153 FERC ¶ 61,108
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.

NST Express, LLC | Docket No. OR15-36-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued October 29, 2015)

1. On August 25, 2015, NST Express, LLC (NST) filed a petition for declaratory order requesting Commission approval of the service priorities and rate structure (but not the specific rates) to be offered in an open season for the NST Express Pipeline. The proposed pipeline is an approximately 23-mile long crude pipeline located entirely in McKenzie County, North Dakota. The pipeline, together with associated facilities also in McKenzie County, North Dakota, will be known as the NST Express Pipeline Project. In anticipation of making a financial investment decision regarding the pipeline, NST requests that the Commission act on the petition no later than November 1, 2015. For the reasons discussed below, the Commission grants NST's petition for declaratory order as consistent with precedent, but subject to one contingency, the successful completion of its open season process.

Background

2. NST states that the pipeline will enable crude oil producers in North Dakota's Bakken production region to safely and efficiently transport crude oil to an existing rail terminal from which the crude oil can reach major U.S. markets, particularly, markets on the west coast when required by market conditions.

3. The pipeline project will consist of an underground pipeline and associated facilities for the transportation of crude oil. The pipeline will be a 12-inch diameter, 23-mile long pipeline that will start at a proposed gathering facility located 9 miles north of Alexander, North Dakota (NST Express Alexander Facility). The proposed NST Express Alexander Facility will serve as a hub, receiving Bakken crude oil from tanker trucks and up to six inbound pipelines. The pipeline will extend west and south from the NST Express Alexander Facility. At its terminus, the pipeline will interconnect to an existing NST Transload Operating Company, LLC rail loading terminal (NST Transload)

located 0.5 miles north of East Fairview, North Dakota (NST Transload East Fairview Facility). The pipeline will also include interconnection points between the NST Express Alexander Facility and the NST Transload East Fairview Facility to which pipeline connections can be constructed. The maximum operational throughput of the pipeline will be 40,000 barrels per day (bpd). NST states the pipeline will require substantial capital investment of approximately $70 million. NST states that it will hold an open season for the pipeline to solicit long-term contractual obligations from committed shippers. NST states that all interested parties will have an equal opportunity to participate in the open season.

4. NST states the shippers that choose to participate in the open season will be provided with the *pro forma* Transportation Services Agreement (TSA) underlying NST's service offering, and a copy of the *pro forma* NST FERC Tariff to be filed with the Commission before the pipeline enters service. In order to attract commitments from shippers, and thereby provide the necessary financial support for the pipeline, NST will offer priority service at a premium rate for dedicated volumes based on commitments from certain shippers as specified in the TSAs. The aggregate initial dedicated volumes eligible for priority service that will move under NST's FERC Tariff are 36,000 bpd for service from the NST Express Alexander Facility to the NST Express Transload East Fairview Facility.

5. The committed shippers will receive priority service for their aggregate dedicated volumes in relation to uncommitted shippers who have not signed TSAs. While the dedicated volumes may fluctuate during the term of the TSAs, at no time will the priority service exceed 90 percent of the capacity of the pipeline. The remaining 10 percent of the capacity will be reserved for uncommitted shippers.

6. NST states that it has already contacted potential shippers to make them aware of the pipeline project. NST intends to publicize the details of its open season in relevant trade press and to continue its marketing efforts to potential shippers so that all interested, qualified parties will have an equal opportunity to participate in the open season. NST states that it is possible that an affiliate may subscribe to some or all of the available priority committed capacity during the open season.

7. NST estimates that the initial rates for uncommitted service will be approximately $0.7618 per barrel based on current cost estimates. The rates for priority service for committed shippers will at all times be at least one cent per barrel higher than the rates for uncommitted service on the pipeline. The transportation rates for the committed shippers will be adjusted annually based on the FERC Index for the applicable year.

8. In the event that requests for priority committed capacity exceed available capacity during the open season, NST will rank requests for priority committed service on the basis of the net present value (NPV) of the requests, taking into account factors including term and rates. NST will then allocate capacity to those parties providing the

highest NPV in their bids, thereby demonstrating a stronger market need for the capacity than their peers.

9. Once the pipeline is in service, committed shippers will have priority access to their dedicated capacity and will not be subject to prorationing under normal operating conditions in exchange for paying the priority rate. Uncommitted shippers will be subject to prorationing based on actual volumes transported under a historical 12-month rolling average. NST states that this arrangement protects the committed shippers against the risk that the barrels they are obligated to move under the TSAs would be pro-rated out of the pipeline capacity by uncommitted shippers that made no commitment to support the pipeline.

NST's Petition and Requested Rulings

10. NST requests that the Commission approve the proposed terms of the contemplated open season, including the proposed priority service terms and general rate structure for the pipeline. NST asserts that it requests are consistent with well-established Commission policy and precedent regarding oil pipeline projects, and the regulatory certainty sought is essential to making a financial investment decision with regard to the pipeline. NST submits that the Commission has a well-established policy recognizing the value of providing advance guidance for significant infrastructure projects through declaratory orders.[1] NST states that the Commission has affirmed that the ICA gives the Commission discretion to approve contract rate service under appropriate circumstances.[2] NST requests that the Commission make the rulings discussed below.

11. NST requests that it be permitted to implement a tariff rate structure that provides different rates for committed (dedicated) volumes and uncommitted (walk-up) volumes. NST asserts that the Commission has repeatedly approved requests to offer priority service at a premium rate to shippers who enter into long-term volume commitments in support of projects to create new pipeline capacity, while preserving access by uncommitted shippers.[3] NST submits that the proposed TSA further complies with

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[1] *Citing, Express Pipeline Partnership,* 76 FERC ¶ 61,245, at 62,253 (1996), *order on reh'g*, 77 FERC ¶ 61,188 (1996).

