

148 FERC ¶ 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

White Cliffs Pipeline, L.L.C.

Docket No. OR14-30-000

DECLARATORY ORDER

(Issued July 15, 2014)

1. On May 9, 2014, White Cliffs Pipeline, L.L.C (White Cliffs) filed a Petition for Declaratory Order (Petition). White Cliffs seeks approval of the overall tariff, rate, and priority service structure for a proposed expansion of White Cliffs' existing crude oil pipeline (Expansion). White Cliffs requests Commission action on its Petition by July 15, 2014, so that service on the Expansion can commence August 1, 2014.

2. White Cliffs states that the Expansion will double the pipeline's current 55,000 barrels per day (bpd) capacity and will parallel the existing 12-inch pipeline that extends approximately 527 miles from the Wattenberg Field in Colorado's Denver-Julesburg Basin (D-J Basin) to the Cushing, Oklahoma Hub (White Cliffs Pipeline). White Cliffs emphasizes that it will preserve existing shippers' capacity rights and that uncommitted shippers also will have access to the capacity they currently have after the Expansion service commences.¹

3. Noble Energy, Inc. (Noble) and Kerr McGee Oil & Gas Onshore, LP (Kerr McGee) intervened and filed limited protests. Although both expressed support for the Expansion and the terms agreed to by committed shippers in the Throughput and Deficiency Agreements (T&D Agreement), they contend that White Cliffs recently executed T&D Agreements with one or more additional shippers that did not participate in the 2012 open season. Noble and Kerr McGee ask the Commission to reject any capacity allocation to these new committed shippers, and they further ask the Commission to require White Cliffs to conduct a new open season so that it can offer additional Expansion capacity to both current and prospective committed shippers.

¹ White Cliffs anticipates that the use of a drag reducing agent will increase the capacity of the Expansion to approximately 80,000 bpd.

4. White Cliffs filed an answer to the limited protests of Noble and Kerr McGee, contending that they failed to show any violation of the Interstate Commerce Act (ICA).² White Cliffs asks the Commission to deny the limited protests.

5. Noble filed an answer to White Cliffs' answer, arguing that White Cliffs failed to comply with its own open season procedures. Further, Noble contends that White Cliffs' answer mischaracterizes the relief that Noble seeks, that it does not seek a right of first offer, and that an additional open season would not afford it an unfair competitive advantage. Rather, states Noble, it merely asks the Commission to remove the competitive disadvantage and put all customers on an equal footing.

6. Kerr McGee also filed an answer to White Cliffs' answer, arguing that White Cliffs failed to comply with its own open season procedure and Commission policy. Kerr McGee further contends that market conditions have changed since the 2012 open season and that White Cliffs cannot rely on the 2012 bids to determine whether shippers are interested in surplus Expansion capacity. White Cliffs filed an additional answer to the answers of Noble and Kerr McGee, largely disputing their interpretations of Commission precedent.

7. As discussed below, the Commission accepts the rate and priority service structure for the Expansion as set forth in the T&D Agreement and the 2012 open season. Further, the Commission finds that by offering the surplus Expansion capacity only to specific shippers, White Cliffs afforded those shippers an undue preference as compared to all potential shippers, including Noble and Kerr McGee to the extent that those shippers might have wished to increase the amount of Expansion capacity for which they previously contracted. Accordingly, the Commission voids the T&D Agreements executed after the 2012 open season and directs White Cliffs to hold a new open season to permit all potentially interested shippers to have an equal opportunity to acquire surplus Expansion capacity.

Background

8. According to White Cliffs, in 2012, shippers began expressing interest in an expansion of the pipeline, and in fact, nominations for service on the White Cliffs Pipeline have exceeded its capacity since September 2013.³ Therefore, continues White

² 49 App. U.S.C. § 1, *et seq.* (1988).

³ White Cliffs cites Affidavit of Peter L. Schwiering in Support of the Petition for Declaratory Order of White Cliffs Pipeline, L.L.C. attached to the Petition as Attachment A at PP 10, 12 (Schwiering Affidavit). White Cliffs relies on the Schwiering Affidavit throughout the Petition.

Cliffs, it conducted an open season to obtain shipper commitments to support the Expansion. White Cliffs adds that the Expansion, including the necessary pumps and control equipment at Platteville, Sharon Springs, and Cunningham, Kansas, will cost approximately \$300 million.

9. According to White Cliffs, in 2007, two shippers entered into throughput and deficiency agreements (similar to the current T&D Agreement) for 20,000 bpd of the White Cliff Pipeline's original 29,700 bpd of capacity. White Cliffs emphasizes that these shippers have increased their production substantially and that certain uncommitted shippers also began transporting volumes on the White Cliffs Pipeline, causing demand to exceed that pipeline's capacity. White Cliffs also explains that, as demand increased, it added pump stations that increased the White Cliffs Pipeline's capacity to 55,000 bpd, although the need for additional capacity continues. In particular, White Cliffs cites the following in support of its assertion that additional capacity is warranted:

