152 FERC ¶ 61,205
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kinder Morgan Cochin LLC Docket No. OR15-28-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 15, 2015)

1. On June 19, 2015, Kinder Morgan Cochin LLC (Kinder Morgan) filed a Petition for Declaratory Order (Petition).[1] Kinder Morgan requests approval of (1) the treatment of the committed rates provided for in the Transportation Service Agreements (TSA) for the proposed Utopia East system (Utopia East) as being the equivalent of settlement rates under section 342.4(c) of the Commission's regulations; (2) the proposed tariff rate structure for Utopia East; (3) the proposed prepayment arrangements as set forth in the TSAs; (4) the proposed TSA cost recovery provisions associated with the addition of capacity and new origin and delivery points; and (5) the proposed TSA contract extension provisions.

2. As discussed below, the Commission grants the Petition.

<u>Background</u>

3. According to Kinder Morgan, Utopia East will enable shippers to move ethane and ethane-propane mixtures from the Utica shale fields to additional markets. Kinder Morgan maintains that shippers in the region have expressed strong interest in the proposed service. Kinder Morgan states that by combining the newly constructed portion of Utopia East with a repurposed section of existing under-utilized pipe, it will be able to offer an efficient, cost-effective solution for shippers seeking additional outlets to market for ethane and ethane-propane mixtures.

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[1] Throughout the Petition, "Kinder Morgan" is used to refer to US-based operations, and "Kinder Morgan Cochin ULC" is used to refer to Canadian-based operations.

4. Kinder Morgan explains that, once completed, Utopia East will transport ethane and ethane-propane mixtures from Harrison County, Ohio to the US-Canadian border near Detroit, Michigan, to an interconnection with Kinder Morgan Cochin ULC, a Canadian affiliate, for ultimate delivery to Windsor, Ontario. Kinder Morgan states the construction of Utopia East will include a new 240-mile 12-inch diameter pipeline to carry ethane and ethane-propane mixtures from the Utica shale fields in Harrison County, Ohio to an interconnection in Fulton County, Ohio with a section of existing, under-utilized portion of pipeline owned by Kinder Morgan, and the repurposing of that under-utilized pipeline to transport ethane and ethane-propane mixtures from Fulton County, Ohio to an interconnection with the Kinder Morgan Cochin ULC pipeline at the US-Canada border.

5. From the border, shippers will be able to move volumes to Windsor, Ontario on the pipeline operated by Kinder Morgan Cochin ULC. Kinder Morgan notes it seeks Commission rulings only with respect to Utopia East, located entirely within the United States. Kinder Morgan states that it will seek approval from the National Energy Board of Canada to operate its line in Canada.

6. Kinder Morgan estimates that construction of Utopia East will require an estimated capital investment of approximately $500 million. Kinder Morgan explains that Utopia East will have an initial design capacity of 50,000 barrels per day (bpd), which may be expanded, without the need for additional or larger diameter pipe, to more than 75,000 bpd in the future.

7. Kinder Morgan explains that, due to the substantial capacity investment necessary to complete Utopia East, Kinder Morgan and Kinder Morgan Cochin ULC jointly conducted a widely publicized open season seeking term and volume commitments by shippers in return for discounted rates pursuant to a volume incentive committed joint tariff rate and a committed joint tariff rate. Kinder Morgan states it provided to any entity that executed a confidentiality agreement either the volume incentive committed joint tariff rate TSA (Volume Incentive Joint Tariff TSA),[2] the committed joint tariff rate TSA (Joint Rate TSA), or both, depending on the entity's contemplated committed volume. No shippers made a commitment under the Joint Rate TSA; consequently, the instant Petition and order addresses only the features of the Volume Incentive Joint Tariff TSA.

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[2] Kinder Morgan explains that the proposed tariff rate structure pursuant to the Volume Incentive Joint Tariff TSA provides a lower, volume discounted international joint tariff rate for committed shippers, and a higher local tariff rate for uncommitted shippers.

Open Season

8. Kinder Morgan states the open season for Utopia East commenced on September 5, 2014, and concluded on October 6, 2014. Kinder Morgan explains that during this time, interested shippers had the opportunity to commit to either the Volume Incentive Joint Tariff TSA or the Joint Rate TSA, with up to 90 percent of Utopia East capacity available for commitments. Kinder Morgan states that notice of the open season was provided to potentially interested parties with additional notice provided by a press release from Kinder Morgan. Kinder Morgan states five prospective shippers signed confidentiality agreements and received the package of open season materials.

9. Kinder Morgan states that neither TSA provided for priority service on Utopia East; rather, as noted, Utopia East will connect at the international border between the US and Canada to the Kinder Morgan Cochin ULC pipeline. The Kinder Morgan Cochin ULC pipeline will provide priority service from the international border to Windsor, Ontario in accordance with the Canadian National Energy Board (NEB) regulations.

