service, regardless of the amount of non-contract shipper volumes tendered. The Commission found that Texaco's proposed terms were preferential and that Texaco had not justified the preference. Thus, the Commission determined that the proposal violated Texaco's common carrier obligation to provide service upon reasonable request by

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[23] *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at P 19 (2007).

[24] *Id*. P 17.

[25] *Id*.

[26] *Mid-America Pipeline Company, LLC*, 116 FERC ¶ 61,040, at P 23-24 (2006).

[27] 74 FERC ¶ 61,071, at p. 61,201 (1996).

restricting access to 80 percent of its pipeline capacity to the exclusive class of shippers that contracted for access to that large share of the capacity.[28]

34. These cases are relevant as the Commission examines the proposal in the instant case. In *CCPS*, the approved premium service was subject to higher rates in exchange for a guarantee that the capacity under contract would not be subject to prorationing. The capacity subject to this reservation consisted of expansion capacity. However, under the pipeline's tariff applicable to its base capacity, new or spot shippers were afforded a means by which they could become "regular" shippers based on their shipping patterns. In contrast, the Petitioners here propose that the firm shippers pay a lower rate than the uncommitted shippers in addition to receiving a guarantee that their contracted volumes will never be subject to prorationing. Additionally, the proposal in this proceeding would prevent new or spot shippers from becoming regular shippers, thereby denying them access to 90 percent of the Project's capacity. The Commission finds that this prorationing arrangement is unreasonable under the ICA and applicable Commission precedent.

35. In *Texaco*, the Commission rejected as preferential a proposed tariff provision that would essentially lock uncommitted shippers out of 80 percent of the pipeline's capacity. Similarly, in the instant case, uncommitted shippers would not have access to 90 percent of the pipeline's capacity for the duration of the 15-year contract term. As in *Texaco*, Petitioners' proposal is unduly preferential, and unlike in *CCPS*, where the preferential prorationing element was supported by premium rates, so as to make the preference not undue.

36. As for *MAPL*, there most of the pipeline's capacity would be available to uncommitted shippers, and both current and new shippers would have the opportunity to participate in the new volume incentive program. Thus, the *MAPL* case is distinguishable from the instant proposal which unreasonably restricts access by uncommitted shippers to all but 10 percent of the pipeline's capacity for many years.

37. Accordingly, the Commission denies Petitioners' request that it approve the proposed discounted rate to be paid by committed shippers whose access to 90 percent of the Project's capacity would never be subject to prorationing. The Commission finds this proposal unjust, unreasonable, and unduly discriminatory under the ICA and applicable Commission precedent, as explained above. Finally, at such time as Petitioners file their uncommitted rate, if the proposed uncommitted rate is protested, they must comply with

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[28] ICA § 3(1) declares unlawful any undue or unreasonable preference or advantage to any particular shipper. 49 App. U.S.C. § 3(1) (1988). ICA § 1(4) establishes the common carrier duty to provide service upon reasonable request therefor. 49 U.S.C. § 1(4) (1988).

section 342.2(b) of the Commission's regulations[29] and support the proposed uncommitted rate by filing cost, revenue, and throughput data supporting such rate as required by part 346 of the Commission's regulations.[30]

The Commission orders:

(A) The petition for a declaratory order is granted to the extent discussed in the body of this order.

(B) Pliura Intervenors' motion to intervene and protest is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose
Secretary

[29] 18 C.F.R. § 342.2(b) (2008).

[30] 18 C.F.R. Part 346 (2008).