

150 FERC ¶ 61,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tapstone Midstream, LLC

Docket Nos. IS15-111-000
OR15-7-000
OR15-9-000

ORDER ACCEPTING AND SUSPENDING TARIFF, SUBJECT TO REFUND AND
CONDITIONS, AND DENYING WAIVER REQUESTS

(Issued January 15, 2015)

1. On December 16, 2014, Tapstone Midstream, LLC (Tapstone) filed FERC Tariff No. 1.0.0 in Docket No. IS15-111-000. Tapstone states that the tariff contains rates, rules, and regulations applicable to certain Texas facilities to be acquired by Tapstone in a transaction that Tapstone expected to be finalized December 31, 2014 (Facilities). The Facilities are described below. Tapstone states that the Facilities are not currently providing transportation pursuant to a tariff filed with the Commission; however, Tapstone believes that the Facilities will be subject to Commission jurisdiction because the crude oil to be transported via the Facilities will be delivered to Cushing, Oklahoma. Tapstone proposes that FERC Tariff No. 1.0.0 be effective December 31, 2014. Tapstone attaches to its filing an affidavit stating that the tariff has been agreed to in writing by each person using the transportation service to which the rate applies, in accordance with section 342.4(c) of the Commission's regulations.¹ However, Tapstone also states that its affiliate will be the only shipper on the Facilities.

2. Also on December 16, 2014, Tapstone filed in Docket No. OR15-7-000 a request for waiver of the cost, revenue, and throughput data requirement established in section 342.2(a) of the Commission's regulations² and asks that the initial rates in FERC Tariff No. 1.1.0 be considered settlement rates. Tapstone again acknowledges that despite the agreement of "all shippers" on the system, it is unable to file its initial rates pursuant to section 342.2(b)³ because the only shipper will be an affiliate of Tapstone's. Tapstone

¹ 18 C.F.R. § 342.4(c) (2014).

² 18 C.F.R. § 342.2(a) (2014).

³ 18 C.F.R. § 342.2(b) (2014).

maintains that no shippers on the Facilities would be harmed by granting the requested waiver.

3. On December 24, 2014, Tapstone filed in Docket No. OR15-9-000, a request for temporary waiver of the tariff filing and reporting requirements applicable to interstate oil pipelines under sections 6 and 20 of the Interstate Commerce Act (ICA)⁴ and Parts 341 and 357 of the Commission's regulations.⁵ Tapstone states that the Facilities will be used to gather crude oil production operated by an affiliate of Tapstone's and ultimately moved to downstream pipeline interconnections for transportation to market.

4. As discussed below, the Commission accepts and suspends FERC Tariff No. 1.0.0, to be effective December 31, 2014, subject to refund and conditions. The Commission also denies the waivers requested in Docket Nos. OR15-7-000 and OR15-9-000.

Background

5. Tapstone states that on November 19, 2014, it executed a purchase and sale agreement for acquisition of the Facilities, which are located in Wheeler County, Texas. Tapstone further states that the Facilities are connected to crude oil production operated by its affiliate and will be used to gather that production and move it to a separation facility, a stabilization facility, and ultimately into downstream pipeline interconnections that will transport the crude oil to market.

6. Tapstone explains that the Facilities consist of three separate but related crude oil gathering systems, known as the Stiles Ranch Liquid Lines (Stiles Ranch) or Mills Ranch Liquid Lines (Mills Ranch). According to Tapstone, Stiles Ranch consists of two separate systems that were not connected at the time of the filing in OR15-9-000. According to Tapstone, the west side of Stiles Ranch consists of approximately 14,000 feet of 8.625-inch diameter pipe and approximately 30,000 feet of 6.625-inch diameter pipe, and the east side of Stiles Ranch consists of approximately 16,000 feet of 8.625-inch diameter pipe and approximately 15,000 feet of 6.625-inch diameter pipe. Additionally, Tapstone states that each of the crude oil gathering systems also has two stabilizer facilities, as well as associated tanks and loading facilities for the crude oil to be transported on the Facilities.

7. Tapstone states that its affiliate will have title to at least 85 percent of the crude oil production to be transported on the Facilities, with the remaining production marketed by

⁴ 49 U.S.C. App. §§ 6, 20 (1988) (requiring all interstate oil pipelines to file all rates, fares and charges for transportation on their systems, to file copies of contracts with other common carriers for any such traffic and authorizing the Commission to require annual or special reports from carriers subject to the ICA).

