

151 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Jayhawk Pipeline, L.L.C.
National Cooperative Refinery Association

Docket No. OR15-11-000

ORDER DENYING WAIVER REQUEST

(Issued April 13, 2015)

1. On January 16, 2015 Jayhawk Pipeline, L.L.C. (Jayhawk) filed a request for temporary waiver of the tariff filing and reporting requirements of sections 6 and 20 of the Interstate Commerce Act (ICA).¹ On February 24, 2015, the waiver request was amended to add the National Cooperative Refinery Association (NCRA) as a joint party to the proceeding.² For the reasons discussed below, the Commission denies the request for waiver.

Background

2. Jayhawk owns and operates crude oil interstate and intrastate pipeline systems in Kansas, Nebraska, Oklahoma, and Texas.³ At El Dorado, Kansas, Jayhawk owns and operates two pipeline segments that transport crude oil owned by its affiliate, NCRA to Halstead Junction, Kansas and McPherson, Kansas, where NCRA owns and operates a petroleum refinery (McPherson Refinery). All capacity on Jayhawk segments between

¹ See 49 U.S.C. App. §§ 6, 20 (1988). Section 6 requires interstate oil pipelines to file all rates, fares, and charges for transportation on their systems, as well as to file copies of contracts with other common carriers for any such traffic. Section 20 authorizes the Commission to require annual or special reports from carriers subject to the ICA. See also 18 C.F.R. pts. 341, 357 (2014) implementing the filing and reporting requirements of ICA sections 6 and 20.

² As the ultimate sub-lessee of the leased capacity on the Osage pipeline, NCRA is the proper entity to seek a waiver request of ICA requirements.

³ Petitioners Amended Waiver Request at Exhibit A 2.

El Dorado and the McPherson Refinery is leased by Jayhawk to NCRA. In 2009 the Commission granted a temporary waiver of the filing and reporting requirements of sections 6 and 20 of the ICA for the El Dorado to Halstead Junction and McPherson Refinery segments.⁴

3. The Osage Pipe Line Co., which is jointly owned by Magellan Midstream Partners, L.P. (Magellan)⁵ and NCRA, , owns a crude oil pipeline that extends from Cushing, Oklahoma to El Dorado, Kansas (Osage). Osage Pipe Line Co. recently entered into a ten-year agreement with Jayhawk, leasing to Jayhawk 42,000 barrels per day (bpd) of capacity on Osage between Cushing and El Dorado. Jayhawk and NCRA (jointly, Petitioners) state that Jayhawk plans to sublease all its leased capacity on Osage to NCRA.⁶

4. Petitioners explain NCRA intends to use the subleased capacity on Osage to provide seamless transportation of NCRA crude oil from Cushing, Oklahoma to the McPherson Refinery. All crude oil transported through the subleased capacity on Osage is NCRA owned and is destined for the McPherson Refinery.⁷

5. Petitioners explain neither NCRA nor Jayhawk intends to transport crude oil for any third party on the leased portion of Osage. Osage transportation is currently subject to two tariffs: a Jayhawk proportional tariff, F.E.R.C. No. 36.5.0, and an Osage local tariff, F.E.R.C. No. 16.5.0. For the past seven years, crude oil shippers have transported volumes only pursuant to the Osage local tariff. Petitioners affirm they have not received any requests for the past seven years for service from unaffiliated shippers seeking transportation subject to the Jayhawk tariff and Petitioners state they do not anticipate any such requests in the future. Petitioners expect current or potential shippers between Cushing and El Dorado will continue to transport crude oil through the Osage local tariff.⁸

⁴ *Jayhawk Pipeline L.L.C.*, 128 FERC ¶ 61,079 (2009).

⁵ Magellan is the sole operator of Osage.

⁶ Petitioners Amended Waiver Request at 1.

⁷ *Id.* at 3.

⁸ *Id.* at 5.

Public Notice and Interventions

6. Public notice of Jayhawk's filing was issued January 28, 2015, with interventions and protests due on February 12, 2015. HollyFrontier Refining & Marketing LLC (HollyFrontier) filed a timely protest. On February 24, 2015, Jayhawk and NCRA filed their amendment to the waiver request and an answer to the protest. On March 10, 2015, HollyFrontier filed an answer to the amended request for waiver.

HollyFrontier Protest

7. HollyFrontier contends it has a present and continuing interest in shipping on both the Osage and Jayhawk tariff.⁹ HollyFrontier explains it is a longstanding shipper on Osage between Cushing and El Dorado and states it may request service on the NCRA subleased capacity under certain operational and economic circumstances.¹⁰ HollyFrontier suggests it would seek to ship on the NCRA subleased capacity in the event the capacity on the Osage tariff is constrained, or if the leased capacity tariff rate is lower than the Osage tariff rate. Further, HollyFrontier explains it is completely dependent on continued access to the Osage facilities because Osage transports 99 percent of all crude oil used at the HollyFrontier's El Dorado Refinery.¹¹

8. HollyFrontier explains NCRA is a direct competitor in the refined petroleum products market and that a portion of Osage's interstate crude oil pipeline facilities would be removed from ICA common carrier regulation if the waiver request were granted, to the sole benefit of NCRA.¹² HollyFrontier states it could be substantially disadvantaged if its access to Osage facilities is diminished by the lease agreement and waiver request, and suggests it could potentially incur higher rates compared to NCRA for crude oil transportation services between Cushing and El Dorado.¹³ HollyFrontier opposes the waiver request.

⁹ HollyFrontier Protest at 6.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 7.

¹² *Id.* at 2, 4.

¹³ *Id.* at 7-8.

