

122 FERC ¶ 61,123  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

CCPS Transportation, LLC

Docket No. OR07-17-001

ORDER ON REHEARING

(Issued February 11, 2008)

1. On January 10, 2008, CCPS Transportation, LLC (CCPS) filed a request for rehearing of the Order on Petition for Declaratory Order issued December 11, 2007, in this proceeding (December 11, 2007 Order).<sup>1</sup> CCPS challenges only the condition imposed by the Commission that requires CCPS to set aside a portion of certain additional Expansion capacity for spot shippers.<sup>2</sup> CCPS contends that spot shippers will have ample access to Spearhead Pipeline capacity without diminishing the 30,000 barrels per day (bpd) of capacity reserved exclusively for Expansion committed shippers. As discussed below, the Commission denies rehearing of the December 11, 2007 Order.

**Background**

2. Following an open season in 2004, CCPS executed Transportation Service Agreements (2004 TSAs) with term shippers who agreed to ship or pay for certain volumes in return for a rate lower than the rate that would be available to uncommitted shippers. CCPS states that the term shippers initially committed to transport a total of 60,000 bpd on a ship-or-pay basis (out of the total initial Spearhead capacity of 125,000 bpd), rising to 70,000 bpd in 2008 and 75,000 bpd in 2009 and thereafter. According to CCPS, the 2004 TSAs also provide the term shippers with “step-up” rights that allow them to increase their total commitments to 144,000 bpd, which is 90 percent of the 160,000 bpd to which CCPS expected to increase the pipeline capacity in the future.<sup>3</sup>

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<sup>1</sup> *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007).

<sup>2</sup> *Id.* P 17 and n.33.

<sup>3</sup> Petition For Declaratory Order of CCPS Transportation, LLC August 13, 2007 Ex. 1 (Affidavit of Perry F. Schuldhaus) ¶ 8.

This assured committed term shippers access to the pipeline's capacity, but still subjected them to prorationing under the pipeline's prorationing policy, which guaranteed a set-aside of 10 percent of total pipeline capacity for new shippers.

3. Because of significant demand for capacity on the Spearhead Pipeline, CCPS announced this Expansion to increase the pipeline's capacity by 65,000 bpd to an approximate total of 190,000 bpd in lieu of the initial expansion to 165,000 expected at the time of the 2004 open season. CCPS states that it held an open season in 2007 in which it offered for commitment 30,000 bpd of the 65,000 bpd Expansion firm capacity. CCPS explains that the 30,000 bpd of firm capacity offered was oversubscribed, so it prorated the Expansion service requests and executed Transportation Service Agreements (2007 TSAs) for 30,000 bpd with the committing shippers. As a result, of the 190,000 bpd of expanded capacity, 144,000 bpd is allotted to stepped-up committed shippers, 30,000 bpd to shippers under new commitments, and 16,000 bpd to new shippers, thus holding new shippers to the same available capacity as was available to them at the initiation of the pipeline's service.

### **Request for Rehearing**

4. CCPS states that, in the December 11, 2007 Order, the Commission determined that a portion of the 30,000 bpd capacity must be available for spot shippers. CCPS contends that the Commission did not establish a firm number, but instead suggested that at least 10 percent of the pipeline's total capacity should be available for spot shippers. CCPS seeks rehearing of this aspect of the December 11, 2007 Order. Specifically, CCPS seeks rehearing on the following two issues:

1. Whether the capacity available to spot shippers under the tariffs, the 2004 TSAs, and the 2007 TSAs already exceeds the 10-percent guideline that the Commission established in the December 11, 2007 Order.
2. Whether the Commission has the discretion to authorize a pipeline to reserve something less than 10 percent of its total capacity for spot or uncommitted shippers and whether that discretion should be exercised in this case to approve the Spearhead proposal.<sup>4</sup>

5. CCPS contends that achieving the 10 percent set-aside of its total capacity would require that 3,000 bpd of capacity be carved out of the 30,000 bpd reserved as firm space for the Expansion committed shippers in addition to the 16,000 bpd already reserved for spot shippers. However, CCPS argues that significantly more than 19,000 bpd of

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<sup>4</sup> CCPS cites *Mid-America Pipeline Co., LLC*, 106 FERC ¶ 61,094 (2004); *Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040, *reh'g denied*, 116 FERC ¶ 61,120 (2006).

capacity already is available to uncommitted shippers without the need to reduce the 30,000 bpd of Expansion committed shipper capacity.

