153 FERC ¶ 61,250
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

North Dakota Pipeline Company LLC Docket No. IS16-28-000

ORDER ON TARIFF AND REQUEST FOR RELIEF UNDER
SECTION 4 OF THE INTERSTATE COMMERCE ACT

(Issued November 30, 2015)

1. On October 19, 2015, North Dakota Pipeline Company LLC (North Dakota Pipeline) filed FERC Tariff No. 3.14.0, to be effective December 1, 2015. The tariff establishes a new delivery point at Minot (Ward County), North Dakota, with both regular rates and rates that North Dakota Pipeline characterizes as "volume discounted rates" from all upstream receipt points. The order also requests for the volume discounted rates relief from section 4 of the Interstate Commerce Act (ICA), which generally prohibits charging a greater amount for a shorter distance than for a longer distance over the same line or route in the same direction.[1] For the reasons discussed below, the tariff is rejected and relief from section 4 of the ICA is denied.

Background

2. North Dakota Pipeline's proposed tariff establishes a new delivery point at Minot, North Dakota with both regular and volume discounted rates from all upstream receipt points. Shippers will be entitled to pay the volume discounted rates to Minot, North Dakota if they meet the Minimum Tender Volume Requirement and re-originate such barrels at Minot for further transportation to Clearbrook, Clearwater County, Minnesota. Pursuant to section 342.2(b) of the Commission's regulations, North Dakota

[1] Section 4 of the ICA in pertinent part provides that "It shall be unlawful for any common carrier subject to [this statute] to charge or receive any greater compensation in the aggregate for . . . transportation . . . for a shorter than for a longer distance over the same line or route in the same direction . . . *Provided,* That, upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to [so] charge…."

Pipeline attached an affidavit attesting that the rates have been agreed to by at least one non-affiliated shipper who intends to use the services in question.

3. Pursuant to section 341.15 of the Commission's regulations, North Dakota Pipeline requests relief from section 4 of the ICA to establish the volume discounted rates to Minot, North Dakota. These initial volume discounted rates to Minot are less than existing transportation rates from the same origin points to delivery points upstream of Minot at Beaver Lodge, Stanley and Berthold, North Dakota. Because the volume discounted rates for the longer haul to Minot will be less than the rates for the shorter hauls to the other North Dakota destinations, relief from section 4 of the ICA is required to establish the volume discounted rates to Minot.

4. North Dakota Pipeline states that it has established a merchant tankage service at Minot to provide shippers with the option to temporarily store barrels. North Dakota Pipeline submits that the volume-discounted rates to Minot are being established to allow shippers that temporarily store barrels at Minot to pay aggregate rates to Clearbrook, Minnesota that are roughly equal to the existing tariff through-rates from the designated origin points to Clearbrook. North Dakota Pipeline asserts that the volume-discounted rates are reasonably compensatory because they will only be applicable to shippers that re-originate barrels delivered to Minot for transportation to Clearbrook, and thus the aggregate rates charged using the discounted rates plus the existing rate from Minot to Clearbrook will remain equal to or slightly higher than the existing through rates charged from the upstream origin points. North Dakota Pipeline contends that the proposed rates are intended to maintain North Dakota Pipeline's competitive position with respect to movements to Clearbrook.

5. North Dakota Pipeline asserts that shippers qualifying for the volume-discounted rates by moving volumes to Minot and then re-originating such volumes on North Dakota Pipeline for further transportation to Clearbrook are not similarly situated to other shippers moving volumes to destinations upstream of Minot. North Dakota Pipeline contends that the shippers who qualify for the volume-discounted rates are receiving a different service based on their commitment to ultimately re-originate their temporarily stored volumes on North Dakota Pipeline for ultimate delivery to Clearbrook, even if the rate those shippers pay for the component transportation to Minot is lower than the rate for movements to destination points upstream of Minot.

6. North Dakota Pipeline asserts that the Commission has found that no undue discrimination results from a volume discount program that allows differential pricing for transportation between the same points.[2] North Dakota Pipeline contends that the volume

[2] *Citing, Mid-America Pipeline Co.*, 93 FERC ¶ 61,306 (2000).

discount shippers are not similarly situated to other shippers who do not commit to move volumes on North Dakota Pipeline to Clearbrook. North Dakota Pipeline claims there is no issue of undue discrimination because any shipper can qualify for the volume-discounted rate by meeting North Dakota Pipeline's Minimum Tender Volume Requirement and re-originating volumes at Minot for further transportation on North Dakota Pipeline to Clearbrook. North Dakota Pipeline submits there is no impact on shippers who do not qualify for the volume discounted rates because the volume discount shippers will pay aggregate rates to Clearbrook that are greater than or equal to the rates charged from the origin points upstream of Minot.