Jayhawk and NCRA Response

9. On February 24, 2015, Petitioners filed a response to HollyFrontier's intervention and protest. Petitioners contend HollyFrontier's objection to the waiver request is based upon access to Osage and the amount of capacity available on Osage. Specifically, Petitioners insist there will be no diminution of service or reduction of third party shipping capacity on the Osage tariff as a result of the capacity lease.

10. Petitioners explain Osage Pipeline Co. agreed to finance the capacity expansion in return for Jayhawk's ten year lease on the Osage pipeline. Petitioners state the expansion includes additional pump stations that will increase Osage's capacity from 168,000 bpd to 192,000 bpd.¹⁴ Petitioners state the remaining approximately 135,000 bpd of operational capacity on Osage would be available to any shipper. Petitioners explain the expansion will preserve HollyFrontier's access to Osage shipping capacity without requiring a cost or term commitment by HollyFrontier. Petitioners argue the leased capacity rate is not less than current Osage tariff rates.¹⁵

11. Petitioners contend if either Jayhawk or NCRA is required to maintain a tariff for common carrier service on the leased capacity on Osage, they would request an amendment to align the tariff's terms with the capacity lease by Osage Pipeline Co., resulting in an increase to the current Jayhawk tariff. Additionally, Petitioners state they would also require third party shippers to execute throughput and deficiency agreements with a term equal to or greater than the term of the Jayhawk capacity lease. Petitioners state this would result in pricing and service terms on the Jayhawk tariff no more advantageous or appealing to third party interests compared to the Osage tariff.

12. Petitioners explain the waiver request was filed because the capacity lease and related Osage expansion have made maintenance or amendment of the current Jayhawk tariff unnecessary. Petitioners explain the Commission has previously approved waivers of tariff filing and reporting requirements applicable to lessees of a portion of interstate pipeline capacity.¹⁶ Petitioners state it is unlikely that Jayhawk will continue to sublease the leased capacity on Osage to NCRA if the Commission does not grant the requested waiver.¹⁷

¹⁴ Petitioners' Response at 5.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 11 (citing *Sinclair Pipeline Co., LLC*, 134 FERC ¶ 61,077 (2011)).

¹⁷ *Id.* at 3.

HollyFrontier Answer

13. On March 10, 2015, HollyFrontier filed a response to Jayhawk and NCRA's pleading, reaffirming its continued interest in gaining access on the Osage leased capacity in the foreseeable future.¹⁸ HollyFrontier reiterates that access to Osage capacity is critical to HollyFrontier's refining business in Kansas. HollyFrontier maintains its opposition to the waiver request.¹⁹

Commission Analysis

14. Since first being applied in *Sinclair Oil Corporation*²⁰ the Commission has granted requests for temporary waiver of the filing and reporting requirements of its regulations and of sections 6 and 20 of the ICA when four criteria are met.²¹ First, the pipeline requesting a temporary waiver (or its affiliates) must own 100 percent of the throughput on the line. Second, there should be no demonstrated third-party interest in gaining access to or shipping upon the line. Third, there should be no likelihood such third-party interest will materialize. Fourth, there is no opposition to granting the waivers.

15. The Commission denies Petitioners' waiver request. The criteria needed to grant a waiver have not been satisfied. HollyFrontier unequivocally opposes the waiver request. Further, HollyFrontier has demonstrated a third party interest in shipping on the Osage leased capacity and offers plausible circumstances in which that interest would materialize.

16. Regarding the tariff obligations associated with the interstate movements of crude oil, the Commission reiterates and clarifies common carrier oil pipeline obligations. Pursuant to section 6 of the ICA, interstate common carrier pipelines are required to

¹⁸ HollyFrontier Answer at 3.

¹⁹ *Id.*

²⁰ *Sinclair Oil Corporation*, 4 FERC ¶ 62,026 (1978) (*Sinclair*).

²¹ *Whiting Oil and Gas Corp.*, 131 FERC ¶ 61,263 (2010); *Cimarron Gathering, L.P.*, 126 FERC ¶ 61,017 (2009); *Enbridge Pipelines (NE Texas Liquids) L.P.*, 117 FERC ¶ 61,046 (2006); *Enbridge Pipelines (NE Texas Liquids) L.P.*, 110 FERC ¶ 61,159 (2005); *Ciniza Pipe Line Inc.*, 73 FERC ¶ 61,377 (1995); *Hunt Refining Co.*, 70 FERC ¶ 61,035 (1995); *Sinclair*, 4 FERC ¶ 62,026 (1978).

maintain a tariff on file with the Commission disclosing the rates for interstate transportation services. As simply an affiliate of NCRA, the joint owner with Magellan of Osage, Jayhawk has no basis for a tariff with the Commission - that obligation resides only with the pipeline offering service. Consequently, the Commission finds the historical Jayhawk tariff, F.E.R.C. No. 36.5.0, is a nullity and must be cancelled.

17. Any common carrier service that either Jayhawk or NCRA holds itself out to provide over Osage-leased facilities in the future must be pursuant to a new tariff establishing initial rates filed in accordance with section 342.2 of the Commission's regulations.²² Moreover, were Petitioners to require third party shippers to execute long-term throughput and deficiency agreements as they have stated they intend to do in providing service over the leased capacity, such a requirement would appear to be inconsistent with the obligations of a common carrier under the statute.²³

The Commission orders:

- (A) The request for waiver is denied.
- (B) Jayhawk must cancel F.E.R.C No. 36.5.0 within 15 days of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²² 18 C.F.R. § 342.2 (2014).

²³ See 49 App. U.S.C. §§ 1(4), 2, and 3(1) (1988).