10. Kinder Morgan states capacity on Utopia East will be allocated *pro rata* based on all shippers' nominations in a month. Kinder Morgan states no shipper will be allocated capacity on Utopia East that exceeds the capacity such shipper has the right to use on the Kinder Morgan Cochin ULC pipeline.

Requested Rulings

11. Kinder Morgan requests Commission confirmation of the following:

A. The requirement for committed shippers to pay the rates for throughput on the basis set forth in the Volume Incentive Joint Tariff TSA for the entire duration of the contract term. The rates will be treated as the equivalent of settlement rates for the term of the Volume Incentive Joint Tariff TSA pursuant to section 342.4(c) of the Commission's regulations.

B. Kinder Morgan's proposed tariff rate structure is consistent with Commission precedent.

C. Kinder Morgan may collect prepayments as additional credit assurance under the terms described in the Volume Incentive Joint Tariff TSA.

D. Kinder Morgan may establish additional origin and delivery points on Utopia East or increase the capacity of Utopia East by agreement with one or more of the committed shippers, and at such committed shippers' cost.

E. Kinder Morgan may offer contract extension rights to committed shippers as provided for in the Volume Incentive Joint Tariff TSA.

Notice and Interventions

12. Notice of the Petition was issued on June 23, 2015, providing for motions to intervene, comments and protests to be filed on or before July 17, 2015. Pursuant to Rule 214 of the Commission's regulations,[3] 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 disrupt the proceeding or place additional burdens on existing parties. The Petition is unopposed.

Proposed Terms of Service—Volume Incentive Joint Tariff TSA

A. Rate Structure

13. Under the Volume Incentive Tariff TSA, a committed shipper agrees to pay the applicable volume incentive international joint committed rate (Volume Incentive Joint Tariff Rate) on all of its nominated volumes, including those in excess of its committed volume, based upon the total volume delivered to that committed shipper, and/or the total volume delivered to all shippers, including uncommitted shippers, during a calendar year. Kinder Morgan explains that as soon as either the total volume delivered to a committed shipper and/or the total volume delivered to all shippers during a calendar year exceeds the number of barrels for an incentive tier, any incremental barrels delivered to that committed shipper will be charged the lower Volume Incentive Joint Tariff Rate for the next highest tier.

14. Kinder Morgan states that 66.7 percent of the Volume Incentive Joint Tariff Rate for each tier level will be increased annually using the FERC indexing methodology for the corresponding year, and the index adjustment will be effective on July 1st of each year beginning with July 1, 2018.[4] Kinder Morgan states that if at any point during the TSA term the Commission discontinues the use of the indexing methodology, the rates will be increased annually, using the annual change in the Producer Price Index for Finished Goods (PPI-FG) as published by the United States Department of Labor. Kinder Morgan specifies the Volume Incentive Joint Tariff Rates will not be reduced by a negative index.

15. Kinder Morgan states the TSA provides Kinder Morgan the ability to adjust the Volume Incentive Joint Tariff Rates to recover costs associated with governmental fees and assessments that are mandated on either side of the border after the date of the TSA. Kinder Morgan specifies costs could include abandonment cost recovery ordered

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[3] 18 C.F.R. § 385.214 (2015).

[4] Kinder Morgan states this remains true regardless of whether the Utopia East system is in service on that date.

pursuant to the NEB Land Matters Consultation Initiative and any other mandatory fees or assessments levied by a governmental authority after the date of the TSA. Additionally, the TSA provides that if the State of Ohio reinstitutes its business personal property tax, or makes assessment of the pipeline subject to the public utility property tax, Kinder Morgan may adjust the Volume Incentive Joint Tariff Rates to recover all or a portion of those costs.

B. Volume and Term Commitments

16. Kinder Morgan states under the Volume Incentive Joint Tariff TSA, committed shippers are required to make a volume commitment of no less than 30,000 bpd from January 1, 2019 through December 31, 2038.

C. Prepayment Provisions

17. Kinder Morgan explains the Volume Incentive Joint Tariff TSA provides for a committed shipper to pay a deficiency fee if the volume of product delivered to it in any contract year is less than its annual volume commitment.[5]

18. As an additional credit assurance, the TSA also provides that if (a) the amount of product delivered to a committed shipper during any month of a contract year is less than the monthly committed volume of such committed shipper for such month, and (b) the cumulative volume of product delivered to such committed shipper by the end of such month is less than the product of the monthly volume commitment and the total number of months that have elapsed in such contract year, then the committed shipper will, as an additional credit assurance, make a prepayment of its deficiency equal to the shortfall in payment in such month.[6]

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[5] This excludes Carrier-declared force majeure or any operational disruption on the Utopia East system or the connected pipeline operated by Kinder Morgan Cochin ULC.