- a. Data from the Colorado Oil and Gas Conservation Commission and Colorado Geological Survey show that Colorado crude oil production has hit a 50-year high of nearly 48 million barrels. The most significant jump has occurred between 2009 and 2012, as Colorado oil production nearly doubled.
- b. The Niobrara Shale is experiencing substantial growth in oil production, especially in the D-J Basin. Gross oil production from the Colorado Niobrara Shale formation increased from 2007 to 2011, at a compound annual growth rate of approximately 67.1 percent. In November 2013, 50 rigs were running in the D-J Basin, a 50-percent increase in just 22 months, according to a rig count conducted by Baker Hughes, an oil field services company.
- c. Noble and Anadarko Wattenberg Company, LLC (Anadarko) are the most active players in the region. Noble has estimated its Niobrara reserves at the equivalent of 2.1 billion barrels and has stated that it plans to spend \$10 billion in the D-J Basin over the next five years. In addition, Noble plans to increase the number of wells drilled in the Weld County portion of the basin to 500 a year by 2017. Similarly, Anadarko has estimated its Niobrara reserves at the equivalent of 1.5 billion barrels, and it plans to drill more than 360 wells in the region in 2014.
- d. The Expansion will complement other existing projects that will help move crude oil from Cushing to the Gulf Coast. For example, Seaway Crude Pipeline Company LLC completed its pipeline reversal from Cushing to the Gulf Coast in 2012, and expected to complete a second loop of the existing line from Cushing to the Gulf Coast in the first half of 2014. Further, the southern portion of TransCanada's Keystone XL pipeline commenced

service from Cushing to Texas in January 2014, and Shell Pipeline Company LLC has completed its Ho-Ho pipeline reversal, permitting service from the Houston area to the Texas Gulf Coast, with increases in capacity expected by the end of 2014.

Open Season

10. White Cliffs states that it conducted a widely-publicized public open season from September 21, 2012, to October 22, 2012, to obtain sufficient volume commitments from shippers to allow it to determine the viability of the Expansion. However, White Cliffs also points out that it extended the open season to October 24, 2012, by providing additional public notice, as well as notice to all interested shippers. White Cliffs contends that all interested shippers had an equal right and opportunity to participate in the open season, and it states that it provided the *pro forma* T&D Agreement to potential shippers, asking that each make a minimum binding commitment of 5,000 bpd for a minimum term of five years. According to White Cliffs, it obtained volume commitments that it deemed sufficient to allow it to move forward with the Expansion, although it did not receive commitments for all of the capacity available for committed shippers. White Cliffs contends that its conduct of the 2012 open season is consistent with similar pipeline actions accepted by the Commission as not unduly discriminatory or preferential.⁴

Requested Rulings

11. White Cliffs states that the ICA gives the Commission discretion to approve priority contract service and volume discounts under appropriate circumstances. White Cliffs cites ICA section 1(4), which provides in part that “[i]t shall be the duty of every common carrier . . . to provide and furnish transportation upon reasonable request therefor. . . .”⁵ Moreover, continues White Cliffs, ICA section 3(1) provides in part that “[i]t shall be unlawful for any common carrier . . . to make, give, or cause any undue or unreasonable preference or advantage to any particular person. . . .”⁶

⁴ White Cliffs cites, *e.g.*, *Shell Pipeline Company LP*, 139 FERC ¶ 61,228, at P 20 (2012); *Sunoco Pipeline L.P.*, 137 FERC ¶ 61,107, at P 15 (2011); *Mid-America Pipeline Company, LLC*, 136 FERC ¶ 61,087, at P 19 (2011); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at P 19 (2007).

⁵ 49 U.S.C. App. § 1(4) (1988).

⁶ 49 U.S.C. App. § 3(1) (1988).

12. White Cliffs asserts that the Commission has considerable discretion to determine the reasonableness of a pipeline's actions, taking into account current industry conditions.⁷ Additionally, White Cliffs points out that the Commission has held that “[t]here is no single method of allocating capacity in times of excess demand on oil pipelines and pipelines should have some latitude in crafting capacity allocation methods to meet circumstances specific to their operations.”⁸

13. White Cliffs maintains that the Commission has recognized that it is appropriate to use the declaratory order mechanism to provide advance regulatory approval of the rates and terms of service before a pipeline undertakes major capital expenditures for projects of this nature.⁹ White Cliffs argues that the terms of the T&D Agreement, including the tariff, rate, and priority service structure of the Expansion, are fully consistent with Commission precedent.¹⁰ White Cliffs asks the Commission to issue a declaratory order finding as follows:

- a. The terms of the T&D Agreements entered into by the committed shippers for the Expansion capacity (including the agreed-upon tariff, rate, and priority service structure) will be upheld and applied during the agreed term of the T&D Agreements.
- b. The rates provided in the T&D Agreements will be treated as settlement rates during the term of the T&D Agreements, including upon their initial

⁷ White Cliffs cites, *e.g.*, *Sea-Land Service Inc. v. ICC*, 738 F.2d 1311, 1319 (D.C. Cir. 1984); *Indiana Harbor Belt R.R. Co. v. United States*, 510 F.2d 644, 649 (7th Cir. 1975).

⁸ White Cliffs cites, *e.g.*, *Bridger Pipeline, LLC*, 123 FERC ¶ 61,081 (2008); *Platte Pipe Line Co.*, 117 FERC ¶ 61,296 (2006); *Mid-America Pipeline Company, LLC*, 106 FERC ¶ 61,094, at 61,336 (2004); *Total Petroleum, Inc. v. Citgo Products Pipeline*, 76 FERC ¶ 61,164 (1996).

⁹ White Cliffs cites, *e.g.*, *Express Pipeline P'ship*, 76 FERC ¶ 61,245, at 62,252 (1996).

