144 FERC ¶ 61,130
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

CenterPoint Energy Bakken Crude Services, LLC Docket No. OR13-21-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued August 14, 2013)

1. On May 14, 2013, CenterPoint Energy Bakken Crude Services, LLC (CPE Bakken or Petitioners) filed a petition for declaratory order (Petition) requesting that the Commission approve the overall tariff and rate structure for a new crude oil gathering pipeline system. The new pipeline will transport Bakken crude to an interconnection with Great Northern Gathering and Marketing, LLC's Watford Terminal (Watford Terminal), also located in North Dakota, for interstate distribution. As discussed below, the Commission grants the Petition.

Project Details

2. The proposed pipeline gathering system (Project) has been developed in response to the well-publicized shortage of pipeline capacity in the Bakken oil production region. The Project adds pipeline capacity which CPE Bakken asserts will help reduce the region's current reliance on other more harmful and costly modes of transportation.

3. The Project will consist of multiple 6-inch, 4-inch and 3-inch gathering lines merging and feeding into an 8-inch diameter, 14-mile mainline pipeline. Once completed, the Project will gather crude oil from various production wells in Dunn and McKenzie Counties, North Dakota, for delivery to the Watford Terminal and further distribution to a variety of refinery and terminal destinations in downstream interstate markets.

4. In addition to the construction of approximately 85 miles of pipeline, the Project will also require the use of multiple "lease automatic custody transfer" units (LACT)[1]

[1] A LACT unit automatically measures, samples, and transfers the crude from the lease to the pipeline and records the net volume and quality of crude.

that are capable of receiving oil from the approximately 45 origin points on the Project. Upon completion, the Project will have sufficient capacity to gather up to 19,500 barrels per day (bpd) at an estimated cost of approximately $112 to $124 million.

Open Season

5. Due to the substantial investment needed, the Project requires support from shippers willing to make long-term volume commitments by executing a transportation services agreement (TSA). An Open Season for the Project commenced on February 19, 2013 and concluded on March 29, 2013. Notice was provided to all parties known by CPE Bakken to have an interest in the Project. CPE Bakken also publicized the Open Season via press releases and trade press announcements. CPE Bakken provided interested parties with a *pro forma* TSA, the proposed committed and uncommitted rates, and the Project's proposed rules and regulations. CPE Bakken states it received a sufficient level of commitments through the Open Season to proceed with the Project.

Proposed Service Structure

6. The Project will provide transportation service to both uncommitted and committed shippers. Service to those committed shippers who executed TSAs during the Open Season, are allocated firm capacity to ship their committed volumes over the contract term. The TSAs obligate the committed shippers to inject committed volumes or otherwise make a deficiency payment for the stated contract quantities of crude oil. The TSA requires both an annual minimum volume commitment as well as a cumulative volume commitment for the 15 year primary term of the TSA.

7. Committed Shippers will not be subject to prorationing for their contract volumes on up to 90 percent of the capacity of the pipeline, except under circumstances of force majeure. The pipeline's remaining 10 percent of capacity will be reserved for uncommitted shippers and allocated using a historical prorationing model.

8. CPE Bakken proposes to allow Committed Shippers the option to nominate barrels in excess of their respective monthly contract volumes for a particular month (Incremental Barrels). CPE Bakken will not subject these Incremental Barrels to prorationing except to the extent the sum of all monthly nominated Incremental Barrels and monthly nominations for committed contract volumes, exceed 90 percent of available capacity. If this circumstance occurs, CPE Bakken proposes to allocate the Incremental Barrels of the committed shippers on a *pro-rata* basis according to each shipper's monthly committed contract volume. This will ensure 10 percent of the capacity remains available to Uncommitted Shippers.

Proposed Rate Structure

9. CPE Bakken designed its rates using a postage stamp design, which means the same rate applies regardless of the origin of the shipper's transportation movement. The Open Season specified that the committed rate that would apply depends upon the volume commitment the committed shipper made in its TSA. Further, CPE Bakken proposes to offer uncommitted shipper rates as volume incentive rates at volume tiers that correspond to the volume tiers available to the committed shippers. The TSAs executed by committed shippers specifically states the applicable tiered rate will always be at a premium relative to uncommitted shipper rate for the same volume tier; i.e., given the absence of priority service for the uncommitted Shippers, their rate will be slightly lower.

