153 FERC ¶ 61,322
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Bayou Bridge Pipeline, LLC Docket No. OR16-1-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued December 18, 2015)

1. On October 19, 2015, Bayou Bridge Pipeline, LLC (Bayou) filed a petition for declaratory order (Petition) regarding a proposed new interstate pipeline project (Project) intended to provide crude oil transportation from crude oil terminals, storage facilities, and a general transportation hub in the vicinity of Nederland, Texas to refineries and markets in Louisiana. Specifically, Bayou seeks Commission approval of its proposed tariff rate structure, terms of service, and prorationing methodology for the Project by December 18, 2015, to enable the Project to proceed on schedule. The Commission grants the rulings requested by Bayou, as discussed below.

Background

2. Bayou is a joint venture between Phillips 66 Company, Energy Transfer Partners, L.P. (Energy Transfer), and Sunoco Logistics Partners L.P. The approximately 200-mile Project from Nederland to St. James, Louisiana is expected to transport up to 235,000 crude oil barrels per day and is anticipated to enter full service in late 2017. However, Bayou will provide service on the first 50-mile segment from Nederland to Lake Charles, Louisiana in early 2016.

3. On December 1, 2014, Bayou commenced an open season which concluded on March 25, 2015. Interested shippers were required to sign a confidentiality agreement to receive a *pro forma* transportation service agreement (TSA) and confidential information memorandum. Upon receiving feedback from potential shippers, Bayou modified the *pro forma* TSA and redistributed materials to all initial open season participants. On October 1, 2015, Bayou launched a second open season to gauge additional market interest and further commitments. Bayou explains both open seasons offered the same terms of service, except for a viscosity surcharge which was included in

only the second open season.[1] Bayou states that notice for both open seasons was announced on Energy Transfer's website and via a press release which was distributed to hundreds of trade press and general circulation publications.

TSA Description

4. Under the TSA, committed shippers will receive a discount compared to uncommitted shippers for the same movements and will not be extended firm service. Bayou explains that the committed tariff rates will vary based on origin and destination point, length of contract term, and volume commitment level, with the initial tariff being lower for longer terms and higher volume commitments. Bayou also explains that committed shippers who executed TSAs will be eligible for the discounted tariff rates for movements of barrels in excess of their volume commitments. Some committed shippers will be subject to the viscosity surcharge if their crude meets a particular standard for "heavy crude petroleum." The initial uncommitted tariff rates will vary by origin and destination points.

5. The TSA includes a provision that permits shippers to apply volumes transported from alternate origin or delivery points (within the same continuous path) towards their minimum volume commitment. Such alternate movements would have lower priority under the proration policy from those specified in the TSAs. The TSA also provides that volumes transported outside a committed shipper's continuous path can satisfy volume commitments, but the rates would equal the higher of the then-applicable uncommitted tariff rate for the movement, or the committed shipper's otherwise applicable committed rate.

6. Bayou explains that shippers who fail to transport their committed volumes in a given month for a particular path must pay a deficiency payment equal to the amount of the shortfall multiplied by the then-effective committed rate applicable to the shortfall volumes. Bayou states that deficiency payments will take the form of a credit and can be applied against future payments due for certain movements on the Project in excess of the shipper's minimum volume commitment, up to 120 percent of a committed shipper's volume commitment. The credits generally expire the earlier of 24 months after the deficiency or the expiration of the term for such path.

7. Bayou states that uncommitted volume rates will be subject to an annual adjustment according to the oil pipeline pricing indexing methodology, and

[1] Bayou explains the viscosity surcharge is levied upon committed shippers that meet certain quality thresholds for heavy crude oil, and the surcharge will vary according to the term of the shipper's commitment.

that committed volumes will be subject to an annual increase of 2.5 percent of the then-applicable rate.

8. Bayou states it will maintain a traditional history-based proration policy where up to 90 percent of the capacity will be available for regular shippers. No shipper history will be earned by any shippers during the first one or two years of service on the initially available incremental capacity so that all capacity on the entire pipeline remains available when the full length of the pipeline enters service. Bayou explains the Project will reserve at least ten percent of the Project's capacity for uncommitted volumes.

9. During prorationing, a committed shipper's history will be equal to the greater of its average shipments over the base period, or its minimum committed monthly volume. A committed shipper will remain a "regular shipper" throughout the term of its commitment.

10. Moreover, if one or more of the regular shippers makes a nomination from an origin or to a destination other than specified under its TSA but in the same continuous path, Bayou explains that it will proportionally allocate the 90 percent of the capacity for regular shippers on the basis of the lesser of the regular shipper's historical shipment volume or its nomination in the month of prorationing.

