149 FERC ¶ 61,001
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Alpha Crude Connector, LLC — Docket No. OR14-37-000

DECLARATORY ORDER

(Issued October 1, 2014)

1. On July 3, 2014, Alpha Crude Connector, LLC (Alpha)[1] filed a Petition for Declaratory Order (Petition) seeking Commission approval of the overall tariff and rate structure and the proposed apportionment policy for a new crude oil pipeline system (Project) to be located in Eddy and Lea Counties, New Mexico, and Culberson, Loving, Reeves, and Winkler Counties, Texas. Alpha states that the Project is designed to transport crude oil produced in the northern Delaware Basin in southeastern New Mexico and West Texas to points of interconnection with the Genesis Energy, L.P rail terminal and multiple long-haul pipelines[2] from which the crude oil will be re-delivered to major hubs at Cushing, Oklahoma, and the U.S. Gulf Coast, as well as to at least one refinery in New Mexico. Alpha requests Commission action on the Petition by October 1, 2014, so that it can commence service on the Project during the second half of 2015.

2. The Commission grants the rulings requested by Alpha, subject to conditions, as discussed below.

Background

3. Alpha states that the Project will consist of approximately 400 miles of pipeline with the capacity to accept more than 100,000 barrels per day (bpd) of crude oil from

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[1] Alpha states that it is a joint venture of Frontier Midstream Solutions, LLC (Frontier) and Concho Resources Inc.

[2] Alpha states that these pipelines include Plains Pipeline, L.P.; Kinder Morgan Wink Pipeline LLC; Holly Energy Partners – Operating L.P.; Enterprise Crude Pipeline LLC; and Western Refining Pipeline Company.

numerous lease tank batteries, other field receipt points, and a truck terminal in the northern Delaware Basin.[3] Alpha further states that, in addition to providing more pipeline transportation capacity to meet increasing demands from that area, the Project will ameliorate several current trucking concerns, including traffic safety, road deterioration, fuel usage, carbon emissions, and limited capacity at truck offload stations and injection points. Alpha anticipates that the Project will reduce crude oil truck traffic on area highways and lease roads by 300 to 500 truckloads per day.

4. Alpha explains that the Project will consist of two Segments. According to Alpha, Segment 1 will originate in Lea and Eddy Counties, New Mexico, and Culberson and Reeves Counties, Texas. Alpha further states that Segment 2 will originate at the Red Hills interconnection with Segment 1 in Lea County, New Mexico, and will terminate at Wink in Winkler County, Texas. Alpha points out that the Project initially will have one terminal at Red Hills for truck unloading and more than 300,000 barrels (bbl) of operational breakout storage to provide increased reliability to shippers. Although Alpha does not propose to offer commercial storage service at this time, it indicates that it may construct additional truck unloading terminals to accommodate production growth from new and existing shippers, as market conditions and service demand warrant.

Open Season

5. Alpha maintains that it conducted a widely-publicized open season for the Project from June 2, 2014, to July 1, 2014 (Open Season) seeking long-term acreage dedications or volume commitments from interested shippers.[4] Alpha explains that the documents provided during the Open Season described four proposed classes of committed service (Levels A-D, which are based on the level of volumes committed or the size of the acreage dedication) and a single class of uncommitted service.[5] According to Alpha, it advised that prospective shippers willing to execute Confidentiality Agreements would receive the following Open Season Documents: the *pro forma* Crude Petroleum

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[3] Alpha cites the affidavit of Dave Presley, which is Appendix A to the Petition (Affidavit). Throughout the Petition, Alpha relies on the Affidavit to support its arguments.

[4] Alpha states that the announcement provided contact information and a link to Frontier's website, which contained a section relating to the Project, including the Open Season Procedures and Documents, a map of the Project, relevant press releases, and the Confidentiality Agreement.

[5] Alpha states that the Open Season Procedures and Documents, as well as the Confidentiality Agreement, are attached to the Petition as Appendix D.

Dedication and Transportation Agreement (D&T Agreement) for acreage dedications, the *pro forma* Crude Petroleum Throughput and Deficiency Agreement (T&D Agreement) for volume commitments, the *pro forma* rules and regulations tariff, and the *pro forma* rates tariff. Additionally, Alpha states that it offered prospective shippers the option of electing either five or 10-year terms.