[6] Kinder Morgan provides the following example: Assume that a committed shipper agreed in its TSA to ship 10,000 bpd, but during the month of May (31 days) only 240,000 barrels were delivered to that shipper. Since 10,000 bpd x 31 days equals 310,000 barrels, the volume actually delivered to the shipper in May would be 70,000 barrels less than the shipper's monthly committed volume for that month, satisfying the first prong of the test. If, in addition, only a total of 1,100,000 barrels were delivered to that shipper from January through the end of May, the second prong of the test would also be satisfied and the shipper would be obligated to make a prepayment equal to the shortfall in May multiplied by the then-applicable Volume Incentive Joint Tariff Rate.

19. Kinder Morgan states these prepayment amounts will bear no interest and will be credited to the shipper for transportation charges and any deficiency fees payable during the contract year in which the prepayment amounts are paid. Kinder Morgan further states if any uncredited prepayment amounts remain at the end of the contract year, the remaining prepayments will be credited to the shipper for transportation charges that accrue during the following contract year.

D. Capacity Increases and New Origin and Delivery Points

20. Kinder Morgan states the TSA provides that a committed shipper and Kinder Morgan may agree, in writing, to increase system capacity, to add origin points, or to add additional delivery points along the line. Kinder Morgan states that under such agreements, if the committed shipper reimburses Kinder Morgan for the reasonable cost of the requested system modifications, then the Volume Incentive Joint Tariff Rates will not be increased with respect to such new origin or delivery points or increased pumping capacity unless it can be demonstrated the modifications will result in greater operating costs for Kinder Morgan.

E. Contract Extension

21. Kinder Morgan represents the TSA provides committed shippers with contract extension rights. Specifically, under the TSA, either Kinder Morgan or a committed shipper can terminate the initial term of the contract effective December 31, 2038, so long as the represented party gives the other party at least thirty-six months' notice in writing. If the initial term is not terminated by either party, then the agreement will automatically renew for the period of one year, with either party able to terminate the agreement upon twelve months' prior written notice to the other party.

Commission Analysis

22. The Commission finds the committed rates and rate structure for which Kinder Morgan seeks approval in the Petition are consistent with Commission precedent, and accordingly will not be subject to modification or revision except as provided in the TSA.

23. The Commission finds the prepayment provision of the TSA is also consistent with Commission policy.[7] Kinder Morgan has demonstrated the provision is both an

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[7] *Kinder Morgan Pony Express Pipeline LLC and Belle Fourche Pipeline Co.*, 141 FERC ¶ 61,180, at P 42 (2012) (*Belle Fourche*); *Tallgrass Pony Express Pipeline LLC*, 147 FERC ¶ 61,266 (2014); *Crosstex NGL Pipeline,LP*, 146 FERC ¶ 61,182 (2014).

additional credit assurance for the pipeline and a means for the shipper to avoid having to make a large deficiency payment at the end of the contract year.[8]

24. The Commission also approves the TSA provisions governing reimbursement from committed shippers for construction expenses,[9] and the contract extension rights provisions,[10] as consistent with Commission precedent.

25. In sum, based on the facts and circumstances as presented in the Petition, the Commission grants the declarations, assurances, and confirmations requested by Kinder Morgan in its Petition concerning the overall tariff and service structure of Utopia East, and the particular contract terms under the committed shippers' TSAs. Kinder Morgan's rates for uncommitted shippers must separately be justified as just and reasonable under the Interstate Commerce Act and the Commission's regulations at the time they are filed.

<u>The Commission orders:</u>

The Commission grants the Petition, consistent with the discussion above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[8] *Tesoro High Plains Pipeline Co LLC*, 148 FERC ¶ 61,160, at P 30 (2014).

[9] *Belle Fourche*, 141 FERC ¶ 61,180 at P 56*; MarketLink, LLC*, 144 FERC ¶ 61,086 (2013); *White Cliffs Pipeline, L.L.C.*, 126 FERC ¶ 61,070 (2009); *Calnev Pipeline, LLC*, 120 FERC ¶ 61,073 (2007).

[10] *Medallion Pipeline Co., LLC*, 150 FERC ¶ 61,156, at P 15 (2015); *Enable Bakken Crude Services, LLC*, 148 FERC ¶ 61,048, at P 14 (2014); *Enbridge Pipelines (FSP) LLC*, 146 FERC ¶ 61,148, at P 32 (2014); *Kinder Morgan Pony Express Pipeline LLC and Hiland Crude, LLC*, 141 FERC ¶ 61,249, at P 39 (2012).