¹⁰ White Cliffs cites, *e.g.*, *NuStar Crude Oil Pipeline L.P.*, 146 FERC ¶ 61,146, at PP 13-16 (2014); *Enterprise TE Products Pipeline Co.*, 144 FERC ¶ 61,092, at PP 4-5, 16, 24 (2013) (*Enterprise TE*); *Sunoco Pipeline, L.P.*, 142 FERC ¶ 61,115, at PP 5, 19-20 (2013); *Skelly-Belview Pipeline Co., L.L.C.*, 138 FERC ¶ 61,153, at PP 6, 16-18 (2012); *Sunoco Pipeline L.P.*, 137 FERC ¶ 61,107, at PP 6, 14-15 (2011); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at PP 16-17 (2007); *Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040, at P 24 (2006).

filing and in the agreed-upon escalation filings, pursuant to section 342.4(c) of the Commission's regulations.¹¹

- c. White Cliffs may provide up to 90 percent of the capacity created by the Expansion as priority committed capacity at a premium rate for shippers that have committed to ship or pay for specified volumes, pursuant to the terms of the T&D Agreements.

14. White Cliffs states that it offered potential shippers the opportunity to obtain priority service by paying a premium of \$0.01 per barrel above the uncommitted shipper rate. White Cliffs explains that this will allow the committed shippers to avoid prorationing of their committed volumes under normal operating conditions without being subject to allocation resulting from nominations to the same delivery points by uncommitted shippers that have paid lower rates for short-term financial commitments.¹² Moreover, continues White Cliffs, all rates for committed and uncommitted shippers will be subject to annual adjustments in accordance with the Commission's indexing methodology;¹³ however, under the terms of the T&D Agreements, the annual changes will not exceed two percent. White Cliffs contends that these features are consistent with Commission precedent.¹⁴

15. White Cliffs further states that the Commission's regulations provide that initial rates may be established by a cost-of-service showing or by the agreement of an unaffiliated shipper, provided that the agreed-to initial rate may be protested, which would require the pipeline to provide schedules to the cost-of-service used to derive the

¹¹ 18 C.F.R. § 342.4(c) (2013).

¹² White Cliffs states that it is not requesting Commission approval of any specific committed rate in this proceeding. White Cliffs states that it will file the proposed committed rate and the uncommitted rate shortly before it places the Expansion in service and that it will file the uncommitted rate pursuant to the Commission's regulations for initial rates. 18 C.F.R. § 342.2 (2013).

¹³ White Cliffs cites 18 C.F.R. § 342.3 (2013).

¹⁴ White Cliffs cites, *e.g.*, *NuStar Crude Oil Pipeline L.P.*, 146 FERC ¶ 61,146 (2014); *Enterprise TE Products Pipeline Co.*, 144 FERC ¶ 61,092 (2013); *Sunoco Pipeline, L.P.*, 142 FERC ¶ 61,115 (2013); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,249 (2012); *Sunoco Pipeline, L.P.*, 139 FERC ¶ 61,259 (2012); *Shell Pipeline Company LP*, 139 FERC ¶ 61,228 (2012); *Sunoco Pipeline L.P.*, 137 FERC ¶ 61,107 (2011); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007).

proposed rate.¹⁵ However, White Cliff's contends that the Commission's long-standing policy with respect to shippers that have executed long-term agreements as part of an open season is to permit the petitioning carrier to file, and the Commission to treat, such rates as settlement rates.¹⁶ White Cliffs cites *Seaway Crude Pipeline Company LLC*, in which the Commission stated that "[A]lthough 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."¹⁷ White Cliffs adds that the Commission previously has allowed pipelines to request waiver of the requirement for a 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."¹⁸

16. White Cliffs points out that the committed shippers have agreed to multi-year commitments to ship or pay for a minimum volume of 5,000 bpd. In contrast, continues White Cliffs, uncommitted shippers that did not choose to enter into T&D Agreements will pay only for volumes shipped. However, White Cliffs clarifies that both committed and uncommitted shippers have the right to volume discounts for uncommitted volumes shipped based on the amount of uncommitted volumes shipped each month. White Cliffs explains that the volume incentive rates decrease as the volume of crude oil shipped increases and are tiered based on approximately 10,000 bpd increments.¹⁹

¹⁵ White Cliffs cites 18 C.F.R. § 342.2 (2013). See also *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at PP 14, 19 (2007).

¹⁶ White Cliffs cites 18 C.F.R. § 342.4(c) (2013); *NuStar Crude Oil Pipeline L.P.*, 146 FERC ¶ 61,146, at P 15 (2014); *Kinder Morgan Pony Express Pipeline LLC and Belle Fourche Pipeline Co.*, 141 FERC ¶ 61,180, at P 21 (2012). White Cliffs states that in contrast to rates established pursuant to 18 C.F.R. § 342.2, a protest to settlement rates established pursuant to 18 C.F.R. § 342.4(c) must assert that the rate "is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable." See *Chevron Pipe Line Co.*, 95 FERC ¶ 61,059, at 61,161 (2001); 18 C.F.R. § 343.2(c)(2) (2013).

¹⁷ *Seaway Crude Pipeline Co. LLC*, 142 FERC ¶ 61,201, at P 12 (2013) (quoting *Express Pipeline P'ship*, 76 FERC ¶ 61,245, at 62,258-59 (1996)).

¹⁸ *Seaway Crude Pipeline Co.*, 142 FERC ¶ 61,201, at P 12 (2013).

¹⁹ White Cliffs cites, e.g., *Shell Pipeline Company LP*, 139 FERC ¶ 61,228, at PP 22-23 (2012); *Mid-America Pipeline Co.*, 116 FERC ¶ 61,040, at PP 23-24 (2006); *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219, at 61,866 (2002).