10. CPE Bakken states that, although it offered various tiers of volume commitment levels in the TSA, the only service level requested during the Open Season was for commitments in excess of 5,000 bpd. CPE Bakken notes that, to date, no uncommitted shipper has expressed any interest for service on the Project. Accordingly, CPE Bakken states it intends to only file committed and uncommitted shipper tariff rates for the service tier in excess of 5,000 bpd. CPE Bakken notes that should any party request service outside of that volume tier, it will file the appropriate uncommitted rate consistent with the rate structure described in the instant Petition. CPE Bakken states that upon the start-up of the Project, it will file the committed rate applicable to the excess of 5,000 bpd tier as a settlement rate pursuant to section 342.4(c) of the Commission's regulations.[2] Further, CPE Bakken intends to file any changes to the committed rate as a settlement rate. Pursuant to the terms of the TSA, the rate will be subject to an escalation adjustment of three percent per year.

Expansion Capacity and Additional Terms

11. CPE Bakken states that, should it expand pipeline capacity, the TSA requires it to provide all committed shippers a first right to submit binding nominations for volume commitments on the expansion capacity without first holding another open season. The amount of expansion capacity available for further volume commitments will not exceed 90 percent of the total available expansion capacity. CPE Bakken notes the TSA further provides that, in the event CPE Bakken receives binding volume commitments that exceed the expansion capacity available for committed volumes, it will allocate expansion capacity via its *pro-rata* methodology. If it receives service requests below the 90 percent level, it will allocate expansion capacity using the volumes set forth in the committed shipper's binding volume commitment submitted pursuant to the first right procedure.

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[2] 18 C.F.R. § 342.4(c) (2013).

12. The TSA gives each committed shipper the ability to extend the initial primary term of the TSA for two additional five-year terms. Following the expiration of those extension terms, if any, the TSA permits a further extension for additional five-year terms with the agreement of both CPE Bakken and the committed shipper. With respect to the extended terms, the committed shipper may elect to either maintain its current volume commitment or reduce its volume commitment at the corresponding rate applicable to reduced volume. The TSA provides the committed shipper the option to eliminate its volume commitment entirely, in which case it would receive non-firm service at an adjusted rate.

Requested Rulings

13. CPE Bakken requests the Commission approve elements of the Project as just and reasonable and not unduly discriminatory or preferential. These are addressed in turn below.

Notice and Interventions

14. Notice of the Petition issued May 16, 2013. Interventions and protests were due June 10, 2013. Pursuant to Rule 214 of the Commission's regulations,[3] all timely filed motions to intervene and any unopposed motion 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. The Petition is unopposed.

Discussion

15. Consistent with the precedent established by the Commission's order in *Express Pipeline Partnership* (*Express*),[4] Petitioners have sought advance approval for the rates, terms, and conditions of a financially significant project to obtain regulatory certainty and to address issues outside the compressed timetable of normal tariff filings.[5] Also,

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[3] 18 C.F.R. § 385.214 (2013).

[4] 76 FERC ¶ 61,245, at 62,253, *reh'g denied*, 77 FERC ¶ 61,188 (1996) (*Express*).

[5] Petitioners cite, *e.g*., *Shell Pipeline Co*., 139 FERC ¶ 61,228 (2012) (*Shell*); *Skelly-Belvieu Pipeline Co*., 138 FERC ¶ 61,153 (2012); *Sunoco Pipeline, L.P*, 137 FERC ¶ 61,107 (2011) (*Sunoco*); *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167, at P 40 (2010); *CCPS Transp., LLC*, 121 FERC ¶ 61,253 (2007) (*CCPS Transp.*); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073, at P 23 (2007); *Colonial Pipeline Co*., 116 FERC ¶ 61,078, at P 9 (2006); *Enbridge Energy Co*., 110 FERC ¶ 61,211 (2005); *Plantation Pipe Line Co*., 98 FERC ¶ 61,219 (2002).

consistent with *Express* and Commission precedent, Petitioners offered rates to all shippers in a widely publicized open season.