6. Moreover, continues Alpha, it advised potential shippers that it will reserve as much as 90 percent of the available Project capacity for shippers making long-term volume or acreage commitments during the Open Season (Committed Shippers). Alpha also points out that it informed prospective shippers that it will reserve at least 10 percent of the Project capacity for shippers that do not make long-term commitments during the Open Season, but instead elect to make timely monthly nominations (Uncommitted Shippers).

7. Alpha reports that 18 shippers executed Confidentiality Agreements and received the Open Season Documents at the July 2, 2014 close of the Open Season. Alpha emphasizes that it received sufficient commitments during the Open Season to support the Project; however, Alpha states that it also announced a second open season for the Project extending from July 2 to November 4, 2014 (Second Open Season) to afford interested parties an additional opportunity to become Committed Shippers. Alpha adds that during the Second Open Season, it offered prospective shippers the same Committed Shipper options that it offered during the Open Season.[6]

<u>Terms of Service</u>

8. Alpha states that the actual initial rate to be paid by Committed Shippers (Committed Shipper Rate) on Segment 1 of the Project will vary, depending on the size of the acreage dedication or volume commitment, as well as on the length of the contract term. However, continues Alpha, all Committed Shippers will pay an initial rate of $0.30 per bbl for service on Segment 2 of the Project.

9. Moreover, continues Alpha, the Committed Shipper Agreements contain a provision rolling over the term of the agreements from year to year after the primary term until terminated by either party providing 365 days prior notice.[7] Additionally, Alpha

[6] Alpha states that these options are reflected in Appendix E to the Petition, which includes the Committed Shipper Agreements, *pro forma* rates tariff, and *pro forma* rules and regulations tariff.

[7] Section 11.2 of the *pro forma* D&T Agreement and section 9.2 of the T&D Agreement also provide for early termination in specific situations.

states that the Committed Shipper Agreements provide most favored nation treatment for Level A Committed Shippers.

10. Alpha reiterates that at least 10 percent of the Project capacity will be reserved for Uncommitted Shippers. Alpha also states that the volume tiers will be the same for both the Committed Shippers and the Uncommitted Shippers, but that the initial rates to be paid by the Uncommitted Shippers for transportation service on Segment 1 of the Project (Uncommitted Shipper Rates) will be greater than the initial rates to be paid by the Committed Shippers. Further, Alpha states that both Committed and Uncommitted Shippers will pay the same $0.30/bbl initial rate for service on Segment 2 of the Project. Alpha explains that an Uncommitted Shipper will pay the applicable Uncommitted Shipper rate based on the level of volumes it transports on the Project in any month. Alpha adds that it will support the initial Uncommitted Shipper Rates as required by 18 C.F.R. § 342.2 (2014) when it files its rates tariff with the Commission.

11. Alpha next states that the Committed Shipper Agreements and *pro forma* rates tariff allow it to adjust both the Committed Shipper Rates and Uncommitted Shipper Rates annually beginning on the first July 1 after the date that is 365 days after the date on which Alpha commences service on the Project and each July 1 thereafter to reflect the annual inflation adjustments in accordance with 18 C.F.R. § 342.3 (2014). However, adds Alpha, the Committed Shipper Rates will not be adjusted downward to less than the initial rates to be charged Committed Shippers, as established in its initial rates tariff.

12. According to Alpha, a Pipeline Loss Allowance (PLA) of two-tenths of one percent will apply to quantities tendered at the receipt point(s) by all Level C and Level D Committed Shippers, as well as the Uncommitted Shippers. Further, states Alpha, the Level A and Level B Committed Shippers will be assessed a PLA of one-tenth of one percent in recognition of their more substantial commitments to the Project. Additionally, Alpha states that the Committed Shipper Agreements do not subject Level A and Level B Committed Shippers from the requirement to provide a sufficient amount of electricity to power the gathering pumps located at or near each receipt point.

13. Alpha points out that Committed Shippers will not receive firm service on the Project. Rather, states Alpha, Committed Shippers will be subject to the apportionment procedures set out in Item 70 of the *pro forma* rules and regulations tariff. Alpha proposes to apportion capacity among shippers on an equitable basis when nominations for transportation on a particular line segment are greater than the volume that can be transported immediately.