17. White Cliffs next asserts that the proposed Expansion is consistent with Commission precedent because White Cliffs has reserved up to 90 percent of the capacity for volumes shipped by committed shippers, but has ensured that shippers of uncommitted volumes will have access to at least 10 percent of the capacity.²⁰ White Cliffs observes that although the Commission “has not established a stated minimum percentage of capacity that must be set aside” for uncommitted shippers and has made clear that “[e]ach proposal presented to the Commission is appraised on its own merits,”²¹ the Commission has indicated that reservation of 10 percent of capacity is sufficient to provide reasonable access for shippers of uncommitted volumes.²²

Public Notice and Interventions

18. Notice of the filing was issued May 15, 2014, with interventions and protests due June 2, 2014. Pursuant to Rule 214 of the Commission’s regulations,²³ 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 delay or disrupt the proceeding or place additional burdens on existing parties.

19. As stated above, Noble and Kerr McGee intervened in support of the Expansion, but protested White Cliffs’ execution of T&D Agreements with certain shippers subsequent to the 2012 open season, allegedly without notice to all potentially interested shippers that additional committed capacity was available. White Cliffs filed a motion for leave to answer and an answer to the limited protests, and both Noble and Kerr McGee filed answers to White Cliffs’ answer. White Cliffs then filed an additional answer. The Commission’s regulations generally prohibit answers to answers; however, the answers of the parties have provided additional facts and arguments for the Commission’s consideration in reaching its decision in this proceeding.

²⁰ White Cliffs cites, *e.g.*, *Sunoco Pipeline, L.P.*, 139 FERC ¶ 61,259, at PP 9-15 (2012).

²¹ White Cliffs cites *CCPS Transportation, LLC*, 122 FERC ¶ 61,123, at P 14 (2008).

²² White Cliffs cites, *e.g.*, *NuStar Crude Oil Pipeline L.P.*, 146 FERC ¶ 61,146, at P 13 (2014); *Enterprise TE Products Pipeline Co.*, 144 FERC ¶ 61,092, at PP 5, 16, 24 (2013).

²³ 18 C.F.R. § 385.214 (2013).

Limited Protests

20. Noble and Kerr McGee contend that White Cliffs' only truly "open" season extended from September 21, 2012, to October 24, 2012. Both maintain that the amended open season extension notice clearly stated that priority service would be available only to shippers that committed to the Expansion before the October 24, 2012 deadline.²⁴ Noble and Kerr McGee state that they executed T&D Agreements in response to White Cliffs' open season notice.

21. However, Noble and Kerr McGee state that they have learned within the last few months that White Cliffs has entered into one or more additional T&D Agreements to provide priority service on the Expansion to shippers that did not participate in the open season. Noble and Kerr McGee contend that they were not notified that additional priority service capacity was available. Further, they argue that White Cliffs' post-2012 open season action making priority service available to certain customers but not to others is discriminatory because shippers that participated in the 2012 open season did not have an opportunity to increase their volume commitments commensurate with more recent production forecasts. Additionally, they assert that White Cliffs' actions also denied those that did not participate in the 2012 open season any opportunity to obtain priority service at a later date.

22. Noble argues that the violation is more egregious because White Cliffs made it clear that it was the 2012 open season shipper commitments that caused it to determine that it had adequate financial support to undertake the Expansion. In contrast, states Noble, the newly-accepted committed shippers did not provide that support and are not similarly-situated with respect to those that made their commitments during the 2012 open season.²⁵ Both Noble and Kerr McGee insist that the Commission must direct White Cliffs to offer a second open season so that all interested shippers, including those that previously made commitments, will have the opportunity to obtain additional capacity and priority service.

23. Noble and Kerr McGee contend that White Cliffs violated ICA sections 1(6) and 3(1) and also violated Commission policy by failing to follow the open season

²⁴ Petition for Declaratory Order of White Cliffs Pipeline, L.L.C., Attachment B (Notice of Open Season (Binding)) dated September 21, 2012 (As amended October 19, 2012) at 3.

²⁵ Noble cites *Enbridge Pipelines (Southern Lights) LLC*, 141 FERC ¶ 61,244, at P 26 (2012) (*Enbridge (Southern Lights)*).

procedures and requirements it announced to the marketplace.²⁶ They observe that the Commission's policy is that an oil pipeline must offer such priority service to all prospective shippers through a widely advertised and transparent open season process.²⁷ They contend that other pipelines that wished to offer additional priority service after the conclusion of an open season have followed the appropriate procedure and conducted additional open seasons.²⁸

24. According to Kerr McGee, the Commission has directed pipelines to redo or supplement open seasons when the Commission has found that all potential shippers were not afforded an equal opportunity to make volume commitments, regardless of whether they were existing or new shippers.²⁹ For example, Kerr McGee cites *Nexen*, asserting that the Commission found that Belle Fourche's method of allocating capacity provided an undue preference for historic shippers on the Belle Fourche system because, in the event that commitments exceeded the amount of expansion capacity, existing shippers would obtain up to 90 percent of the expansion capacity, and new shippers would be limited to 10 percent of the expansion capacity.³⁰ Kerr McGee points out that the Commission explained its action as follows:

The Commission requires Belle Fourche to redo its open season for expansion capacity so that all shippers are given an opportunity to make volume commitments regardless of whether they are Existing or New shippers under Belle Fourche's currently effective prorationing policy. If there are more volume commitments than expansion capacity, each shipper should receive a pro rata share of the capacity. In addition, if Belle Fourche intends to institute new

²⁶ 49 U.S.C. App. §§ 1(6), 3(1) (1988). Noble also cites, *e.g.*, *PBF Holding Co. v. Enbridge Energy, Limited Partnership*, 140 FERC ¶ 61,119, at P 18 n.2 (2012).

