

145 FERC ¶ 61,287
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

MarkWest Liberty Ethane Pipeline, L.L.C.

Docket No. OR14-1-000

DECLARATORY ORDER

(Issued December 30, 2013)

1. On October 3, 2013, MarkWest Liberty Ethane Pipeline, L.L.C. (MarkWest) filed a petition for a declaratory order (Petition) approving the overall tariff and rate structure for a new pipeline that will transport ethane from the vicinity of Majorsville, West Virginia, to Houston, Pennsylvania (Project). MarkWest seeks Commission action on the Petition by December 31, 2013. As discussed below, the Commission grants the rulings requested in the Petition.

Background

2. MarkWest states that the Project will give shippers the ability to connect to pipeline systems that transport ethane to key markets, including the U.S. Gulf Coast, Canada, and other international markets.¹ According to MarkWest, the 34-mile long Project will transport approximately 40,000 barrels per day (bpd) and will cost approximately \$110 million.² MarkWest further states that at the Houston, Pennsylvania destination, shippers will have direct access to several ethane pipeline systems, including Enterprise Liquids Pipeline LLC's ATEX pipeline, as well as Sunoco Pipeline L.P.'s Mariner West and Mariner East Pipelines, which will give the ethane shippers significant flexibility for further transportation, processing, and distribution of the ethane.

3. MarkWest explains that, before natural gas can be transported and sold, the heavier liquid hydrocarbons/natural gas liquids (NGL) must be removed. MarkWest

¹ MarkWest states that a map of the Project is attached to the Petition as Exhibit 2.

² Throughout the Petition, MarkWest cites the Affidavit of Randy S. Nickerson, which is attached to the Petition as Exhibit 1, for additional details of the Project.

emphasizes that ethane is the major component of the NGLs. Further, states MarkWest, a number of recent studies and reports confirm that the rapidly-developing natural gas fields of the Marcellus Shale and the lack of a market for ethane in that region could limit natural gas production.³

4. MarkWest states that the significant capital investment required by the Project makes it necessary to have the support of shippers that will execute Transportation Service Agreements (TSA) obligating them to make long-term volume commitments. On November 20, 2013, MarkWest submitted a supplemental filing stating that it had commenced a widely-publicized open season that began on November 8, 2013, and would conclude on December 9, 2013. In that filing, MarkWest also included copies of the open season notice, the press release, and a sampling of published news articles addressing the open season.

Rulings Sought by MarkWest

5. MarkWest seeks approval of the following elements of the Project as just and reasonable and not unduly discriminatory or preferential:

- The provisions of the TSA will be upheld and will govern the transportation services that MarkWest will provide to Committed Shippers⁴ during the terms of their TSAs.
- The rates for the Committed Shippers' long-term service may be filed, at MarkWest's election, as settlement rates during the term of the TSA, including

³ MarkWest cites AEO2013 Early Release Overview, U.S. Energy Information Administration (Dec. 12, 2012), available at <http://www.eia.gov/forecasts/aeo/er/>; Jennifer Brickle, *Surging NGL Production Drives Infrastructure Projects In Marcellus, Utica Plays*, American Oil & Gas Reporter (Dec. 2012), available at <http://www.aogr.com/index.php/magazine/cover-story/surging-ngl-production-drives-infrastructure-projects-in-marcellus-utica-pl>; Russel Braziel, *Infrastructure Projects Connect Marcellus Shale to Ethane, NGL Markets*, American Oil & Gas Reporter (Mar. 2011), available at <http://www.aogr.com/index.php/magazine/cover-story/infastructure-projects-connect-marcellus-shale-to-ethane-ngl-markets>; Chesapeake: Lack of market for ethane is limiting gas production (Feb. 21, 2013), available at <http://www.statejournal.com/story/21297510/chesapeake-lack-of-market-for-ethane-is-limiting-production>.

⁴ Committed Shippers are shippers that make long-term ship-or-pay volume commitments by entering into TSAs with MarkWest.

upon the initial filing of the pipeline's tariff, pursuant to section 342.4(c) of the Commission's regulations.