I. **TSA Provisions**

16. CPE Bakken requests the Commission confirm it will uphold the provisions of the committed shippers' TSA during the term of their TSA. Specifically, CPE Bakken requests the Commission find the provisions concerning committed shippers' volume commitment and deficiency payment obligations will govern the transportation services provided during the term of the TSA. CPE Bakken points out that the provisions of the TSA addressing these obligations require each committed shipper to ship both an annual minimum volume commitment, as well as a cumulative volume commitment for the primary term of the TSA, and to make a deficiency payment if the committed shipper fails to meet such volume commitments. CPE Bakken states the TSA also requires the committed shipper pay the applicable tier rate for the shipment of its volume commitments.

Commission Determination

17. The Commission confirms that the provisions of the TSA will govern transportation services provided to committed shippers for the duration of the contract. The Commission previously approved similar requests for this type of assurance,[6] and will also approve the TSA provisions for which assurance is sought in the instant Petition.

II. **Treatment of Committed Rates as Settlement Rates**

CPE Bakken requests the Commission approve its filing of the initial committed rates upon the start-up of the Project, as well as all subsequent adjustments to the committed rates that are made in accordance with the terms of the TSA as settlement rates under section 342.4(c) of the Commission's regulations.

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[6] *See Mid-America Pipeline Company, LLC*, 136 FERC ¶ 61,087, at P 9 (2011) (MAPL); *Kinder Morgan Pony Express Pipeline LLC and Hiland Crude, LLC*, 141 FERC ¶ 61,180, at P 22 (2012) (*Pony Express*). *See also Seaway Crude Pipeline Company LLC*, 142 FERC ¶ 61,201 (2013) (*Seaway*). In *Seaway*, the Commission specifically affirmed that the rate design embodied in the TSA to establish the rates for committed and uncommitted shippers "would be upheld and applied during the established terms of the agreements between the pipeline and the shippers that made volume commitments during the open season . . . ." *Seaway*, 142 FERC ¶ 61,201 at P 13. If an uncommitted rate is protested, however, the pipeline must comply with section 342.2(b) of the Commission's regulations to support it.

Commission Determination

18. The Commission has approved this request in previous declaratory orders. Specifically, the Commission in *Pony Express* held the committed rates established as part of an open season and included in shipper contracts could be filed as settlement rates under section 342.4(c).[7] As the Commission recently stated in *Seaway*, "although the Commission's regulations do not provide specifically for negotiated initial rates with agreed-to future rate changes, the Commission has ruled that such contracts "'are consistent with the spirit of section 342.4(c)' of the Commission's regulations."[8] Section 342.4(c) also requires the carrier to file a verified statement that any proposed rate change has been agreed to by all current shippers.[9] The Commission has allowed pipelines to request waiver of this verified statement, "reasoning that all the committed shippers subject to the committed rate schedule have agreed to pay the associated rate over the period of their contracts."[10]

19. Accordingly, the Commission approves CPE Bakken's request to obtain waiver of the verified statement requirement to treat committed rates as settlement rates in the initial tariff filing. CPE Bakken offered its committed rates through a widely-publicized Open Season that gave interested shippers notice and opportunity to sign TSA's accepting the proposed committed rates; such shippers as might have an interest were sophisticated parties capable of fully understanding the terms and rates being offered in the TSA; and all potential shippers are assumed to have the opportunity to provide comments and suggestions to the TSA prior to the final agreement. As discussed above, CPE Bakken must still file the request for waiver of the verified statement when it files the initial tariff to conform to the Commission's regulatory requirements and precedent.

III. Proposed Uncommitted Rate Adjustment Mechanism

20. CPE Bakken requests the Commission approve its proposed adjustment mechanism applicable to the committed rates and corresponding uncommitted rates. The adjustment mechanism as detailed in the TSA permits CPE Bakken to adjust the committed rates annually pursuant to terms in the TSA, rather than the Commission's indexing methodology. The TSA provides that beginning on the first anniversary of the in-service date of the Project and continuing annually thereafter, the pipeline may

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[7] Petitioners cite *Pony Express* at PP 19-21.

[8] *See Seaway*, 142 FERC ¶ 61,201 at P 12.

[9] *See* 18 C.F.R. § 342.4(c) (2013).