11. Bayou states that available incremental capacity for each prorated pipeline segment will be allocated on a pro rata basis to all shippers based on the excess of each shipper's nomination over the capacity allocated to each shipper. Thereafter, any remaining available capacity would be allocated on a pro rata basis to all shippers that were allocated capacity.

12. As noted above, Bayou explains further that a certain amount of capacity will not initially accrue shipper history for prorationing purposes, in order to allow the phasing-in of full service on the Project, and the ramping-up of volume commitments by committed shippers over two years, without impairing the ability of any shippers to accrue history on the entire line until full in-service date of the Project.

13. Bayou explains that the 10 percent reserved for uncommitted shippers will be distributed on a pro rata basis, not to exceed either a new shipper's nomination or 2.5 percent of available capacity in any given month. If no new shipper is able to be allocated the minimum volume for a nomination, a lottery process will ensue. Bayou explains a new shipper will not be allocated capacity if it is an affiliate of a regular shipper, or affiliate of another shipper which received a volume allocation.

14. The TSA includes a most-favored nation clause which provides that if Bayou contracts a lower committed transportation rate or surcharge with a third party that satisfies the TSA's criteria, a committed shipper's rate or surcharge may be reduced for an equal volume of crude oil to the lower rate/surcharge. Bayou states it will charge the

lesser of the remaining term of the shipper's TSA for the applicable transportation path or the term of the applicable rate or surcharge for the third party.[2] If Bayou files an uncommitted rate for an origin-destination path that is less than the then-effective committed rate for the same path, Bayou will reduce the committed rate to 5 cents per barrel less than the uncommitted rate to preserve the discount for the shipper's committed volumes.[3]

15. Shippers that committed to terms greater than five years from certain origin points were presented the opportunity to ramp-up the amount of volume commitments over the first two years of service based upon fixed elections.[4] The TSAs include parameters for the amount of capacity that could be increased over the first two years to arrive at the shipper's full commitment at the beginning of the third contract year.[5] In addition, those shippers making ten or fifteen year commitments were provided the opportunity to extend the original term of their TSAs for the minimum volume commitment level of the final contract year for an additional three to ten years.[6]

16. Bayou also explains the TSA provides that prior to the date of full service, it may offer early service on specific segments, subject to Bayou's sole discretion and applicable legal requirements. Bayou explains that other than for the specific early service to the Lake Charles destination, there would be no minimum volume commitments associated with the early service.

Requested Rulings

17. Bayou requests Commission confirmation and approval of the following aspects of the Project:

A. A committed shipper capacity allocation based on a uniform and non-discriminatory net present value ranking of the shippers' commitments in each open season;

[2] Bayou Petition at 12.

[3] Bayou Petition at 13.

[4] Bayou Petition at 13.

[5] *Id.*

[6] Bayou Petition at 18.

B. The tariff rate structure which provides different rates for committed and uncommitted shippers' volumes;

C. The committed rates, index rate adjustment mechanism, and viscosity surcharge agreed to as part of the TSA will not be subject to revision other than by agreement of the parties to a given TSA;

D. The committed rates (including the committed shipper viscosity surcharge) provided in the TSAs may be treated as the equivalent of settlement rates both initially and during the term of the TSAs pursuant to section 342.4(c) of the Commission's regulations;

E. A proration policy that would allow up to 90 percent of available capacity to be treated as capacity reserved for committed shippers and other regular shippers;

F. A proration policy that would allow shippers to initially accrue shipping history for purposes of allocation on a defined amount of available capacity, with no history accruing on the balance of the capacity for a defined time period during which uncommitted and committed shippers would have equal access to that capacity, to accommodate the phased in-service dates of the Project and the increase of committed shippers' volume commitments over that time;

G. A proration policy under which the volume history of committed shippers will be deemed to be the greater of their average actual shipments over the base period in a defined amount of capacity or tier minimum volume commitments;

H. A lottery mechanism for allocation of capacity available to new shippers to prevent any new shippers' allocations from falling below the minimum tender volume during periods of prorationing;

I. A provision permitting qualifying committed shippers to extend the initial terms of their TSAs; and

J. Early service prior to the full in-service date of the Project.

<u>Bayou's Attestations</u>

18. Bayou explains that the net present value (NPV) was not necessary during the initial open season. Bayou states that uniform, non-discriminatory NPV ranking is consistent with Commission policy.[7] Bayou explains that if capacity subscriptions

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[7] Bayou Petition at 20 (citing *Sunoco Pipeline L.P.*, 141 FERC ¶ 61,212, at P 21 (2012) (*Sunoco)*).

exceed available capacity reserved for committed shippers during the second open season, Bayou will allocate the available capacity commitments based on a uniform and non-discriminatory NPV ranking.[8] The methodology would account for elections made by each committed shipper for transportation path, term, volume commitment, and applicable rate. If committed shippers submit TSAs in such instances of equal value, the capacity commitments would be awarded on a pro rata basis.