²⁷ Noble cites *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130, at P 27 (2013) (*CenterPoint*); *Magellan Pipeline Co., L.P.*, 138 FERC ¶ 61,177, at P 12 (2012).

²⁸ Noble cites, *e.g.*, *Enbridge Pipelines (Southern Lights), LLC*, 141 FERC ¶ 61,244, at P 8 (2012).

²⁹ Kerr McGee cites *Enterprise TE Products Pipeline Co., LLC*, 144 FERC ¶ 61,092 (2013) (*Enterprise TE*); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at P 17 (2007), *order on reh'g*, 122 FERC ¶ 61,123 (2008); *Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235, at P 50 (2007) (*Nexen*).

³⁰ Kerr McGee cites *Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235, at P 46 (2007).

prorating rules for the expansion capacity, the base period for calculating prorating cannot start before shipments commence on the expansion facilities.³¹

25. Additionally, Kerr McGee cites *Enterprise TE*, stating that the Commission required the pipeline to hold a supplemental open season because it failed to provide all shippers the opportunity to enter into or review the transportation service agreements relating to the expansion project.³² Kerr McGee also emphasizes that the Commission rejected the pipeline's claim that it was appropriate to screen potential shippers and send open season information only to those it deemed to be bona fide interested parties. Instead, continues Kerr McGee, the Commission held that the pipeline must afford the opportunity to all shippers willing and able to meet the contract's terms and that it could not limit the open season to shippers that are already in the market.³³

White Cliffs' Answer

26. In response to the limited protests, White Cliffs argues that neither Noble nor Kerr McGee has a preferential right for additional Expansion capacity. White Cliffs states that Noble and Kerr McGee were well aware of the amount of capacity for which they bid and the remaining Expansion capacity. White Cliffs contends that having held an open season during which shippers did not subscribe to all of the capacity, it had no obligation to hold an additional open season because there was no new or additional capacity, and it offered no different terms or conditions of service.

27. White Cliffs maintains that Noble and Kerr McGee have failed to show any undue preference or undue discrimination. According to White Cliffs, they did not establish that the committed shippers that executed T&D Agreements in 2014 did so on terms that were different from those of the T&D Agreements executed by Noble and Kerr McGee. Further, White Cliffs claims that the economic burdens are the same for Noble and Kerr McGee as those assumed by the newer committed shippers. White Cliffs asserts that *Enbridge (Southern Lights)* is inapplicable because there is only one class of committed

³¹*Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235, at PP 48, 50 (2007).

³² Kerr McGee cites *Enterprise TE Products Pipeline Co., LLC*, 144 FERC ¶ 61,092, at P 21 (2013).

³³ Kerr McGee cites *Enterprise TE Products Pipeline Co., LLC*, 144 FERC ¶ 61,092, at PP 22-23 (2013).

shippers in the instant case, none of which has any preferential right to additional Expansion capacity.³⁴

28. White Cliffs argues that Noble and Kerr McGee obtained priority service for the volumes they deemed appropriate for their operations and that they did not contact White Cliffs to obtain additional capacity. According to White Cliffs, the open season process does not guarantee a certain volume of service and also does not guarantee that there will be any capacity left for use on a non-priority basis beyond the 10 percent that is held for uncommitted shippers.

29. White Cliffs points out that the Commission previously has determined “that discrimination is undue when there is a difference in rates or services among similarly situated customers that is not justified by some legitimate factor.”³⁵ White Cliffs also cites *North Dakota Pipeline Co.*,³⁶ in which the anchor shipper for the proposed expansion was an affiliate of the pipeline, and the petition was protested because the project structure was claimed to be discriminatory and designed to confer economic benefits on the affiliated shipper at the expense of uncommitted shippers.³⁷ However, White Cliffs emphasizes that because the terms of the transportation service agreements recently were the same as those offered to other parties during the open season, the Commission found no issues of undue discrimination.³⁸

30. White Cliffs also rejects the claim that Noble and Kerr McGee are providing financial support to the Expansion, while the newer committed shippers are not. White Cliffs argues that the Commission has recognized that committed shippers share the financial risks of projects addressed in similar petitions for declaratory orders.³⁹ White Cliffs claims that the fact that not all of the T&D Agreements were executed during the open season does not mean that the shippers that executed T&D Agreements subsequent to the 2012 open season are not providing long term financial support.

³⁴ White Cliffs cites *Enbridge Pipelines (Southern Lights) LLC*, 141 FERC ¶ 61,244, at P 26 (2012).

³⁵ White Cliffs cites *California Independent System Operator Corp.*, 119 FERC ¶ 61,061, at P 69 (2007).

³⁶ 147 FERC ¶ 61,121, at PP 1-2 (2014) (*North Dakota*).

³⁷ *North Dakota Pipeline Co. LLC*, 147 FERC ¶ 61,121, at PP 6-20 (2014).

³⁸ *North Dakota Pipeline Co.*, 147 FERC ¶ 61,121, at P 27 (2014).

³⁹ White Cliffs cites, e.g., *Sunoco Pipeline L.P.*, 137 FERC ¶ 61,107, at PP 4-15 (2011).