[10] *See Seaway*, 142 FERC ¶ 61,201 at P 12.

increase the committed rates by three percent per year. Additionally, CPE Bakken requests assurance that it can adjust each uncommitted rate that corresponds to a Committed Rate by three percent per year rather than use the Commission's indexing methodology. This allows CPE Bakken to maintain the same level of rate premium between the committed and uncommitted rates throughout the term of the TSAs.

Commission Determination

21. The Commission's regulations allow, in addition to the indexing rate methodology, other mechanisms that pipelines may utilize in establishing rates. Among these are settlement rates, market-based rates, and cost of service rates. Further, as Petitioners note, the Commission has approved analogous requests before.[11]

22. The Commission further recognizes that in order to preserve the premium nature of the Committed Rates, CPE Bakken intends to adjust the Committed and Uncommitted Rates in parallel. The Commission approves the adjustment mechanism described in the TSA.

IV. Capacity Designation for Committed and Uncommitted Shippers

23. CPE Bakken proposes to make available 90 percent of total capacity on the Project to committed shippers, reserving the remaining 10 percent of capacity for uncommitted shippers, and requests Commission assurance that this allocation of capacity is appropriate.

Commission Determination

24. The Commission previously found that a reservation of at least 10 percent of the pipeline's capacity for uncommitted shippers is sufficient to provide reasonable access to the pipeline.[12] The Commission finds the capacity allocation proposed here conforms to its policy.

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[11] Petitioners cite *CCPS Transp.*, 121 FERC ¶ 61,253 at P 14; *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310, at P 31 (2007), *reh'g*, 122 FERC ¶ 61,170 (2008).

[12] Petitioners cite *Sunoco*, 137 FERC ¶ 61,107 at PP 6-15; *Shell*, 139 FERC ¶ 61,228 at P 21.

V. Priority Service

25. CPE Bakken seeks approval to offer priority, or firm, service to committed shippers. In exchange for this premium service, committed shippers are required to ship or pay for certain levels of volumes each year on the pipeline during the TSA term and pay a premium of one cent per barrel more than the applicable uncommitted shipper rate for service under the same rate tier.

Commission Determination

26. The Commission previously approved requests for priority service similar to the service proposed here. The Commission stated that "there is no single method of allocating capacity in times of excess demand...and pipelines should have some latitude in crafting allocation methods to meet circumstances specific to their operations."[13] In *CCPS Transp.*, the Commission recognized that priority shippers are critical to the pipeline's capital financing, and further recognized that "premium rate firm shippers are not similarly situated with the pipeline's non-firm shippers…(p)remium rate firm shippers have made long-term agreements and must pay for their contracted amounts even if not used…(whereas) uncommitted shippers have maximum flexibility to react to changes in their own circumstances or in market conditions, although they do not provide assurances and financial support for the (pipeline) that firm shippers provide."[14]

27. The subject Petition's priority service rights are virtually identical to those proposed and accepted in *Shell Pipeline Company L.P*. The Commission has held that priority service is permissible under the Interstate Commerce Act, so long as committed shippers paid a premium rate compared to uncommitted shippers, and the committed rates and priority service options were offered during an open season.[15] The Commission therefore approves CPE Bakken's proposal regarding its priority service for committed shippers.

VI. Incremental Barrels

28. CPE Bakken proposes to allow committed shippers to elect additional Incremental Barrels each month in excess of the committed shipper's volume commitment for the month. Further, the TSA provides that the same tiered rate charged for a committed shipper volume commitment will apply to any of its Incremental Barrels. Further, those

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[13] Petitioners cite *Mid-America Pipeline Co., LLC*, 106 FERC ¶ 61,094, at P 14 (2004).

[14] *See CCPS Transp.*, 121 FERC ¶ 61,253 at P 19.

[15] *See Shell*, 139 FERC ¶ 61,228 at P 21.

Incremental Barrels will not be prorated, unless the sum of all Incremental Barrels in a month would cause the allocation of capacity for uncommitted shippers to be less than 10 percent of the available capacity for the month. CPE Bakken states that if that happens, the TSA provides for CPE Bakken to allocate the nominated Incremental Barrels on a *pro-rata* basis according to the level of committed shippers' monthly volume commitments ensuring that 10 percent of available capacity remains reserved for uncommitted shippers.