14. Alpha explains that it proposes to allocate space in each segment among "Regular Shippers"[8] and "New Shippers."[9] First, states Alpha, the capacity of the applicable line segment will be divided by the monthly total of all volumes nominated by Regular Shippers and New Shippers to produce a "proration factor." Next, continues Alpha, if application of the proration factor causes the allocation to New Shippers to be greater than 10 percent of the capacity of the applicable line segment, then each New Shipper will be allocated space equal to 10 percent of the segment capacity multiplied by the fraction derived from dividing its nomination by the total of all volumes nominated by New Shippers. Alpha adds that the remaining capacity will be allocated proportionally among Regular Shippers, as applicable to their nominations of volumes produced from acreage subject to a D&T Agreement, their nominations of volumes subject to a T&D Agreement, or their nominations of volumes equal to or below their shipments during a rolling 12-month base period.

Requested Rulings

15. Alpha asks the Commission to approve and confirm the following aspects of its proposal:

(a) The provisions of the Committed Shipper Agreements will govern the transportation services provided to Committed Shippers during the terms of such agreements.

(b) Alpha may implement a rate structure for the Project that establishes separate rates for four classes of Committed Shippers that will pay discounted initial Committed Shipper Rates, and the rates will vary depending on the acreage or volume commitments, as well as the contract terms. Further, the Level A and Level B Committed Shippers will be subject to a lower PLA. Additionally, Alpha may establish rates for one class of Uncommitted Shippers.

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[8] Alpha states that Item 70(c) of its *pro forma* rules and regulations tariff provides that a "Regular Shipper" is (1) a shipper having a record of movements in all months during a 12-month base period; (2) any shipper that has signed a Committed Shipper Agreement; and/or (3) any shipper receiving assignment of a Regular Shipper history in connection with the assignment of a Committed Shipper Agreement.

[9] Alpha states that Item 70(c) also defines a "New Shipper" as any shipper that is not a Regular Shipper.

(c) Alpha may offer up to 90 percent of the total Project capacity to Committed Shippers, with at least 10 percent of the remaining capacity reserved for Uncommitted Shippers.

(d) Shippers that executed Committed Shipper Agreements during the Open Season or the Second Open Season will pay Committed Shipper Rates based on the acreage or volumes to which they committed under the provisions of their Committed Shipper Agreements.

(e) Pursuant to section 342.4(c) of the Commission's regulations,[10] Alpha may file the Committed Shipper Rates as the equivalent of settlement rates that have been agreed to by all of the shippers paying those rates during the terms of their respective Committed Shipper Agreements, including as reflected in Alpha's initial rates tariff.

(f) The provision in the Committed Shipper Agreements providing for the term of each agreement to roll over from year to year after the primary term until terminated by Alpha or the Committed Shipper is consistent with Commission policy.

(g) Alpha's proposed apportionment policy, as reflected in Item 70 of its *pro forma* rules and regulations tariff, is reasonable and not unduly discriminatory.

<u>Alpha's Arguments</u>

16. Alpha maintains that a declaratory order approving its proposal will provide the regulatory certainty it needs before embarking on the capital-intensive Project.[11] Alpha points out that the Committed Shippers will make significant financial commitments to the Project as well.

17. According to Alpha, the Commission has stated in a number of cases that it will honor transportation service agreements executed by common carriers and their committed shippers, including the agreed-upon rate and terms of service, during the terms of the agreements. Alpha contends that its proposed rate structure is similar to those

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[10] 18 C.F.R. § 342.4(c) (2014).

[11] Alpha cites *Express Pipeline P'ship,* 76 FERC ¶ 61,245, at 62,253 (1996), *order on reh'g,* 77 FERC ¶ 61,188, at 61,755 (1997).

approved by the Commission in previous cases.[12] Alpha also cites *Enterprise Liquids Pipeline LLC*, observing that the Commission stated as follows:

> [A] volume incentive (or discounted) rate does not violate the anti-discrimination or undue preference provision of the Interstate Commerce Act (ICA) by virtue of being lower than the general commodity rate, so long as (1) all potential shippers had the opportunity to take advantage of the discounted rate and (2) the discount rate reflects the relevant differences among shippers.[13]

18. Alpha emphasizes that it's Open Season afforded all interested shippers the opportunity to become Committed Shippers and to take advantage of the discounted rates and other terms of service based on their acreage or volume commitments and contract terms. Further, argues Alpha, there is no undue discrimination or undue preference among the various proposed classes of shippers because none of the shipper classes is similarly situated with respect to the other shipper classes.[14] Specifically, states Alpha, its proposed Committed Shipper Rates vary inversely based on the size of the acreage or volume commitment and contract term, with larger acreage or volume commitments and longer contract term commitments providing the larger rate discounts.