31. Additionally, White Cliffs argues that the Commission should not require it to conduct a second open season to remedy the alleged discrimination. White Cliffs seeks to distinguish *Nexen*,⁴⁰ again observing that all committed shippers in the instant case had an equal opportunity to obtain Expansion capacity and to enter into T&D Agreements with the same rates, terms, and rights that it offered during the 2012 open season. White Cliffs emphasizes that Noble and Kerr McGee made commercial decisions to commit to certain levels of throughput during that open season.

32. White Cliffs disputes Kerr McGee's interpretation of *Enterprise TE*, stating that the protestors in that case claimed that the pipeline refused to provide open season documents to certain parties.⁴¹ White Cliffs emphasizes that it did not withhold open season information from any parties, all of which had the same opportunity to enter into T&D Agreements. White Cliffs argues that this satisfies the Commission's policy that committed rates are non-discriminatory "when the carrier offering such rates [makes] them available to 'any shipper willing and able to meet the contract's terms.'"⁴²

33. White Cliffs submits that its 2012 open season process was entirely sufficient. It cites Kerr McGee's claim that surplus capacity remaining after an otherwise proper open season may only be offered through an additional open season. White Cliffs states that Kerr McGee deliberately overlooks the fact that all potential shippers had the opportunity to contract for that capacity. In fact, continues White Cliffs, Kerr McGee openly acknowledged this fact in its protest, stating that the open season "was conducted in accordance with the Commission's policy, under which all shippers must be given an equal, non-discriminatory opportunity to review and contract for committed service."⁴³

34. White Cliffs further attempts to distinguish *CenterPoint*, contending that the case stands for the proposition that priority service is permissible under the ICA if the committed shippers paid a premium rate compared to uncommitted shippers and priority service options were offered during an open season.⁴⁴ White Cliffs states that holding a duplicative open season would harm the new committed shippers by voiding their agreements. Finally, White Cliffs emphasizes that there is currently no need for

⁴⁰ *Nexen*, 121 FERC ¶ 61,235, at PP 46, 50.

⁴¹ *Enterprise TE*, 144 FERC ¶ 61,092, at PP 13, 22-23.

⁴² *Enterprise TE Products Pipeline Co., LLC*, 144 FERC ¶ 61,092, at P 22 (2013).

⁴³ White Cliffs cites Motion to Intervene, Statement of Support, and Limited Protest of Kerr McGee Oil & Gas Onshore, LP, June 2, 2014, at 5.

⁴⁴ *Center Point*, 144 FERC ¶ 61,130, at P 27.

allocation among the committed shippers, but if Noble and Kerr McGee had an opportunity to acquire additional capacity, it would be at the expense of the other committed shippers.

Answers of Noble and Kerr McGee to White Cliffs' Answer

35. Kerr McGee and Noble emphasize that that the problem with White Cliffs' "continuation" of its open season is that no other shippers were aware of it, except for those that executed the T&D Agreements after the close of the 2012 open season. Kerr McGee states that giving favored shippers the opportunity to commit only months before the Expansion goes into service, rather than years earlier (as was the case with Kerr McGee and other potential shippers), demonstrates that the two groups of shippers are not similarly-situated.

36. Kerr McGee and Noble again point out that White Cliffs' 2012 open season originally ended on October 22, 2012, and that White Cliffs issued a supplemental notice, extending that open season to October 24, 2012, and requiring all prospective shippers to review and execute T&D Agreements by 5:00 p.m. on October 24. Kerr McGee and Noble also observe that nothing in the original or supplemental notice of the 2012 open season extended that open season beyond October 24, 2012, or permitted a shipper to enter into a T&D Agreement later than that date and on the same terms and conditions offered during the 2012 open season. Instead, states Kerr McGee, White Cliffs requested that shippers interested in the surplus Expansion capacity execute confidentiality agreements, after which White Cliffs provided those shippers with the *pro forma* T&D Agreement and offered the surplus capacity on a committed, priority service basis. Both Kerr McGee and Noble contend that they merely seek an equal opportunity to bid for surplus Expansion capacity, so they ask the Commission to void the T&D Agreements executed outside of the 2012 open season.

37. Kerr McGee disputes White Cliffs' interpretation of *Nexen*. Kerr McGee maintains that the Commission required the pipeline in that case to redo its open season for expansion capacity so that all shippers would be afforded an opportunity to make volume commitments regardless of whether they were existing or new shippers under the pipeline's then-effective prorationing policy.⁴⁵

38. Likewise, Kerr McGee and Noble find no merit in White Cliffs' effort to analogize its "continuous open season process" with the open season addressed in *North Dakota*.⁴⁶

⁴⁵ *Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235, at P 50 (2007).

⁴⁶ 147 FERC ¶ 61,121 (2014)

In that case, asserts Kerr McGee, the Commission addressed protestors' concerns that there were issues of undue discrimination because the pipeline signed a transportation service agreement with one of its affiliates. However, continues Kerr McGee, the Commission found no issues of undue discrimination because all potential shippers had the opportunity to sign such an agreement.⁴⁷ Kerr McGee emphasizes that White Cliffs omits the detail that the transportation service agreements in that case were signed during the open season.

39. Kerr McGee and Noble argue that, since the conclusion of the 2012 open season, market conditions have changed, so White Cliffs could not rely on prior bids to determine whether those shippers were interested in the surplus capacity. They assert that nearly two years after the 2012 open season, they have additional information about current market conditions and the factors affecting market conditions. Kerr McGee also claims that White Cliffs is incorrect in stating that neither it nor Noble indicated any further interest in the capacity. Kerr McGee states that it asked White Cliffs to grant it a right of first refusal to acquire surplus capacity. However, Kerr McGee states that White Cliffs denied its request.⁴⁸ Noble states that it never sought a similar right.