Commission Determination

29. The Commission finds that committed shippers may elect to ship Incremental Barrels pursuant to the TSA. The rate for this service is at a premium rate, and the Incremental Barrels will not affect the 10 percent capacity reserved for uncommitted shippers on the pipeline.

VII. Prorationing Proposal

30. CPE Bakken requests the Commission approve its prorationing policy for the Project. The proposed policy states that except during an event of force majeure, committed shippers will not be subject to prorationing for their committed volumes on up to 90 percent of the available capacity. The pipeline will allocate each committed shipper an amount of capacity equal to the committed shipper's Monthly Volume Commitment and its nominated Incremental Barrels, provided the allocation of Incremental Barrels to committed shippers would not reduce available capacity for uncommitted shippers to less than 10 percent. If the allocation of Incremental Barrels would cause the available pipeline capacity allocated to uncommitted shippers to fall below 10 percent, CPE Bakken will allocate Incremental Barrels to committed shippers on a *pro rata* basis according to their respective monthly volume commitments. Ten percent of capacity is reserved for uncommitted shippers and will be allocated using a historical prorationing model with a 12-month base period. CPE Bakken states that if there is any remaining capacity after implementing the above-described procedures, it will allocate this remaining capacity among all committed and uncommitted shippers having remaining unmet nominations in proportion to the shipper's initial capacity allocation.

Commission Determination

31. The Commission approves CPE Bakken's prorationing proposal. The policy does not bar uncommitted shippers from obtaining capacity on the pipeline in the event that prorationing is required. Further, the proposed prorationing policy is consistent with prorationing policies previously approved by the Commission.[16]

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[16] *See, generally*, *CCPS Transp.*, 121 FERC ¶ 61,253; *Shell Pipeline Company LP*,

(continued...)

VIII. Expansion Capacity Rights

32. CPE Bakken states that pursuant to the terms of the TSA, should it agree to expand the pipeline in response to a direct request from a committed shipper, it will first provide any committed shipper the right to submit binding nominations to ship, or otherwise pay for, a committed volume of crude oil on such expansion capacity, subject to the limitation that such volume commitments cannot exceed 90 percent of the total expansion capacity.

Commission Determination

33. The Commission has found such a right of first offer in a TSA is permissible, inasmuch as the original TSA was available to all shippers in a widely publicized open season, and all shippers had the same opportunity to take advantage of the terms and conditions of the original TSA.[17] Thus, there is no undue discrimination or undue preference among shippers, and at least 10 percent of the expansion capacity remains available for uncommitted shippers.

IX. Extension Rights

34. CPE Bakken requests the Commission confirm that the TSA term extension rights afforded to the committed shipper are appropriate. Specifically, CPE Bakken states that following the expiration of the initial TSA term, the committed shipper may extend the initial term for two additional five year terms. Following the expiration of those terms (if any), the TSA provides that the shipper can further extend the TSA for additional five year terms with the agreement of both CPE Bakken and a committed shipper. With respect to these extended terms, a committed shipper may elect to either maintain its current volume commitment or reduce its volume commitment, in which case CPE Bakken will adjust the tiered rate charged to correspond to its reduced volume commitment. A committed shipper may also elect to eliminate its volume commitment entirely, in which case it would receive non-firm service at an adjusted rate.

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141 FERC ¶ 61,017 (2012); *Oxy Midstream Strategic Development, LLC*, 141 FERC ¶ 61,005, at P 19 (2012); *see also Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 56 (2006).

[17] Petitioners cite *Enbridge Pipelines (Southern Lights) LLC*, 141 FERC ¶ 61,244, at P 26 (2012).

Commission Determination

35. The Commission previously approved contract extension and rollover rights in prior declaratory orders.[18] Further, CPE Bakken conducted an Open Season in which all interested parties that were willing and able to meet the term and volume commitments had notice of the contract extension provision in the TSA. Finally, the structure gives shippers the ability to adjust to changing market conditions without being locked into a long term contract. The Commission finds that the TSA contract extension provision is not unduly discriminatory, and approves the provision.

The Commission orders:

The Petition is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[18] *See MAPL*, 136 FERC ¶ 61,087; *Pony Express*, 141 FERC ¶ 61,249 at PP 19-20.