6. Specifically, states CCPS, in addition to the 30,000 bpd at issue, the Expansion will provide 35,000 bpd of new capacity that has not been allocated to any class of shipper (nearly 20 percent of the post-Expansion total pipeline capacity). At least initially, continues CCPS, the 35,000 bpd will be allocated among all nominating shippers on a purely *pro rata* basis because no shipper has any historical entitlement to that capacity. CCPS maintains that, over time, shippers will build up historical shipment records and may become Regular Shippers utilizing this 35,000 bpd. Thus, states CCPS, a new uncommitted shipper that nominates on a regular basis can become a Regular Shipper and obtain an ongoing allocation of space that cannot be invaded solely to make way for an original term shipper.

7. CCPS offers an example that assumes that the original term shippers collectively nominate an average of 100,000 bpd for the first year of service of the Expansion and the Expansion committed shippers nominate their 30,000 bpd of committed volumes. The example also assumes that uncommitted shippers nominate an average of 60,000 bpd over the same period. According to CCPS, at the end of that year, the average monthly volume of the uncommitted shippers (many of whom would presumably have become Regular Shippers over that period) would be 60,000 bpd (*i.e.*, far in excess of the 10-percent standard). CCPS emphasizes that neither the original 2004 term shippers nor the Expansion firm shippers would have any right to force those uncommitted shippers out of that 60,000 bpd of capacity representing their historical average movements.<sup>5</sup>

8. CCPS maintains that new spot shippers will continue to have access to the pipeline even after that first year because of the 10-percent set-aside in the Spearhead historical prorationing policy.<sup>6</sup> CCPS explains that, as those new spot shippers come into the system, the historical allocations of both the original term shippers and the uncommitted Regular Shippers will be proportionately reduced so that the next generation of uncommitted spot shippers will have the opportunity to become Regular Shippers, and their average monthly volumes will no longer count against the 10-percent new shipper set-aside. Thus, reasons CCPS, even if the Spearhead Pipeline is fully utilized at its 190,000 bpd total planned capacity over an extended period of time, there always will be ample capacity available to new or uncommitted shippers. Indeed, adds CCPS, up to 160,000 bpd of capacity is theoretically available for uncommitted shippers because the

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<sup>5</sup> CCPS admits that nominations by new shippers who entered the line after that time could reduce the amount allocated to Regular Shippers, whether they are term shippers or uncommitted shippers, but the term shippers could not simply preempt the space properly allocated to uncommitted Regular Shippers.

<sup>6</sup> FERC No. 10, Item 17b.

original term shippers can retain their prorationing status only so long as they continue to ship on a regular basis. CCPS reiterates that nothing in the 2004 TSAs entitles those shippers to any ongoing preference in obtaining access to the pipeline other than the opportunity to maintain their Regular Shipper status -- just as any shipper can do.

9. CCPS points out that the 2004 TSAs do permit the original term shippers to step up their volume commitments (for a limited time) if they elect to do so. CCPS asserts that the practical effect of this step-up right is that a term shipper can obtain the discounted term rate for a larger volume of shipments in exchange for its commitment to move that larger volume (or pay the tariff rate for that volume) over the remaining term of the TSA. CCPS emphasizes that the right to step-up is restricted to a total of no more than 144,000 bpd collectively. However, continues CCPS, the term shippers are not guaranteed access to the 144,000 bpd because, if a term shipper steps up its commitment, but is unable to move the full quantity of its nominated barrels due to prorationing, it does not have to pay for the unmoved barrels, but it also has no ability to “bump out” the barrels properly allocated to uncommitted shippers under the Spearhead prorationing policy.

10. CCPS argues that the 10-percent standard applied by the Commission in this case should not be applied as a rigid rule, but rather as a guideline.<sup>7</sup> CCPS submits that the Commission has the discretion to approve the proposal offered here, which in substance provides ample opportunity for new uncommitted shippers to access the pipeline.<sup>8</sup>

### **Discussion**

11. The initial petition for a declaratory order filed in Docket No. OR05-1-000 by Enbridge Energy Company, Inc. (Enbridge) anticipated that the Spearhead Pipeline would be expanded from a capacity of 125,000 bpd to a capacity of 160,000 bpd.<sup>9</sup> Enbridge’s petition also stated that shippers committing to term rates would have the

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<sup>7</sup> CCPS cites cases decided under the Outer Continental Shelf Lands Act that CCPS claims allow pipelines to provide firm, contract service without providing any capacity for spot shipments. CCPS further claims that the National Energy Board of Canada allows pipelines to reserve less than 10 percent of their space for spot shipments. Request for Rehearing of CCPS Transportation, LLC, January 10, 2008, at 9-10.

<sup>8</sup> CCPS cites *Mid-America Pipeline Co., LLC*, 106 FERC ¶ 61,094, at P 14 (2004). (“There is no single method of allocating capacity in times of excess demand on oil pipelines and pipelines should have some latitude in crafting capacity allocation methods to meet circumstances specific to their operations.”)