40. Kerr McGee points out that since the 2012 open season, it has built up a shipper history by using uncommitted capacity, a substantial portion of which would be consumed by the committed capacity awarded to shippers after the 2012 open season.⁴⁹ Kerr McGee cites *Enterprise TE*, observing that the Commission stated as follows in that case:

Contract rates can only satisfy the principle of nondiscrimination when the carrier offering such rates is required to make them available to “any shipper willing and able to meet the contract’s terms.” All prospective shippers must have an equal,

⁴⁷ *North Dakota Pipeline Co.*, 147 FERC ¶ 61,121, at P 27 (2014).

⁴⁸ Kerr McGee cites the Motion to Intervene, Statement of Support, and Limited Protest of Kerr McGee Oil & Gas Onshore, LP, Exhibit A (Verified Statement of Glenn Karnei) June 2, 2014, at 6. Kerr McGee states that White Cliffs claimed that it was not permitted to offer a right of first refusal, which Kerr McGee contends is incorrect. See *Enbridge Pipelines (Southern Lights) LLC*, 141 FERC ¶ 61,244 (2012).

⁴⁹ Kerr McGee cites the Motion to Intervene, Statement of Support, and Limited Protest of Kerr McGee Oil & Gas Onshore, LP, Exhibit A (Verified Statement of Glenn Karnei) June 2, 2014, at 8.

non-discriminatory opportunity to review and enter into contracts for committed service.⁵⁰

Kerr McGee emphasizes that the Commission conditionally approved Enterprise TE's petition for declaratory order because the pipeline essentially screened potential shippers and only sent information to shippers it deemed to be "bona fide interested parties,"⁵¹ which the Commission found to be contrary to Commission precedent and the ICA. Kerr McGee points out that the Commission stated that "[i]n order for the common carriage and anti-discrimination provisions of the ICA to be met, any shipper willing and able to ship product under substantially similar circumstances and conditions as another shipper must be afforded the opportunity to join a similar contract."⁵²

41. Kerr McGee states that it is irrelevant whether the amount of capacity sought by the new committed shippers was within the 90 percent of the Expansion capacity previously made available or whether the T&D Agreements executed after the 2012 open season contained the same terms as those executed in response to the 2012 open season. According to Kerr McGee, Commission policy requires that all shippers, both existing and prospective, be given an equal opportunity to obtain expansion capacity.⁵³ Kerr McGee reiterates that the common carriage and anti-discrimination provisions of the ICA require that any shipper willing and able to ship product under substantially similar circumstances and conditions must be given the opportunity to join a similar contract.⁵⁴

42. Moreover, continues Kerr McGee, by electing not to hold another open season, White Cliffs essentially reserved or set aside the surplus Expansion capacity for the shippers that executed T&D Agreements after the close of the 2012 open season. Kerr McGee points out that, in the event the volume commitments exceed 90 percent of the Expansion capacity, the volume commitments could be prorated,⁵⁵ putting Kerr McGee and any other previous committed shipper at a disadvantage.

⁵⁰ *Enterprise TE*, 144 FERC ¶ 61,092, at P 22 (footnote omitted).

⁵¹ *Enterprise TE*, 144 FERC ¶ 61,092, at P 23.

⁵² *Enterprise TE Products Pipeline Co.*, 144 FERC ¶ 61,092, at P 23 (2013).

⁵³ Kerr McGee Cites *Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235, at P 46 (2007).

⁵⁴ Kerr McGee cites *Enterprise TE Products Pipeline Co.*, 144 FERC ¶ 61,092, at P 23 (2013).

⁵⁵ Kerr McGee cites *MarkWest Liberty Ethane Pipeline, L.L.C.*, 145 FERC ¶ 61,287, at PP 25, 27 (2013).

White Cliffs' Answer to the Answers

43. White Cliffs filed an answer to the answers of Noble and Kerr McGee. White Cliffs argues that it held a widely publicized open season and, as a continuation of that open season, it executed T&D Agreements with other committed shippers with rates and terms identical to those executed by Noble and Kerr McGee. According to White Cliffs, the claims that priority service was available only during the 2012 open season do not require it to hold an additional open season. White Cliffs further contends that it has not offered “additional priority service” because the T&D Agreements executed in 2014 were for unsubscribed capacity remaining after the 2012 open season, and the protesting parties were well aware that capacity remained unsubscribed after that open season.⁵⁶ White Cliffs argues that the fact that they subscribed to less than all of the available Expansion capacity and now appear unhappy with that season does not constitute a violation of the 2012 open season terms or Commission policy. Finally, White Cliffs disputes what it calls the mischaracterization of certain cases it cited, including *North Dakota*⁵⁷ and *Nexen*.⁵⁸

Commission Analysis

44. The Commission will grant the rulings requested by White Cliffs insofar as they apply to the T&D Agreements executed at the close of the 2012 open season, as extended to October 24, 2012.

45. The Expansion will double White Cliffs' capacity to transport crude oil to the Cushing, Oklahoma Hub from the D-J Basin, which is expected to yield dramatically increased volumes of crude oil over the next few years. The Commission finds that White Cliffs conducted its 2012 open season in a manner consistent with the ICA's requirements and Commission precedent. The open season was widely advertised and afforded all potentially interested shippers a fair and equal opportunity to become committed shippers on the Expansion capacity.