- Up to 90 percent of the total capacity available on the Project will be offered for volume commitments by Committed Shippers during the open season, with the remaining 10 percent of the Project's total available capacity reserved for Uncommitted Shippers.⁵
- MarkWest may provide priority transportation service for the Committed Shippers' volumes at rates higher than the rates applicable to Uncommitted Shippers that ship similar levels of volumes.
- MarkWest may implement its prorationing policy for Committed and Uncommitted Shippers.
- The provision in the TSA allowing MarkWest the option of constructing an expansion of the Project and giving Committed Shippers a first right to submit binding nominations to ship, or otherwise pay for, committed volumes on the expansion capacity.
- The term extension rights provided to Committed Shippers in the TSA.

Summary of Petition

6. MarkWest asserts that the rulings it seeks are consistent with Commission policy and precedent. First, MarkWest contends that the Commission has granted advance approval of proposed rate structures and proposed rates in cases such as *Express Pipeline Partnership*, in which the Commission stated:

[I]t is better to address these issues [rate structure and validity of proposed rates] in advance of an actual tariff filing than to defer until the rate filing is made, when the decisionmaking process would be constrained by the deadlines inherent in the statutory filing procedures. The public interest is better served by a review of the issues presented before a filing to put the rates into effect.⁶

Further, states MarkWest, on rehearing, the Commission added that "issuing a declaratory order [is] procedurally appropriate for a new oil pipeline entrant . . . because

⁵ Uncommitted Shippers are shippers that choose to take service on an uncommitted or spot basis rather than making long-term volume commitments.

⁶ *Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,253 (1996).

[the pipeline] needs to acquire and guarantee financing in order to begin construction.”⁷ MarkWest also cites *MAPL*, observing that the Commission has granted requests similar to its current proposal,⁸ most recently in *CenterPoint Energy Bakken Crude Services, LLC*.⁹

7. According to MarkWest, the proposed rates for service on the Project are based on volume tiers, and the tiers will be the same for both the Committed and Uncommitted Shippers. However, continues MarkWest, the rates applicable to Committed Shippers at a particular volume tier will always be at a premium relative to the rates that Uncommitted Shippers will pay for the same volume tiers. MarkWest contends that this rate structure is consistent with Commission precedent addressing the relationship between Committed and Uncommitted Shippers’ rates.¹⁰ MarkWest explains that the rate applicable to Committed Shippers that commit to certain volume tiers at the startup of the Project will be at least \$.01 higher than the rate applicable to Uncommitted Shippers that ship at the same volume tiers.

8. MarkWest also points out that the TSA gives a Committed Shipper the ability to extend the 15-year primary term of its TSA for an additional five-year term, with an evergreen provision that will automatically extend the TSA for subsequent five-year terms thereafter until cancelled by either party. MarkWest adds that, with respect to any extended term, the Committed Shipper’s stated committed volumes and the rate applicable to the committed volumes will be the same as those established in the Committed Shipper’s TSA.

⁷ *Express Pipeline Partnership*, 77 FERC ¶ 61,188, at 61,755 (1996). See also *Sunoco Pipeline L.P.*, 137 FERC ¶ 61,107, at P 14 (2011); *Mid-America Pipeline Co.*, 136 FERC ¶ 61,087, at P 18 (2011) (*MAPL*); *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167, at P 40 (2010); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073, at P 14 (2007); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078, at P 45 (2006).

⁸ *MAPL*, 136 FERC ¶ 61,087 at P 9 (“the terms of the TSA executed by the committed shippers (including the agreed-upon tariff, rate and priority service structure) will be upheld and applied during the agreed term of the TSA as between Mid-America and the shippers that made volume commitments during the open season.”). See also *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at P 22 (2012).

⁹ 144 FERC ¶ 61,130, at P 17 (2013) (*CenterPoint*).

¹⁰ MarkWest cites, e.g., *CenterPoint*, 144 FERC ¶ 61,130 at PP 26-27 and *Shell Pipeline Co.*, 139 FERC ¶ 61,228, at P 21 (2012).

9. MarkWest also proposes that, at its election during the term of the TSAs, it will file the Committed Shipper rates as settlement rates, including in the initial tariff filing, pursuant to section 342.4(c) of the Commission's regulations.¹¹ In addition, states MarkWest, in accordance with section 342.2(a) of the Commission's regulations,¹² it will file a cost of service to establish the initial rates that applicable to the Uncommitted Shippers. MarkWest further explains that it will have the right to adjust the Committed Rates as provided by section 342.3 of the Commission's regulations¹³ or any successor indexing methodology that the Commission may adopt.