19. Further, states Alpha, in recognition of the fact that Level A or Level B Committed Shippers have made the greatest volume or acreage commitments, the volumes they tender will be subject to a lower PLA charge. Alpha states in the Petition that it will bear the cost of the PLA discount afforded to these shippers and that the other shippers will not be responsible for that cost. However, continues Alpha, the other two classes of Committed Shippers (Level C and Level D) and the Uncommitted Shippers will be assessed a fixed PLA charge. Additionally, Alpha states that Level A and Level B Committed Shippers will not be required to provide electricity to power

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[12] Alpha cites *Enbridge Pipelines (FSP) LLC*, 146 FERC ¶ 61,148, at P 27 (2014); *Shell Pipeline Co., LP*, 146 FERC ¶ 61,051, at P 21 (2014); *MarkWest Liberty Ethane Pipeline, L.L.C.*, 145 FERC ¶ 61,287, at P 24 (2013); *KinderMorgan Pony Express Pipeline LLC and Belle Fourche Pipeline Co.*, 141 FERC ¶ 61,180, at PP 22-23 (2012); *Kinder Morgan Pony Express Pipeline, LLC and Hiland Crude, LLC*, 141 FERC ¶ 61,249, at P 22 (2012); *Shell Pipeline Co., LP*, 139 FERC ¶ 61,228, at P 8 (2012); *Mid-America Pipeline Co., LLC*, 136 FERC ¶ 61,087, at PP 9, 19 (2011).

[13] 142 FERC ¶ 61,087, at P 25 (2013). *See also TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025 (2008).

[14] Alpha cites *Sea-Land Services, Inc. v. ICC*, 738 F.2d 1311, 1319 (D.C. Cir. 1984); *Express Pipeline P'ship*, 76 FERC at 62,254.

gathering pumps because these two classes of Committed Shippers have made the greatest commitments for the longest terms.[15] According to Alpha, the most favored nation provision in the Committed Shipper Agreements also recognizes that Level A Committed Shippers have made the greatest acreage or volume and contract term commitments.[16] Alpha cites a Petition for Declaratory Order filed by Enable Bakken Crude Services, LLC (Enable) in Docket No. OR14-24-000, contending that Enable also argued that acreage dedications and volume commitments serve the same purpose, namely that both provide the project developer with assurance that there will be a sufficient level of product shipped on the pipeline to justify its investment in the future.[17]

20. Alpha next asserts that, notwithstanding the fact that "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."[18] Alpha further argues that the Commission has ruled in numerous declaratory orders that a common carrier can file committed rates as the equivalent of settlement rates under section 342.4(c) of its regulations.[19]

21. Alpha reiterates its pledge to reserve up to 90 percent of the Project's capacity for Committed Shippers and that at least 10 percent of the Project capacity will be reserved

[15] Neither the Affidavit nor the D&T Agreement specifies that Alpha will bear the cost of the electricity provided to Level A and Level B Committed Shippers.

[16] Alpha cites *Dominion NGL Pipelines, LLC*, 145 FERC ¶ 61,133, at PP 11, 20 (2013).

[17] After Alpha filed its Petition, the Commission issued an order approving Enable's petition. *Enable Bakken Crude Services, LLC*, 148 FERC ¶ 61,048 (2014).

[18] Alpha cites *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130, at P 18 (2013).

[19] Alpha cites, *e.g.*, *Shell Pipeline Co. LP*, 146 FERC ¶ 61,051 at PP 20-21 ; *Enbridge Pipelines (FSP) LLC*, 146 FERC ¶ 61,148 at P 31; *MarkWest Liberty Ethane Pipeline, L.L.C.*, 145 FERC ¶ 61,287 at P 26; *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130 at P 19.

for Uncommitted Shippers. Alpha contends that the Commission has found such allocations to be consistent with its policies.[20]

22. Alpha points out that each Committed Shipper may choose a five or 10-year term for its Committed Shipper Agreement, which contains a rollover provision automatically extending the agreement for subsequent one-year terms thereafter until terminated by Alpha or the Committed Shipper. According to Alpha, its proposed rollover provision is similar to evergreen or rollover provisions approved by the Commission in other cases.[21]

23. Alpha also emphasizes that the Commission has 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."[22] For example, continues Alpha, the Commission has found that it is not unduly preferential to set aside a fixed percentage of capacity for apportionment to regular or historical shippers,[23] In particular, continues Alpha, the Commission has approved apportionment procedures that set aside 90 percent of capacity for regular or historical shippers.[24] Alpha explains that, while a Committed Shipper automatically qualifies as a Regular Shipper, a New Shipper also will qualify as a Regular Shipper by moving crude oil in each month during a rolling 12-month period.