46. The terms of the T&D Agreements, including the agreed tariff, rate, and priority service provisions, are consistent with Commission precedent. Additionally, White Cliffs

⁵⁶ White Cliffs cites Motion for Leave to Answer and Answer of White Cliffs Pipeline, L.L.C. to the Limited Protests of Kerr McGee Oil & Gas Onshore, LP and Noble Energy, Inc., Attachment A, June 9, 2014, at P 6.

⁵⁷ *North Dakota Pipeline Co.*, 147 FERC ¶ 61,121 (2014).

⁵⁸ *Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235 (2007).

appropriately proposes to reserve 10 percent of the Expansion capacity for uncommitted shippers. Its rates provide priority firm service for shippers willing to pay a premium rate and guarantee to ship a minimum volume each day for a minimum term. Both committed and uncommitted shippers will have the ability to ship greater quantities in accordance with a tiered rate structure that decreases the applicable rates as the shipper increases the volumes shipped. White Cliffs' proposal to adjust both committed and uncommitted rates annually in accordance with the Commission's rate indexing procedure, subject to a two-percent limitation, is acceptable as well. Finally, White Cliffs' proposal to treat the rates provided in the T&D Agreement as settlement rates is consistent with Commission precedent.

47. However, White Cliffs' execution of any T&D Agreements after the 2012 open season contravenes the requirements of the ICA, as well as Commission policy and precedent, and the Commission will require White Cliffs to conduct an additional open season to afford all potentially interested shippers (including Noble and Kerr McGee) a fair and equal opportunity to acquire the surplus Expansion capacity that remained following the close of the 2012 open season. For this reason, any T&D Agreements with shippers executed after the close of the 2012 open season are invalid.

48. Moreover, White Cliffs violated the explicit terms of its own amended notice that extended the 2012 open season to October 24, 2012. In the amended notice, White Cliffs unambiguously stated that "[t]o indicate interest in the expansion capacity to be provided by White Cliffs, a shipper must complete and execute two original copies of the T&D Agreement attached hereto. All signed T&D Agreements must be received by White Cliffs no later than 5:00 P.M. (CDT) on October 24, 2012."⁵⁹ The amended notice contained nothing that supports White Cliffs' actions in privately awarding surplus Expansion capacity at any point following that deadline.

49. Moreover, White Cliffs' adherence to Commission policy in establishing and extending the 2012 open season with an amended notice is inconsistent with its claim that an additional open season was not required for it to award the surplus Expansion capacity more than a year after the close of the 2012 open season. There is also no merit to White Cliffs' assertions that the capacity awarded in recent months was part of the capacity originally reserved for committed shippers and that the newer T&D Agreements contained the same rates and terms of service offered during the 2012 open season. It is undisputed that White Cliffs executed T&D Agreements with other shippers after the 2012 open season without making the surplus Expansion capacity available to all potential shippers. In doing so, it acted in a discriminatory manner and afforded an

⁵⁹ Petition for Declaratory Order of White Cliffs Pipeline, L.L.C., Attachment B (Notice of Open Season (Binding)) dated September 21, 2012 (As amended October 19, 2012) at 4.

undue preference to the shippers that contracted for that capacity outside of a valid open season process.

50. All of the arguments raised by White Cliffs in an effort to justify its private award of the surplus Expansion capacity are irrelevant and unpersuasive in light of White Cliffs' failure to meet the basic obligations of the ICA. For example, even if Noble and Kerr McGee were aware of the surplus Expansion capacity, and even if they could have subscribed for more Expansion capacity in 2012, White Cliffs itself describes the recent and anticipated production increases and market changes in the D-J Basin region. That information reasonably could cause Noble and Kerr McGee to seek additional Expansion capacity.

51. While White Cliffs seeks to distinguish the cases on which Noble and Kerr McGee rely, White Cliffs' basic common carrier and anti-discrimination obligations are the same as the pipelines that were the subject of those earlier cases. In *Enterprise TE*, the Commission stated as follows:

Contract rates can only satisfy the principle of nondiscrimination when the carrier offering such rates is required to make them available to "any shipper willing and able to meet the contract's terms." All prospective shippers must have an equal, non-discriminatory opportunity to review and enter into contracts for committed service.

...

In order for the common carriage and anti-discrimination provisions of the ICA to be met, any shipper willing and able to ship product under substantially similar circumstances as another shipper must be afforded the opportunity to join a similar contract.⁶⁰

52. Accordingly, the Commission conditionally grants the rulings requested in the Petition with respect to the Expansion capacity subscribed during the 2012 open season. If White Cliffs wishes to obtain commitments for the surplus Expansion capacity on the same terms, it must conduct a new widely publicized public open season to give all potential shippers an equal opportunity to enter into similar contracts.

⁶⁰ *Enterprise TE Products Pipeline Co., LLC*, 144 FERC ¶ 61,092, at PP 22-23 (2013) (citing *Sea-Land Svc., Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984); *Express Pipeline P'ship*, 76 FERC ¶ 61,245, at 61,245 (1996)).

The Commission orders:

(A) As discussed in the body of this order, the Commission grants the rulings requested in White Cliffs' Petition with respect to the Expansion capacity awarded to committed shippers at the close of the 2012 open season.

(B) If White Cliffs wishes to have those rulings apply to the surplus Expansion capacity, it must conduct an additional widely publicized and public open season and provide all potential shippers the opportunity to enter into T&D Agreements for that capacity.

(C) Any T&D Agreements executed since the close of the 2012 open season are invalid as the result of White Cliffs' failure to comply with the requirements of the ICA and Commission precedent.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.