10. MarkWest again relies on *CenterPoint*, explaining that the petitioner in that case sought assurance that its initial committed rates established as part of the open season and included in TSAs with committed shippers, as well as any subsequent adjustments to the rates in accordance with the TSAs, could be filed as settlement rates. According to MarkWest, in approving the request, the Commission determined that its regulations do not provide specifically for negotiated initial rates with agreed-to future rate changes, although the Commission had ruled in earlier cases that contracts of that nature were consistent with the spirit of the regulations.¹⁴

11. Additionally, MarkWest argues that its proposed designation of 90 percent of the Project's capacity for Committed Shippers and 10 percent for Uncommitted Shippers is consistent with Commission precedent. MarkWest points out that, although the Commission "has not established a stated minimum percentage of capacity that must be set aside"¹⁵ for shippers that do not make long-term volume commitments, it has found repeatedly that the reservation of at least 10 percent of the pipeline's capacity for uncommitted shippers is sufficient to provide reasonable access to the pipeline.¹⁶

¹¹ 18 C.F.R. § 342.4(c) (2013).

¹² 18 C.F.R. § 342.2(a) (2013).

¹³ 18 C.F.R. § 342.3 (2013).

¹⁴ MarkWest cites *CenterPoint*, 144 FERC ¶ 61,130 at P 18.

¹⁵ MarkWest cites *CCPS Transportation, LLC*, 122 FERC ¶ 61,123, at P 14 (2008).

¹⁶ MarkWest cites *CenterPoint*, 144 FERC ¶ 61,130 at P 24. *Shell Pipeline Co.*, 139 FERC ¶ 61,228 at P 21. *Sunoco Pipeline L.P.*, 137 FERC ¶ 61,107 at PP 6-15. *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167, at P 40 (2010); and *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at P 17 n.33 (2007) (CCPS).

12. MarkWest further contends that its proposed priority service to the Committed Shippers is consistent with Commission policy and precedent. MarkWest points out that the TSA will require a Committed Shipper to (a) ship or pay for a certain level of volumes on the Project each year during the term of the TSA, and (b) pay a premium rate for the shipment of its committed volumes, compared to the rate charged to similarly-situated Uncommitted Shippers (i.e., those that ship a level of volumes in a month that is similar to the level shipped by Committed Shippers). According to MarkWest, at the startup of the Project, the rate applicable to Committed Shippers that qualify for a certain volume tier will be at least \$0.01 higher than the rate applicable to Uncommitted Shippers shipping under the same volume tier.¹⁷

13. MarkWest asserts that the Interstate Commerce Act (ICA) does not specifically address the issue of priority contract service; rather, the relevant provisions consist of broad delegations of authority to the Commission to determine what liquids pipeline practices are reasonable and not unduly discriminatory or preferential.¹⁸ MarkWest emphasizes that the Commission has stated that “[t]here 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.”¹⁹

14. MarkWest also points out that the Commission has approved similar requests for priority service when all potential shippers have been afforded a fair opportunity to participate in an open season and to enter into term volume commitments or to remain uncommitted shippers.²⁰ Moreover, MarkWest maintains that the Commission requires that a pipeline’s proposal should “appropriately distinguish[] committed shippers and uncommitted shippers and provide[] for rates consistent with the obligations of each

¹⁷ *Shell Pipeline Co.*, 139 FERC ¶ 61,228, at P 21. See also *Magellan Pipeline Co., L.P.*, 138 FERC ¶ 61,177, at PP 10, 14 (2012).

¹⁸ MarkWest cites 49 U.S.C. app. §§ 1(4), 3(1) (2012). MarkWest states that the courts have interpreted these statutory provisions to invest the Commission with considerable discretion to assess the reasonableness of pipeline practices. See, e.g., *Sea-Land Service Inc. v. ICC*, 738 F.2d 1311, 1319 (D.C. Cir. 1984).

¹⁹ MarkWest cites *Mid-America Pipeline Co., LLC*, 106 FERC ¶ 61,094, at P 14 (2004) (footnote omitted).