Comments

7. On November 4, 2015, comments were filed by Suncor Energy Marketing Inc. (Suncor). Suncor states it is a shipper on the North Dakota Pipeline and is concerned with the proposed tariff and waiver request. Suncor submits that Enbridge has provided similar services on other parts of its system. For example, Suncor states that Flanagan South shippers have the option to go into Cushing tankage without the need for the carrier obtaining relief from the provisions of the ICA. Suncor assert that relief from the provisions of the ICA should only be granted after careful consideration and when no alternative is available. Suncor suggests that alternatives are available to North Dakota Pipeline.

8. Suncor asserts that the rate differences are quite substantive. For example, Suncor states that North Dakota Pipeline is proposing a discounted rate for transportation from Tioga to Minot of 3.62 cents per barrel whereas the current uncommitted rate for transportation from Tioga to Berthold, a point in between Tioga and Minot, is 104 cents per barrel. Suncor understands that the tariff indicates that shippers must meet the Minimum Tender Volume Requirement to qualify for the new rates. However, Suncor asserts that this Minimum Tender Volume Requirement is a minimum requirement that all shippers must meet on all segments of the system. Accordingly, Suncor contends that all shippers are similarly situated and there is no volume incentive distinction between them to warrant a rate distinction. Rather, the distinction appears to relate to the use of the pipeline's storage facilities and the re-origination of those stored volumes into the pipeline for ultimate delivery.

9. Suncor states that there are no proposed changes to the apportionment rules in the filing. Suncor states that Committed Shippers, Historical Shippers and New Shippers are treated differently under apportionment. Suncor contends that to be equitable to all shippers, it is critical that the Minot re-originated volumes not cause any changes to the apportionment allocations. Suncor submits that to the extent re-origination occurs at other points on the North Dakota Pipeline system, North Dakota Pipeline should provide similar rate treatment at those locations.

10. Suncor requests that the Commission reject the request for ICA section 4 relief and reject the proposed tariff. If the tariff is approved, Suncor requests that the Commission direct North Dakota Pipeline to apply the existing apportionment rules to re-origination receipts elsewhere and to provide comparable rate treatment at other locations so as to treat all shippers comparably.

North Dakota Pipeline's Response

11. On November 9, 2015, North Dakota Pipeline filed a response to Suncor's comments. North Dakota Pipeline asserts that Suncor's comments should be treated as a protest because it requests rejection of the tariff. North Dakota Pipeline contends that as a protest Suncor's filing is procedurally deficient because it is one day out-of-time and Suncor did not explain the reason for the filing's untimeliness. In addition, North Dakota Pipeline asserts that the comments fail to show any injury to Suncor or other shippers that would result from granting the section 4 waiver. Therefore, North Dakota Pipeline submits that Suncor's pleading should be rejected.

12. North Dakota Pipeline contends that Suncor's pleading raises no substantive issues that should affect the Commission's consideration and approval of North Dakota Pipeline's section 4 application. North Dakota Pipeline states that Suncor alleges that Enbridge has provided a similar service on other systems without the need for section 4 relief. North Dakota Pipeline contends that Suncor has not cited any authority that North Dakota Pipeline must use a particular method to provide the type of service in question. North Dakota Pipeline submits that the issue is simply whether the method North Dakota Pipeline did choose is lawful and reasonable.

13. North Dakota Pipeline states that Suncor claims that North Dakota Pipeline's proposed discount rates to Minot are not justified because all shippers meet the qualifying volume. North Dakota Pipeline contends that the proposed section 4 relief allows those shippers to pay total rates for the transportation to Minot and subsequently to Clearbrook that are the same (or in some cases slightly higher than) the existing through rates from the upstream origin points to Clearbrook. North Dakota Pipeline argues that the proposed rates are reasonably compensatory because the aggregate rates charged for transportation to Clearbrook via Minot will not be lower than the existing through-rates charged from the upstream origin points to Clearbrook. Thus, North Dakota Pipeline asserts there is no

impact on shippers that elect not to use the pipeline's storage facilities and then re-originate the stored volumes at Minot for later transport to Clearbrook. North Dakota Pipeline contends that all shippers are treated equally in that regard, since any shipper can qualify for the discounted rate to Minot if it meets North Dakota Pipeline's Minimum Tender Volume Requirement and then re-originates the volumes at Minot for further transportation to Clearbrook. North Dakota Pipeline asserts that out of over 150 current shippers on the system, only Suncor filed a comment in opposition to the proposal, and Suncor cannot identify any injury that would result from granting the proposed relief.

14. North Dakota Pipeline asserts that Suncor's other concerns are not the proper subject of a protest. North Dakota Pipeline asserts that it will apply existing apportionment rules to re-originated volumes. North Dakota Pipeline asserts that discussion of any future re-origination services are hypothetical and would be the subject of a separate tariff filing.