19. Bayou maintains that its tariff rate structure is consistent with Commission precedent.[9] Bayou explains it will have separate rates for committed volumes and uncommitted volumes. The initial uncommitted rates will vary only by origin and destination point. However, Bayou explains the committed volume rates will vary based upon the origin and destination points, daily volume commitments, and commitment term. Bayou explains it will also levy a surcharge for committed shippers transporting heavy crude oil who signed TSAs in the second open season. Bayou argues that committed shippers who did not sign a TSA in the initial open season are not similarly situated to those who did not, and the surcharge should therefore be permissible.[10] Bayou states the Commission has previously approved rate structures in which committed shippers making term and volume throughput commitments initially pay lower rates on their committed volumes compared to the rates payable on uncommitted volumes, and where committed shippers' rates vary according to their commitments, so long as the opportunity to execute TSAs featuring such volume and term commitments is open and available to all interested parties.[11]

20. Bayou requests the Commission to affirm that the rates for committed volumes, related adjustment mechanism, and viscosity surcharge will not be subject to revision other than by agreement of the parties during the terms of the TSAs, and that such rates may be treated as settlement rates both initially and for the term of the TSA. Bayou contends the Commission has previously affirmed that contractually-agreed upon rates,[12]

[8] Bayou Petition at 10.

[9] Bayou Petition at 21.

[10] Bayou Petition at 23.

[11] Bayou Petition at 21 (citing *TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at P 22 (2008); *Sunoco Pipeline L.P., SunVit Pipeline LLC, and ExxonMobil Pipeline Co*., 150 FERC ¶ 61,172, at P 28 (2015) (*Sunoco/Sunvit/Exxon*)).

[12] Bayou Petition at 23 (citing *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130, at PP 17-19 (2013)).

including a surcharge,[13] by committed shippers pursuant to a valid open season is consistent with Commission policy. Moreover, Bayou maintains that the Commission has permitted mechanisms to establish and adjust rates other than the indexing rate methodology, including those which cannot be adjusted downward.[14]

21. Bayou further argues that its prorationing policy and lottery mechanism is consistent with Commission precedent. Bayou explains that the pro rata allocation of capacity within the incremental capacity means that new shippers will have equal access to the capacity compared to regular shippers, and uncommitted shippers will have access to more than 10 percent of capacity during this time. Additionally, Bayou contends that its policy is consistent with Commission precedent stating that shipper history may not accrue during an early service period so that committed shippers will have assurance that the TSA terms will be maintained upon the Project's completion.[15] Bayou explains that its ramp-up provision is consistent with prior Commission orders approving similar rights so long as the provision does not infringe on the capacity available for uncommitted shippers.[16] Bayou also explains its proration policy is consistent with Commission precedent as it reserves 10 percent of available capacity for new shippers.[17]

22. Moreover, Bayou maintains that allocation of capacity during prorationing to regular shippers, based on the shipper's average volumes shipped over a base period, or greater if based on a committed shipper's monthly minimum volume commitment, is consistent with Commission precedent.[18]

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[13] Bayou Petition at 24 (citing *Seaway Crude Pipeline Company, LLC*, 142 FERC ¶ 61,201, at P 13 (2013); *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310, at PP 31, 45 (2007)).

[14] Bayou Petition at P 24-25 (citing *Dakota Access, LLC and Energy Transfer Crude Oil Co.*,149 FERC ¶ 61,275, at P 35 (2014); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at P 22 (2007)).

[15] Bayou Petition at 26 (citing *Sunoco*,141 FERC ¶ 61,212 at P 22).

[16] Bayou Petition at P 26-27 (citing *Saddlehorn Pipeline Co., LLC*, 153 FERC ¶ 61,067, at P 34 (2015)).

[17] Bayou Petition at 27 (citing *Enbridge Pipelines (Illinois LLC)*, 144 FERC ¶ 61,085, at PP 24-25 (2013)).

[18] Bayou Petition at 27 (citing *Enterprise Liquids Pipeline LLC*, 142 FERC ¶ 61,087, at P 28 (2013)).

