156 FERC ¶ 61,163
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Grand Mesa Pipeline, LLC Docket No. OR16-12-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 8, 2016)

1. On March 11, 2016, Grand Mesa Pipeline, LLC (Grand Mesa), a subsidiary of NGL Energy Partners LP (NGL), filed a petition for declaratory order requesting approval of a proposed rules and regulations tariff, rate tariff, service priority rights, transportation service agreement (TSA) and prorationing procedures for Grand Mesa's proposed pipeline project (Petition). On August 9, 2016 Grand Mesa filed an amendment to the Petition requesting approval of an amended TSA and revised priority rights granted through a July 2016 second open season (Amendment to the Petition). The proposed project is a 550-mile, 150,000 barrel per day (bpd) pipeline designed to transport crude oil produced in the Denver-Julesburg Basin (D-J Basin) to the Cushing, Oklahoma hub, which affords shippers access to the U.S. Midcontinent markets and the Texas Gulf Coast refinery complex. Grand Mesa requests that the Commission grant its Petition, including the Amendment to the Petition, no later than September 8, 2016, "so that Grand Mesa can meet its targeted November 1, 2016 in-service date." As discussed further below, this order grants Grand Mesa's Petition, as supplemented by the Amendment to the Petition, and the requested rulings contained therein.

I. Background

2. The Grand Mesa Pipeline is part of an undivided joint interest project[1] between Saddlehorn Pipeline Company, LLC (Saddlehorn) and Grand Mesa, who will both share

[1] The project is for 340,000 bpd of capacity (150,000 bpd for Grand Mesa and 190,000 bpd for Saddlehorn).

in the costs for the pipeline that is currently under construction.[2] Grand Mesa states that it will own 150,000 bpd of capacity on this pipeline. Grand Mesa will own pipeline capacity completely independent of Saddlehorn, but will share in the expense of constructing and operating the undivided joint interest project. Additionally, Grand Mesa and Saddlehorn will have separate and independent tariffs, rules, and agreements with shippers.

3. Grand Mesa states that the D-J Basin has seen a significant expansion of oil and gas development in recent years and industry reports indicate that this producing area may be capable of producing a total of over 4 billion barrels of oil equivalent. Grand Mesa states that the Grand Mesa pipeline will provide critical takeaway capacity for crude oil producers in the D-J Basin in a cost-effective manner while also affording a more environmentally responsible transportation method than the current utilization of rail and truck shipments.

4. Grand Mesa states that, in response to the takeaway capacity needs of producers in the D-J Basin, it is constructing a new crude oil pipeline originating at a new station near Lucerne, Weld County, Colorado (the Lucerne Station) and terminating at the NGL storage terminal in Cushing, Lincoln County, Oklahoma. Grand Mesa anticipates that the Lucerne Station will have the capability to receive crude oil from third party gathering pipelines and will also have truck receiving capabilities and sufficient operational breakout storage to provide increased reliability to shippers. Grand Mesa states that there will be an additional injection point at a station near Kersey, Weld County, Colorado (the Riverside Station). Grand Mesa states that the Riverside Station will have truck unloading facilities, the capability to receive crude oil from third party gathering pipelines and offer operational breakout storage to accommodate potential shippers.

A. Initial Open Season

5. In light of the capital investment required to construct the Grand Mesa pipeline, Grand Mesa states that it held a widely publicized initial open season (Initial Open Season) for the Grand Mesa pipeline from September 15, 2014 to October 3, 2014, seeking commitments from a sufficient number of shippers to enter long-term contracts for transportation service on the pipeline. Grand Mesa states that, following the close of the Initial Open Season, it issued a press release announcing that it had received sufficient long-term commitments to proceed with development of the Grand Mesa pipeline. Grand Mesa states that included in the Initial Open Season was a right for committed shippers to obtain up to ninety percent of any expansion capacity of the Grand

[2] The Commission granted Saddlehorn's petition for declaratory order in *Saddlehorn Pipeline Co., LLC*, 155 FERC ¶ 61,225 (2016).

Mesa pipeline. In its Petition, Grand Mesa states that it anticipates an additional open season, which in fact was held in July 2016 (the Second Open Season), during which interested shippers may enter into long-term contracts to transport crude oil on the Grand Mesa pipeline.