Discussion

15. In its filing, North Dakota Pipeline establishes a new delivery point at Minot and proposes rates to Minot from upstream points that include certain discounted rates.[3] The discounted rates will apply to shippers who store crude at North Dakota Pipeline's merchant tankage at Minot and who agree to transport their barrels downstream to Clearbrook. North Dakota Pipeline is seeking relief under section 4 of the ICA because it proposes to charge rates for transportation over a longer distance that is less than the rate for transportation for a shorter distance.[4] This relief is required to enable North Dakota Pipeline to charge the new rate for re-originated-from-tankage service to Clearbrook from Minot.

16. Under the Commission's regulations a pipeline must explain any changes to the rates, rules or terms and conditions of service. With respect to section 4 relief, the ICA

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[3] North Dakota Pipeline refers to the proposed discounted rates as "volume discounted rates," but there are no volumes associated with these rates that would qualify shipments for a discount. The only volume requirement for movement under the discounted rates is that shippers meet the Minimum Tender Volume Requirement specified in North Dakota Pipeline's FERC Tariff No. 2.4.0, which is a requirement that applies to all movements on the pipeline. The other requirement for movement under the discounted rates is that shippers must re-originate barrels for further transportation to Clearbrook.

[4] For example, the existing rate from Alexander, North Dakota, to Tioga, North Dakota, a point upstream of Minot, is 92.81 cents per barrel, whereas the proposed rate from Alexander to Minot is 59.82 cents per barrel.

states that it will be granted in "special cases" and section 341.15(b)(3) of the Commission's regulations requires "[a]n accurate and complete statement giving the basis and reasoning why section 4 relief is necessary." The Commission has reviewed North Dakota Pipeline's tariff filing and response and finds that it has not adequately explained the changes to the rates for the new Minot delivery point nor has it justified why relief under section 4 of the ICA is necessary.

17. Pursuant to section 342.2 of the Commission's regulations, North Dakota Pipeline provided a sworn affidavit that its proposed initial rate has been agreed to by a non-affiliated shipper who intends to use the service. However, North Dakota Pipeline has filed initial rates for what appears to be two separate services but has not explained how these services would work. For example, Table 7 of North Dakota Pipeline's filing shows the discounted rates for shippers who will use North Dakota Pipeline's merchant storage at Minot and then re-originate the crude oil for further transportation to Clearbrook. Table 6 shows the non-discounted rates for transportation to Minot for transportation service that supposedly is not subject to further movement to Clearbrook and thus terminates at Minot. However, there is no explanation or justification in the transmittal letter regarding those movements that terminate at Minot, nor is there a statement that the unaffiliated shipper supporting the tariff filing will use the proposed service under both Table 6 and Table 7. It is also not clear what happens to the volumes that terminate at Minot after transportation under the rates in Table 6. For example, the existing rates contained in the instant tariff filing show that other delivery points go to other interstate or intrastate pipelines or affiliated rail or storage facilities.

18. The Commission also finds that North Dakota Pipeline has not adequately explained why relief under section 4 of the ICA is necessary. North Dakota Pipeline simply asserts that the rates are intended to maintain its competitive position with respect to movements to Clearbrook but fails to explain what type of competition it faces or provide any detail on special circumstances that would justify the requested relief. Without more information concerning the options at the Minot delivery point or the competitive environment, it appears that the section 4 relief would permit North Dakota Pipeline to provide discounted rates as a means to attract business to its merchant tankage at Minot.

19. Finally, North Dakota Pipeline's tariff, as currently proposed, raises an issue as to whether the merchant storage provided by North Dakota Pipeline at Minot should be considered to be jurisdictional. It appears that using North Dakota Pipeline's merchant storage at Minot is a requirement for receiving the discounted rate to Minot, since under the proposed tariff barrels must be re-originated at Minot for further transportation to Clearbrook. This bundling or tying of the storage at Minot with the further transportation to Clearbrook appears to make the storage at Minot a necessary part of the overall transportation service. Moreover, the storage seems to be an integral, temporary part of the through-transportation-service to Clearbrook. This situation as presented by the

proposed tariff raises questions as to whether there is a jurisdictional issue regarding the merchant tankage service.

20. North Dakota Pipeline seems to suggest that there is no harm to Suncor if their exemption request is granted. However, this is not the standard for granting exemption from ICA section 4. Rather, it is incumbent on the carrier to show why this is a "special case" that warrants such an exemption. Here, the filing and the pleadings currently before the Commission do not make that case, and raise further questions about the status of the merchant tankage being provided at Minot. Accordingly, for the reasons discussed above, North Dakota Pipeline's tariff is rejected and relief from section 4 of the ICA is denied.

The Commission orders:

(A) North Dakota Pipeline's FERC Tariff No. 3.14.0 is rejected.

(B) North Dakota Pipeline's request for relief under section 4 of the ICA is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.