²⁰ MarkWest cites *CCPS*, 121 FERC ¶ 61,253 (2007) and *Skelly-Belview Pipeline Co., L.L.C.*, 138 FERC ¶ 61,153, at P 18 (2012).

class of shipper.”²¹ MarkWest argues that the exact meaning of this requirement depends on the circumstances of the proposed project.

15. MarkWest states that a Committed Shipper must agree to an annual minimum volume for a primary term of 15 years. MarkWest also states that the TSA term extension option gives each Committed Shipper the ability to extend the primary term of its TSA for an additional five-year term, with an evergreen provision that will automatically extend the TSA for subsequent five-year terms thereafter until canceled by either party. MarkWest explains that a Committed Shipper’s TSA committed volumes and the rate applicable to those volumes will remain the same during the extension terms. According to MarkWest, the Commission has approved similar contract extension/rollover rights in other cases involving proposed new pipeline capacity.²²

16. Additionally, states MarkWest, if a Committed Shipper fails to meet its volume commitment in a particular month, that shipper must make a deficiency payment to MarkWest for the month. MarkWest explains that it will calculate the deficiency payment by multiplying the Committed Shipper’s rate by the difference between the actual number of barrels shipped in that month and the Committed Shipper’s monthly committed volume.

17. MarkWest submits that when the Project is operational, both Committed and Uncommitted Shippers will be subject to the same rules and regulations for transportation service, except during periods of prorationing. Normally, states MarkWest, Committed Shippers will not be subject to prorationing for their committed volumes up to a total of 90 percent of the Project, while the remaining 10 percent held for Uncommitted Shippers will be allocated among all shippers on a *pro-rata* basis according to each shipper’s nomination during the prorationing period.

18. MarkWest asserts that its prorationing policy complies with the Commission’s requirements. According to MarkWest, the ICA requires liquids pipelines to provide service upon reasonable request, which requires them only to make reasonable efforts to maintain the public service at all times. MarkWest emphasizes that a common carrier may make reasonable and appropriate rules for transportation on its system if the rules

²¹ MarkWest cites *Enbridge Pipelines (North Dakota)*, 133 FERC ¶ 61,167 at P 40.

²² MarkWest cites *Enbridge Energy Company, Inc.*, 110 FERC ¶ 61,211, at P 10 (2005) (*Spearhead*) and *CenterPoint*, 144 FERC ¶ 61,130 at PP 34-35.

do not violate the ICA's common carrier obligation.²³ Therefore, continues MarkWest, while ICA section 3(1) makes it unlawful for a common carrier to subject a shipper to any undue or unreasonable preference or any undue or unreasonable prejudice or disadvantage,²⁴ the Commission has allowed liquids pipelines to develop their own prorating programs to address their responsibilities when their capacity is oversubscribed.²⁵

19. If it determines to expand the Project's capacity, MarkWest points out that the TSA requires it to provide all Committed Shippers a first right to submit binding nominations to ship or pay for an additional committed volume of ethane on the expansion capacity. MarkWest emphasizes that the amount of the expansion capacity that will be available for volume commitments will not exceed 90 percent of the total available expansion capacity. However, continues MarkWest, if the total of the binding volume commitments exceeds the expansion capacity available for committed volumes, it will allocate to each Committed Shipper the lesser of (a) the Committed Shipper's *pro rata* share of the expansion capacity available for committed volumes, which will be calculated by multiplying the Committed Shipper's proportionate share²⁶ times the expansion capacity available for committed volumes; or (b) the volumes established in the Committed Shipper's binding volume commitment submitted pursuant to the first-right nominations procedure.

20. MarkWest asserts that this right with respect to the expansion capacity also is consistent with Commission precedent, including *Enbridge Pipelines (Southern Lights) LLC*, in which the Commission stated in part that the fact that the expansion capacity

²³ MarkWest cites 49 U.S.C. app. § 1(4) (2012); *Brotherhood of Railroad and Steamship Clerks v. Florida East Coast Railroad Co.*, 384 U.S. 238, 245 (1966); *see also Pennsylvania Railroad Co. v. Puritan Coal Mining*, 237 U.S. 121, 133 (1915); *Lakehead Pipe Line Co.*, 71 FERC ¶ 61,338, at 62,325 (1995); and *Suncor Energy Marketing Inc.*, 132 FERC ¶ 61,242, at P 24 (2010).

²⁴ 49 U.S.C. § 3(1) (2012).