⁵ 18 C.F.R. pts. 341, 357 (2014).

the affiliate on behalf of non-operating working interest owners. Tapstone maintains that no third-party production is connected to the Facilities, and no third-party shipper has requested service or is anticipated to request service on the Facilities. Rather, continues Tapstone, pursuant to joint operating agreements (JOAs), Tapstone's affiliate will operate and market 100 percent of the crude oil production connected to the Facilities.

8. According to Tapstone, JOAs are common arrangements in the oil and gas industry that establish the rights and obligations of the parties when several working interest owners have rights to certain production. In these cases, states Tapstone, the working interest owners designate one party as the "operator," which generally is responsible for taking custody of all of the production, selling it, and remitting the proceeds due to the other working interest owners. Additionally, Tapstone states that on receipt of the temporary waiver requested in Docket No. OR15-9-000, it will withdraw the tariff filed in Docket No. IS15-111-000.

9. Tapstone contends that the Commission has consistently granted requests for waiver of ICA sections 6 and 20, as well as Parts 341 and 357 of the Commission's regulations when pipelines have demonstrated that (a) the pipelines (or their affiliates) own 100 percent of the throughput on the line, (b) there is no demonstrated third-party interest in gaining access to or shipping on the lines, (c) no such interest is likely to materialize, and (d) there is no opposition to granting the waivers.⁶ According to Tapstone, in such cases, the Commission "determined that there were no active third-party shipper interests to protect under the ICA, and therefore, temporary waivers of the section 6 and 20 filing and reporting requirements were warranted."⁷ However, continues Tapstone, the Commission has also made such temporary waivers subject to revocation should the circumstances upon which they are based change and has required pipelines receiving such waivers to keep their books and records in a manner consistent with the Commission's Uniform System of Accounts and to make such books and records available to the Commission upon request.⁸

10. Tapstone argues that while not holding title to all throughput on the Facilities, its affiliate will bear other indicia of ownership, such as custody, control, and good right to

⁶ Tapstone cites *Pelican Gathering Systems, LLC*, 141 FERC ¶ 61,245, at PP 3, 5-6 (2012); *Tesoro High Plains Pipeline Company, LLC*, 141 FERC ¶ 61,143, at PP 4, 7-8 (2012); *Agave Energy Co.*, 136 FERC ¶ 61,094, at P 5 (2011); *Saddle Butte Pipeline, LLC*, 136 FERC ¶ 61,071, at P 3 (2011); *Jayhawk Pipeline, L.L.C.*, 128 FERC ¶ 61,079, at P 4 (2009).

⁷ Tapstone cites *Jayhawk Pipeline, L.L.C.*, 128 FERC ¶ 61,079, at P 4 (2009).

⁸ Tapstone cites, *e.g.*, *Saddle Butte Pipeline, LLC*, 136 FERC ¶ 61,071, at PP 3, 6 (2011).

sell. Tapstone also contends that the mere fact that its affiliate does not have title to the non-operating working interest volumes should not be determinative. Tapstone explains that, pursuant to the JOAs, all working interest owners of the crude oil production will give Tapstone's affiliate complete control over their crude oil production and require the operator to transport and sell the oil on their behalf, and the JOAs also grant the operator of the crude oil production a lien on the production to secure any payment obligations of the non-working interest owners. Tapstone asserts that because this lien is in place at all times when the crude oil is flowing through the Facilities, that underscores the fact that the operator has dominion over (if not title to) all of the crude oil production as it flows through the Facilities. Tapstone also seeks to equate the issue in this case with Commission precedents applicable to the transportation of natural gas, the "shipper-must-have-title" rule, and the Commission grants of exceptions to that rule.⁹

11. Therefore, concludes Tapstone, the Commission should grant the requested waivers of its regulations based on the following:

- a. The Facilities are connected only to crude oil production owned or controlled by Tapstone's affiliate, including production that Tapstone's affiliate should be deemed to own for purposes of the waiver;
- b. Tapstone is not aware of any third-party interest in gaining access to the Facilities for the purpose of transporting crude oil not owned or controlled by Tapstone, and given the physical configuration of the system, Tapstone does not anticipate that such third-party crude oil can access the Facilities or that such interest is likely to materialize;