23. Bayou further contends that the Commission has previously approved lottery mechanisms. Bayou states that the Commission recently approved a lottery mechanism whereby new shippers were assigned randomly generated numbers corresponding to sequentially administered minimum volume allocations.[19] Bayou states that the Commission should approve the lottery system because it is consistent with its policy.[20]

24. Bayou asks the Commission to approve its contract extension rights with respect to committed shippers. Specifically, Bayou explains that only shippers committing for ten or fifteen year terms were provided the contract extension rights, but such rights were offered to all interested shippers during an open season. Bayou contends Commission policy has consistently upheld granting specific rights to committed shippers as an inducement to enter into long-term contracts, provided that those rights are offered to all interested shippers, and that contract extension rights for committed shippers is permissible where such rights were made available to interested parties in a valid open season.[21]

25. Bayou requests approval of its intended early in-service date for the Lake Charles destination. Specifically, Bayou explains that no shippers would develop shipper history for the early service period, and that the Commission has previously permitted early service where such service would not override volume commitments of committed shippers when the project is fully operational.[22]

<u>Public Notice, Interventions, Protests, and Comments</u>

26. Notice of the petition was issued on October 22, 2015, providing for motions to intervene, comments and protests to be filed on or before November 19, 2015. Pursuant to Rule 214 of the Commission's regulations,[23] 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.

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[19] Bayou Petition at 29 (citing *Sunoco/Sunvit/Exxon*, 150 FERC ¶ 61,172 at P 31).

[20] Bayou Petition at 29-30.

[21] Bayou Petition at 30.

[22] Bayou Petition at 31-32 (citing *Sunoco*, 141 FERC ¶ 61,212 at P 22).

[23] 18 C.F.R. § 385.214 (2015).

Commission Determination

27. Based on the representations in the petition, the Commission will grant all the rulings requested by Bayou as consistent with precedent. These confirmations and rulings are briefly summarized below.

28. The Commission confirms the TSA's provisions, including that the index rate adjustment mechanism and viscosity surcharge will not be subject to revision except by agreement of the parties. Bayou's proposal to treat the committed rates, including the committed shipper viscosity surcharge, as settlement rates, pursuant to section 342.4(c) of the Commission's regulations, is consistent with Commission precedent.[24]

29. The Commission finds that the terms of the Project, including the tariff rate structure,[25] reservation of up to 90 percent of capacity for committed shippers,[26] contract extension rights,[27] early service provisions,[28] NPV methodology,[29] and "ramp-up" election,[30] are also consistent with prior Commission orders.

30. Bayou's prorationing policy, which provides that shippers can initially accrue shipping history for purposes of allocation on a defined amount of available capacity, with no history accruing on the balance of the capacity for a defined time period during which uncommitted and committed shippers would have equal access to that capacity, to accommodate the phased in-service dates of the Project and the increase of committed shippers' volume commitments over that time is approved. The Commission finds that a

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[24] *See Seaway Crude Oil Pipeline Co. LLC*, 142 FERC ¶ 61,201 at P 12, citing *Express Pipeline P'ship*, 76 FERC ¶ 61,245, at 62,258-59 (1996).

[25] *Panola Pipeline Company, LLC,* 151 FERC ¶ 61,140, at P 20 (2015).

[26] *Enbridge Pipelines (FSP) LLC,* 146 FERC ¶ 61,148, at P 27 (2014).

[27] *Belle Fourche Pipeline Company and Bridger Pipeline LLC,* 151 FERC ¶ 61,139, at P 25 (2015); *Kinder Morgan Pony Express Pipeline LLC and Hiland Crude, LLC*, 141 FERC ¶ 61,249, at P 39 (2012).

[28] *Sunoco,* 141 FERC ¶ 61,212 at P 22.

[29] *Id.* PP 9, 21; *Shell Pipeline Company LP*, 139 FERC ¶ 61,228, at P 22 (2012).

[30] *Tallgrass Pony Express Pipeline LLC*, 147 FERC ¶ 61,266, at PP 6, 19 (2014); *Medallion Pipeline Co., LLC*, 148 FERC ¶ 61,095, at PP 7, 18 (2014).

set-aside of capacity on which shipper history will not accrue until the in-service date is reasonable and will ensure the rights of committed shippers who signed TSAs during a valid open season will be preserved. Further, the Project's prorationing policy under which the volume history of committed shippers will be deemed to be the greater of their average actual shipments over the base period in a defined amount of capacity or tier minimum volume commitments is approved.

31. The Commission also confirms and approves Bayou's lottery mechanism for allocation of capacity available to new shippers.

The Commission orders:

Bayou's petition for declaratory order is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.