<u>Notice and Interventions</u>

24. Notice of the Petition was issued July 8, 2014, with interventions and protests due August 1, 2014. Pursuant to Rule 214 of the Commission's regulations,[25] all timely filed

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[20] Alpha cites, *e.g.*, *Sunoco Pipeline L.P. and SunVit Pipeline LLC*, 147 FERC ¶ 61,204, at P 27 (2014); *Sunoco Pipeline L.P.*, 145 FERC ¶ 61,274, at P 11 (2013); *Dominion NGL Pipelines, LLC*, 145 FERC ¶ 61,133 at P 21.

[21] Alpha cites *MarkWest Liberty Ethane Pipeline, L.L.C.*, 145 FERC ¶ 61,287 at P 28.

[22] Alpha cites *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130 at P 26.

[23] Alpha cites *Enbridge Pipeline (North Dakota) LLC*, 140 FERC ¶ 61,193, at PP 21-22 (2012).

[24] Alpha cites *Enbridge Pipelines (FSP) LLC*, 146 FERC ¶ 61,148, at P 29 (2014); *Enbridge Pipeline (North Dakota) LLC*, 132 FERC ¶ 61,274 (2010); *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 56 (2006).

[25] 18 C.F.R. § 385.214 (2014).

motions to intervene and any unopposed motion to intervene out-of-time filed before the 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.

Commission Analysis

25. The Commission grants the rulings requested by Alpha. The Project will provide additional transportation capacity from an area with significant current production and additional anticipated activity. The Commission finds that Alpha has demonstrated that it conducted the Open Season in a fair and transparent manner consistent with the ICA's requirements and Commission precedent. The Open Season was widely advertised and afforded all potentially interested shippers an opportunity to become Committed Shippers on the Project.

26. Alpha currently is conducting the Second Open Season, which will end November 4, 2014, more than one month after Alpha's requested date for Commission action. Alpha states that the terms of the Second Open Season are the same as those offered during the Open Season. However, during the Second Open Season, should Alpha wish to offer interested shippers any terms that differ from the terms applicable to shippers participating in the Open Season, Alpha must seek specific prior Commission approval of any such terms.

27. Alpha has demonstrated that its proposal is consistent with Commission policy and precedent. Alpha's proposal includes various classes of shippers that are appropriately distinguished by their financial commitments, acreage or volume commitments, and the length of their contract terms. Further, Alpha's proposal to offer up to 90 percent of the Project's capacity to Committed Shippers, with the remaining 10 percent reserved for Uncommitted Shippers, is consistent with Commission policy and precedent, as is Alpha's proposed apportionment policy, which sets aside 90 percent of the Project's capacity for Regular Shippers in times of excess demand. Additionally, the proposed contract term extension provisions applicable to the Committed Shipper Agreements are appropriate and consistent with Commission policy and precedent. As the Commission has permitted in similar circumstances, Alpha's Committed Shipper Rates may be filed as settlement rates in accordance with section 342.4(c) of the Commission's regulations.

28. Finally, Alpha states that the D&T Agreements permit Level A and Level B Committed Shippers to be exempt from the requirement to provide electricity to power the gathering pumps. It is usual for these types of variable costs to be applied equally to each barrel shipped so that each barrel bears the same amount of costs as each of the other barrels shipped through the pipeline. Alpha does not indicate, however, who will bear the electricity costs from which the Level A and Level B Committed Shippers will be relieved. To ensure that these costs are not shifted to the Uncommitted Shippers, the

Commission directs Alpha to include in its tariff the at-cost, per-barrel electricity charge spread across all barrels shipped by all Committed and Uncommitted Shippers, and a provision to ensure that the Uncommitted Shippers pay only for electricity per barrel in direct proportion the volume of barrels they ship.

The Commission orders:

A. Alpha's Petition is granted to the extent discussed in the body of this order.

B. Alpha must seek prior Commission approval if it wishes to offer interested shippers during the Second Open Season any terms of service that differ from the terms offered during the Open Season.

C. Alpha must include in its tariff a provision applying electricity charges to all classes of shippers in proportion to the volumes of crude oil they ship.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.