[2] *Citing, CCPS Transportation, LLC,* 12 FERC ¶ 61,253, at P 18 (2007).

[3] *Citing, Tesoro High Plains Pipeline Company,* 148 FERC ¶ 61,129, at P 24 (2014) and *Mid-America Pipeline Company,* 136 FERC ¶ 61,087 (2011).

Commission precedent by providing that committed shippers will pay a premium rate for transportation of their dedicated volumes of at least one cent per barrel above the uncommitted rate.[4]

12. NST requests that the provisions of the TSA for which NST is requesting approval will govern the transportation services NST provides to the committed shippers and that the committed shippers will pay the rates for which they contract for their dedicated volumes on the basis set forth in the TSA for the duration of the contract term. NST submits that the Commission has held that it will honor agreed-upon rates and terms and conditions of service entered into by a common carrier and shippers who make long-term arrangements during a valid open season to support a project during the terms of those agreements.[5]

13. NST requests that it may provide up to 90 percent of the capacity of the pipeline as priority service capacity at a rate that is not less than one cent greater than the uncommitted rate. NST contends that its proposal is consistent with Commission precedent in reserving 90 percent of pipeline capacity for priority service for committed volumes, while ensuring that uncommitted volumes will have access to 10 percent of the new capacity.[6]

14. NST requests that an affiliate may participate in the open season. NST asserts that the Commission has reasoned that the fact that an affiliate is an anchor shipper does not, in and of itself, indicate any undue discrimination in the open season process where the open season process was widely publicized and conducted in an open and transparent manner, and the affiliate does not sign a contract with terms different than those available to any other potential shipper.[7]

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[4] *Citing, Sunoco Pipeline, L.P.* 149 FERC ¶ 61,191, at PP 13, 29 (2014) and *Shell Pipeline Co. LP*, 139 FERC ¶ 61,228, at P 21 (2012).

[5] *Citing, Kinder Morgan Pony Express Pipeline LLC, Belle Fourche Pipeline Co.,* 141 FERC ¶ 61,180 (2012); *Seaway Crude Pipeline Co., LLC,* 146 FERC ¶ 61,151, at P 13 (2014).

[6] *Citing, Sunoco Pipeline L.P.,* 149 FERC ¶ 61,191 at P 31; *NuStar Crude Oil Pipeline L.P.,* 146 FERC ¶ 61,146, at P 13 (2014); *JBBR Pipeline LLC,* 150 FERC ¶ 61,012, at P 21 (2015).

[7] *Citing, North Dakota Pipeline Company LLC,* 147 FERC ¶ 61,121, at P 27 (2014).

15. NST requests a finding that its allocation methodology and prorationing policy comply with Commission precedent. NST submits that the use of an NPV methodology to allocate requests for service in the event of an oversubscribed open season is reasonable, non-discriminatory, and supported by Commission policy. NST states the Commission has concluded that there is no issue of discrimination where all potential shippers have notice of the use of the NPV methodology because all shippers have the ability to determine how their contracts will be structured based on volume and term, and know in advance what the impact of the contract terms will be for the purpose of evaluating their bid.[8] NST asserts that the proration policy of 90 percent of capacity for priority committed service and 10 percent of capacity for uncommitted shippers allocated on a *pro rata* basis based on a shipper's history during a twelve-month base period is reasonable and non-discriminatory and consistent with the principle that pipelines have discretion in crafting allocation methods in times of excess demand.[9]

Discussion

16. In its petition for declaratory order, NST is seeking approval of the service priorities and rate structure (but not the specific rates) to be offered in an open season for its proposed pipeline in North Dakota designed to serve the Bakken production region. Consistent with Commission precedent, NST is seeking approval of its service priorities and rate structure through a petition for declaratory order.

17. Specifically, NST is seeking approval that (1) the TSAs will be upheld during their terms, (2) committed shippers will be charged a premium rate for priority service compared to uncommitted shippers, (3) 90 percent of the capacity will be reserved for committed priority shippers and 10 percent of the capacity will be available to uncommitted shippers, (4) the NPV allocation methodology and proration policy are reasonable, and (5) an affiliate of NST may participate in the open season. The Commission finds that the rate structure and terms and conditions of service NST is proposing to offer to potential committed shippers during the future open season are consistent with the ICA and Commission precedent and policy cited by NST in its petition and discussed above. The rulings requested by NST have been fully addressed by the Commission in various prior orders and no further discussion is necessary. Based on the representations made by NST in its petition, the Commission finds the confirmations and rulings sought by NST are consistent with precedent, and therefore grants the declaratory order petition, but with one contingency, related to the yet-to-be-held open season.

[8] *Citing, Shell Pipeline Company LP*, 139 FERC ¶ 61,228 at P 22.

[9] *Citing, Mid-America Pipeline Co., LLC,* 106 FERC ¶ 61,094, at 61,336 (2004).

18. Since NST has not held an open season, the rulings here are necessarily contingent upon NST's successfully completing an open, transparent, and widely-publicized open season where no issues of undue discrimination or undue preference, or other objections under the Interstate Commerce Act are raised. Should any potential shipper raise such issues to the Commission concerning the conduct or validity of the open season during or after it is held, the Commission may need to investigate the open season process and possibly revisit the rulings conditionally granted here. Accordingly, NST's petition for declaratory order is granted subject to this contingency.

The Commission orders:

NST's August 25, 2015 petition for declaratory order is granted subject to the condition discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.