⁹ Tapstone cites, *e.g.*, *Rendezvous Gas Services, L.L.C.*, 113 FERC ¶ 61,169, at P 40 (2005) (stating that "[t]o use capacity on an interstate pipeline a shipper must have a capacity contract with the pipeline, and have title to the gas when transportation is scheduled"); *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,300 (2000) (cross-referenced at 90 FERC ¶ 61,109 (2000)) (explaining that the "capacity release rules were designed with the [shipper-must-have-title] policy as their foundation"); *In re MGTC, Inc.*, 121 FERC ¶ 61,087, at P 8 (2007) (citing Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,300) (stating that "Without the shipper-must-have title requirement, the identities of the users of the pipeline's transportation and the conditions under which they moved gas would not be known, undermining the Commission's objectives of pipeline open-access and non-discrimination."); *Florida Gas Transmission Co.*, 65 FERC ¶ 61,336, at 62,595 (1993) (Florida Gas) (discussing arguments raised in protest in another case and the basis for the Commission's "good right to deliver" exemption).

- c. No such third-party crude oil can physically access the Facilities, and accordingly, no third party has reasonably requested that Tapstone provide transportation service on the Facilities for crude oil not owned or controlled by Tapstone or its affiliate; and
- d. Given that Tapstone is unaware of any such third-party physical ability to access the Facilities and thus no reasonable third-party interest in gaining access to the Facilities for transporting crude oil not owned or controlled by Tapstone or its affiliate, it is unlikely in Tapstone's best judgment that any opposition to Tapstone's requests for waivers will materialize.

Public Notice and Interventions

12. Notice of Tapstone's filing in Docket No. OR15-9-000 was issued December 30, 2014, with interventions and protests due January 9, 2015. Pursuant to Rule 214, of the Commission's regulations,¹⁰ all timely filed motions to intervene and any unopposed motion to intervene out-of-time are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No interventions or protests were filed.

Commission Analysis

13. The Commission will accept and suspend FERC Tariff No. 1.0.0 to be effective December 31, 2014, subject to refund and subject to Tapstone's filing the supporting data required by section 342.2(a) of the Commission's regulations within 15 days of the date of this order. The Commission denies Tapstone's requests for waivers of those requirements in Docket Nos. OR15-7-000 and OR15-9-000.

14. Tapstone's argument that waiver of the regulations is warranted because its affiliate will serve as operator under various JOAs and will either own or "have control of" all of the crude oil to be transported on the Facilities has no merit. Section 342.2 of the Commission's regulations clearly provides only two methods for a carrier to establish initial rates. Section 342.2(b) unambiguously requires an affidavit from a non-affiliated person that intends to use the service. Order No. 561, which established that section of the regulations, also clearly stated as follows: "In the event there are no non-affiliated shippers, the pipeline must use a cost-of-service showing to justify its initial rate."¹¹

15. The Commission does not find the argument that the lone affiliated shipper on the Facilities signed an affidavit to be persuasive. Because the shipper is an affiliate, there is

¹⁰ 18 C.F.R. § 385.214 (2014).

¹¹ *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs., ¶ 30,985 (1993).

no assurance that there was an arms-length negotiation between the entities agreeing to the rate, as required by Commission policy and precedent.

16. Tapstone's additional request for waiver of sections 6 and 20 of the ICA seems to be an attempt to further address and defend the issue of control over the oil shipped on the Facilities. The Commission has heretofore never equated substantial control of, or dominion over, the crude oil to be transported with the 100-percent ownership requirement to warrant temporary waiver of the ICA and oil pipeline regulation. Tapstone's assertion that other indicia of ownership, "such as custody, control, and good right to sell" should equate to ownership for purposes of waiver of the regulations is not sufficient to warrant acceptance of its tariff filing.¹²

The Commission orders:

(A) FERC Tariff No. 1.0.0 is accepted and suspended to be effective December 31, 2014, subject to refund and subject to Tapstone's filing within 15 days of the date of this order, the cost, revenue, and throughput data applicable to the Facilities, as required by section 342.2(a) of the Commission's regulations, and as discussed in the body of this order.

(B) Tapstone's request for waiver of section 342.2(a) of the Commission's regulations is denied, as discussed in the body of this order.

(C) Tapstone's request for temporary waiver of ICA sections 6 and 20, as well as Parts 341 and 357 of the Commission's regulations is denied, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

¹² Tapstone's citations drawing parallels between control and ownership were specifically in the natural gas regulatory context, rather than in the oil pipeline context. The Commission emphasizes that the ICA is a distinctly different statute, with a unique regulatory construct, and reiterates that natural gas constructs, such as a distinction between a gathering system and a mainline system, are not necessarily applicable in the oil construct.