6. Grand Mesa states that it will offer two types of service on its pipeline system: (1) service for shippers that enter into TSA, under which they make binding, long-term volume commitments to ship stated quantities of crude oil or pay for the unused capacity (Committed Shippers); and (2) service for shippers that choose not to make long-term volume commitments and instead ship volumes on an uncommitted, or spot, basis (Uncommitted Shippers). Grand Mesa states that the terms of the committed rates offered to potential shippers in the Initial Open Season held for the Grand Mesa pipeline (Committed Rates) provided that Committed Shippers could make a certain volume commitment for a five year, a seven year, or a ten year term.[3] Grand Mesa states that the rates for each term vary, with longer terms entitling Committed Shippers to a lower rate. Grand Mesa states that, in each term category, the rates also decrease as the committed volumes increase. Grand Mesa states that the rate tariff structure also includes separate rates for volumes transported for Uncommitted Shippers. Grand Mesa states that the rates for each of the different terms and categories are set forth in Grand Mesa's TSA and in the draft rate tariff. Grand Mesa states that the TSA also provides that Committed Shippers receive priority capacity during periods of pipeline prorationing in exchange for a premium rate and that Committed Shippers may make a one-time election to extend the term of the TSA by an additional five years.

B. <u>August 9, 2016 Amendment and Second Open Season</u>

7. Grand Mesa states that it submits the Amendment to the Petition to reflect the Second Open Season and certain modifications to the TSAs. Grand Mesa states that, following the Initial Open Season, subsequent market changes associated with oil price volatility altered the production profiles of the shippers with whom Grand Mesa had executed TSAs. Grand Mesa states that a majority of the shippers with whom it had

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[3] Committed rates, or contract rates, are an alternative to traditional, tariffed average-cost pricing subject to the Commission's review under the Interstate Commerce Act (ICA). This type of rate structure may be offered to shippers willing to make a long-term financial commitment, so long as the terms of the committed, or contract, rates are made available to any shipper willing and able to meet the contract terms. *Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,254 (1996) (applying *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1316 (D.C. Cir. 1984)). In the Petition, Grand Mesa indicates that the priority service transportation rate that is to be paid by the Committed Shippers is the Committed Rate.

executed TSAs requested modifications to their existing TSAs to provide necessary flexibility to accommodate the new market dynamics. Grand Mesa states that it held the Second Open Season to offer the modified TSA terms to all potential shippers, as well as those shippers who had already made commitments during the Initial Open Season, consistent with the requirements of the ICA and Commission precedent.

8. Grand Mesa reports that the rate structure and terms of service memorialized in the original TSAs were largely unchanged in the Second Open Season. However, it reports a number of amended terms which were revised in light of changing market conditions. Grand Mesa states that the TSAs were modified to provide greater flexibility in managing shipper volume commitments.[4] Specifically, Grand Mesa states that the term of the TSA was modified so that the agreement would terminate on the earlier of either (a) after the number of years specified in the agreement or (b) when the customer has met its total volume commitment under the amended TSA.[5] Grand Mesa explains that a shipper taking 10,000 bpd for seven years could terminate its TSA before the end of the term if the shipper meets its total service commitment of twenty five and a half million or so barrels.[6] Grand Mesa states that, in this scenario, the shipper actually ships more than its daily commitment over time. Grand Mesa states that, this change also necessitated the elimination of the annual volume true-up mechanism previously included in the original TSA. Grand Mesa states that it made a minor change to its pro-rationing policy to make it consistent with the elimination of the annual volume true up mechanism. Grand Mesa reports that shippers under the amended TSAs will pay committed rates rather than uncommitted rates for shipments greater than monthly committed volumes until their total volume commitment is reached.

9. Grand Mesa states that it also added additional flexibility for parental guarantees and clarified credit assurance and assignment provisions.[7] Finally, Grand Mesa states that it created one additional volume commitment tier available to prospective shippers.

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[4] Amendment to the Petition at 3; Attachment C, amended and restated *pro forma* TSA.

[5] Amended TSA section 4, Term.