²⁵ MarkWest cites *Belle Fourche Pipeline Co.*, 28 FERC ¶ 61,150, at 61,281-82 (1984) and *Mid-America Pipeline Co., LLC*, 106 FERC ¶ 61,094, at P 14 (2004) (citing *SFPP, L.P.*, 86 FERC ¶ 61,022, at 62,115 (1999) and *Total Petroleum Inc. v. Citgo Products Pipeline, Inc.*, 76 FERC ¶ 61,164, at 61,947 (1996)).

²⁶ MarkWest states that Proportionate Share means the percentage equal to the Committed Shipper's minimum volume commitment divided by the total minimum volume commitments of all Committed Shippers.

would not be offered in an open season is not discriminatory under the ICA.²⁷ According to MarkWest, the Commission explained that because the right-of-first-offer provision was offered in the pipeline's original TSA, which was available to any shipper, all shippers had an equal opportunity to take advantage of the provision.

Public Notice, Interventions, and Protests

21. Notice of the filing was issued October 8, 2013, with interventions and protests due on November 5, 2013. Pursuant to Rule 214 of the Commission's regulations,²⁸ 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 delay or disrupt the proceeding or place additional burdens on existing parties. The Petition is unopposed.

Commission Analysis

22. The Commission will grant the rulings requested in the Petition. Granting these rulings will provide regulatory certainty for an important infrastructure project that will transport NGLs from a significant natural gas production area to major ethane markets, thereby also facilitating the production and transportation of the natural gas. As set forth in the Petition, Commission precedent supports granting the rulings sought by Mark West. Accordingly, as discussed below, the Commission grants the rulings requested by MarkWest.

23. Specifically, MarkWest's proposed rate and rate structure are consistent with those that the Commission has approved for other petroleum pipelines. MarkWest will offer 90 percent of the capacity of the Project to Committed Shippers that will ship or pay premium rates for the volumes established in their TSA's with MarkWest. Additionally, MarkWest has established a reasonable methodology to determine any deficiency payments that may be required of the Committed Shippers. Moreover, MarkWest's proposed reservation of 10 percent of the Project's capacity will allow Uncommitted Shippers sufficient access to the Project at lower rates than the Committed Shippers will pay for transportation of the same levels of volumes.

24. MarkWest also held a public open season, which gave all prospective shippers the opportunity to determine whether they wish to become Committed Shippers. The Commission has long held that uncommitted shippers that do not enter into agreements for committed service, but instead take service on a common carrier basis, are not

²⁷ 141 FERC ¶ 61,244, at P 26 (2012).

²⁸ 18 C.F.R. § 385.214 (2013).

similarly situated with committed shippers that provide financial support for a proposed pipeline project.

25. Further, MarkWest's proposed allocation methodology is reasonable and not unduly discriminatory. Both Committed and Uncommitted Shippers will be subject to the same prorationing policy, although the Committed Shippers normally will not be subject to prorationing for their committed volumes up to a total of 90 percent of the Project's capacity, and the remaining 10 percent of the capacity will be allocated among all shippers on a *pro rata* basis according to each shipper's nomination during the prorationing period.

26. The Commission also grants MarkWest's request that it be allowed to file the Committed Shippers' rates, including the initial rates, as settlement rates at any time during the term of their TSAs, consistent with sections 342.4(c) and 342.2(a) of the Commission's regulations. Additionally, MarkWest may adjust the Committed Shippers' rates in accordance with section 343.3 of the Commission's regulations (or any successor indexing methodology). MarkWest has stated that it intends to file a cost of service to establish the initial rates for the Uncommitted Shippers.

27. The Commission finds that it is appropriate for Committed Shippers to have the first opportunity to obtain capacity on any expansion of the Project, up to a total of 90 percent of the expansion capacity. However, if the total binding volume commitments exceed 90 percent of the expansion capacity, MarkWest states that it will allocate the expansion capacity on the basis of each Committed Shipper's proportionate share of the initial capacity of the Project.

28. Finally, the Commission approves MarkWest's proposal that, at the end of the 15-year primary term of a Committed Shipper's TSA, the shipper will have the opportunity to extend the terms of its TSA for an additional five-year term at the rates and committed volume levels established in the TSA and thereafter for consecutive five-year terms until cancelled by either party.

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.