[6] 10,000 barrels per day, 365 days a year for seven years (plus leap days).

[7] Amended TSA section 10.2, Credit Assurance; section 13.9, Successors and Assignability: “a reasonable basis for withholding consent may include, but is not limited to, the financial condition of the assignee raising reasonable concern about its ability to perform under this Agreement.”

C. Requested Rulings

10. Grand Mesa seeks advance approval from the Commission regarding the application, reasonableness, and lawfulness of the structure of the Committed Rates and certain provisions relating to prorationing of pipeline capacity pursuant to the Committed Rates. Grand Mesa seeks advance approval of contract extension rights and the right of first offer.[8] In addition, Grand Mesa states that it seeks Commission approvals as being lawful for Committed Rates and priority service and allocation terms.[9] Specifically, Grand Mesa states that it seeks approval of a stipulation that Committed Shippers would have priority access to as much as ninety percent of Grand Mesa Pipeline's capacity, with at least ten percent of the remaining capacity reserved for Uncommitted Shippers.[10] Grand Mesa also states that it seeks Commission approval for a stipulation that Committed Shippers would pay a priority service transportation rate (the Committed Rate), equaling $0.01 per barrel more than the rate for Uncommitted Shippers for the same volume delivery range, to obtain proration priority in accordance with the Committed Rate structure proposed by Grand Mesa.[11]

11. In light of the Second Open Season, Grand Mesa requests additional rulings approving the amended TSAs and its having made the terms of the amended TSA available to existing and potential shippers through the Second Open Season in an open, fair and non-discriminatory fashion. Grand Mesa also requests a finding that the revisions to the TSA are just and reasonable and not unduly preferential and will be upheld during the term of the agreement.

II. Public Notice and Interventions

12. Public notice of Grand Mesa's Petition was issued on March 15, 2016, providing for interventions and protests to be filed no later than April 11, 2016. The Amendment to the Petition was likewise noticed on August 10, 2016, with interventions and protests due August 22, 2016. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2016)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance

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[8] Because truck unloading and inter-facility transfer services are non-jurisdictional services, Grand Mesa has not included these services in the proposed tariffs.

[9] Petition at 4.

[10] *Id.*

[11] *Id.*

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.

13. Extraction Oil & Gas, LLC, a committed shipper on the pipeline, filed a motion to intervene and comments in support of Grand Mesa's Petition.

III. Discussion

14. Based upon the representations in the Petition, and the Amendment to the Petition, and the requirements of the provisions of the ICA and Commission precedent applying those provisions, the Commission grants Grand Mesa's unopposed petition for declaratory order, finding that the elements of Grand Mesa's proposal are consistent with precedent, just and reasonable and not unduly discriminatory or preferential. The specific rulings requested by the Petition, as supplemented by the Amendment to the Petition, and granted by this order are discussed below.

15. The Commission confirms that the key provisions of the TSA and amended TSA will be upheld during the term of the agreement.[12]

16. The Commission finds that the tiered Committed Rate discounts based on length of term and volume of commitment are appropriate. The Commission has recognized that shippers committing to transport larger volumes may appropriately pay a discounted rate relative to those not committing to transport larger volumes.[13] The Commission has also recognized that shippers making longer-term commitments incur greater costs and undertake more significant risks than shippers that do not make longer-term commitments and are therefore not similarly situated.[14]

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[12] *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,249, at P 20 (2012) (*Pony Express*) (citing *Mid-America Pipeline Co., LLC*, 136 FERC ¶ 61,087, at P 9 (2011); *Enbridge Pipelines (Southern Lights) LLC*, 122 FERC ¶ 61,170, at P 13 (2008)). *See also Centerpoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130, at P 17 (2013).

[13] *Pony Express*, 141 FERC ¶ 61,249 at P 22; *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002); *Williams Pipe Line Co.*, 80 FERC ¶ 61,402 (1997).

[14] *Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,254 (1996); *TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at 61,077 (2008).

17. The Commission confirms that Committed Shippers may have priority access to up to ninety percent of the Grand Mesa pipeline capacity, with at least ten percent of the capacity reserved for Uncommitted Shippers.[15]

18. The Commission approves the proposed prorationing policy, including the right for Committed Shippers to receive priority capacity during periods of pipeline prorationing in exchange for a premium rate of at least $0.01 per barrel more than the rate for Uncommitted Shippers. The Commission has held that, where carriers are offering premium service that is not subject to prorationing, in exchange for this guaranteed service, it must charge a premium rate of at least one cent per barrel more than that charged for uncommitted service.[16]

19. The Commission confirms that the filing of Committed Rates, including the initial Committed Rates and any adjustments to such rates pursuant to the Commission's indexing methodology, will be treated as settlement rates under 18 C.F.R. § 342.4(c) during the term of the TSA.[17]

20. The Commission approves the contract extension rights in the TSA allowing Committed Shippers to make a one-time election to extend the term by an additional five years.[18]

21. The Commission approves the right of first offer available to Committed Shippers for up to ninety percent of any expansion capacity of the Grand Mesa Pipeline. Grand Mesa offered its original TSA, including the right of first offer, in two widely publicized open seasons (Initial Open Season and the Second Open Season), with all shippers having

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[15] *Medallion Pipeline Company, LLC*, 148 FERC ¶ 61,095, at P 18 (2014) (*Medallion*); *Sunoco Pipeline L.P.*, 145 FERC ¶ 61,274, at PP 11-12 (2013); *Centerpoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130 at P 24; *Shell Pipeline Company LP*, 139 FERC ¶ 61,228 at P 21 (2012).

[16] *Shell Pipeline Company LP*, 139 FERC ¶ 61,228, at P 21; *Sunoco Pipeline, L.P.*, 137 FERC ¶ 61,107, at P 15 (2011); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007), *order on reh'g*, 122 FERC ¶ 61,123 (2008) (CCPS).

[17] *Pony Express*, 141 FERC ¶ 61,249 at PP 17-18 (citing *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167 (2010)).

[18] *Medallion*, 148 FERC ¶ 61,095 at P 18; *Enbridge Pipelines (FSP) LLC*, 146 FERC ¶ 61,148, at PP 8e-8f (2014); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at P 47 (2012).

the opportunity to take advantage of these offers. Therefore, there is no issue of undue discrimination or undue preference in relation to the right of first offer or the open seasons.[19]

22. The Commission finds that the truck unloading and interfacility transfer services are non-jurisdictional services and are not required to be included in the proposed rules and regulations tariff or rate tariff. The Commission has previously recognized that, "[a] service is subject to the ICA and the Commission's jurisdiction only if it is 'integral' or 'necessary' to the pipeline transportation function."[20] The Commission has found that services offered at a pipeline destination terminal are not jurisdictional, because "the transportation services are completed at the time the petroleum products enter the terminal."[21]

23. The Commission confirms that both Grand Mesa and Committed Shippers may assign the TSA with consent and may assign the TSA to a wholly owned subsidiary without consent. The Commission has approved similar assignment provisions, allowing committed shippers to assign their TSAs as well as their shipping history with the pipeline's consent.[22] The Commission has found that the ability to assign its TSA provides committed shippers with market flexibility, thereby increasing the value of the TSA, and that assignment rights "were an important basis of the bargain for the Committed Shippers making major volume commitments needed to support the project."[23]

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[19] *Enbridge Pipelines (Southern Lights) LLC*, 141 FERC ¶ 61,244, at P 26 (2012).

[20] *TE Products Pipeline Co., L.L.C.*, 131 FERC ¶ 61,277, at P 12 (2010).

[21] *Kerr McGee Refining Corporation*, 72 FERC ¶ 61,274, at 62,198 (1995).

[22] *Shell Pipeline Co.*, 141 FERC ¶ 61,017, at P 16 (2012) (approving TSA with terms limiting assignment rights to shippers maintaining minimum credit rating); *Tesoro High Plains Pipeline Co.*, 148 FERC ¶ 61,160, at P 24 (2014).

[23] *Shell Pipeline Co.*, 141 FERC ¶ 61,017 at P 16.

<u>The Commission orders</u>:

Grand Mesa's petition for declaratory order and the specific rulings requested therein and in the subsequent amendment are granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.