<sup>9</sup> Petition for Declaratory Order of Enbridge Energy Company, Inc., December 10, 2004, at 4.

right, within seven years from the commencement of service on Spearhead Pipeline, to increase their commitments up to 144,000 bpd of the 160,000 bpd anticipated total capacity of the pipeline.<sup>10</sup> Enbridge made it clear that it would maintain 10 percent of the 160,000 bpd of capacity (16,000 bpd) for new shippers wishing to transport on the pipeline.<sup>11</sup>

12. In the instant petition, CCPS proposes an Expansion of 65,000 bpd, rather than the 35,000 bpd it originally contemplated. CCPS proposes to reserve the additional Expansion volume of 30,000 bpd for those shippers that agree to pay a premium rate for firm service. In the 2007 open season, all shippers had the opportunity to reserve guaranteed Expansion capacity by making 10-year volume commitments, thereby providing financial support that is essential to the Expansion project. The instant petition for a declaratory order anticipates that, following the Expansion to 190,000 bpd, committed shippers will have up to 144,000 bpd of capacity (which includes the committed shippers' original entitlements and their potential step-up rights), premium rate firm shippers will be guaranteed 30,000 bpd, and new shippers, therefore, will continue to have access to only 16,000 bpd.

13. Despite CCPS's addition of 30,000 bpd to its original Expansion plan, the amount of capacity reserved for new or spot shippers remains at 16,000 bpd of the projected 190,000 bpd total capacity or 8.42 percent. In its request for rehearing, CCPS acknowledges that the new or spot shippers will have this percent of the total annual average capacity of the expanded Spearhead Pipeline, but CCPS claims that the other 35,000 bpd of Expansion capacity will remain uncommitted and thus available for new shippers. However, this will not be the case if the 2004 committed shippers exercise their step-up rights to a total of 144,000 bpd. The demand for capacity on the Spearhead Pipeline makes it reasonable to expect that they will do so. It is also reasonable to expect that these committed shippers will, in fact, ship their stepped-up committed volumes, notwithstanding CCPS's speculation to the contrary proffered on rehearing that they might not continue to ship on a regular basis. Moreover, although the committed shippers are not guaranteed the total stepped-up 144,000 bpd of capacity after the first year, to the extent that they do exercise their step-up rights, they will establish a higher 12-month historical shipping level upon which CCPS will base prorationing thereafter.

14. We do agree with CCPS that the Commission has not established a stated minimum percentage of capacity that must be set aside for new or spot shippers on a pipeline. Each proposal presented to the Commission is appraised on its own merits

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<sup>10</sup> See Petition for Declaratory Order of CCPS Transportation, LLC, August 13, 2007, at 4 n.7.

<sup>11</sup> Petition For Declaratory Order of Enbridge Energy Company, Inc. December 10, 2004, at 9 n.8.

regarding the amount of set-aside capacity planned to be reserved for spot volumes. However, in the December 11, 2007 Order, the Commission cited the following statement from Enbridge's initial petition for a declaratory order: "Spearhead's proposed proration policy is a form of historical-based prorationing that apportions 90 percent of the capacity to historical shippers based on their average movements during a rolling 12-month base period, with the remaining 10 percent set aside for new shippers, as defined in the tariff."<sup>12</sup> In the December 11, 2007 Order, the Commission made it clear that its "approval of the original Enbridge Energy, Inc. petition was based in part on the premise that neither historical shippers nor new shippers would be denied access to the expansion capacity, thus sufficiently balancing the shippers' competing interests. Therefore, to be consistent with that rationale, the Commission directs CCPS to set aside part of the additional proposed 30,000 bpd Expansion capacity for uncommitted spot shippers."<sup>13</sup> CCPS's argument on rehearing that such a set-aside is unnecessary is based solely on the possibility that additional capacity will be available for spot movement in lieu of capacity unused by original term shippers. As stated earlier, this appears unlikely in view of the ongoing demand for capacity that has fueled CCPS's decision to expand beyond its initial plan.

15. Further, Item 17(b) of the prorationing provisions in CCPS's FERC No. 10 also obligates CCPS to maintain the 10-percent set-aside:

If, for any month, more crude Petroleum is tendered to the Carrier than can be transported by the carrier, then the Carrier shall prorate the tenders received among shippers as follows: (i) Up to 10% of the Available capacity will be allocated among all New Shippers, if any, on a pro rata basis.

The Commission views the common carriage obligations of the Interstate Commerce Act (ICA) as requiring approval of committed capacity expansions with an assured set-aside of capacity for new shippers, thus guaranteeing continued access to transportation on an ongoing basis upon reasonable request. True, the Commission has not established a specific percentage to be set aside, and as CCPS points out in its request for rehearing, other pipeline tariffs on file with the Commission provide for set-asides that are less than 10 percent.<sup>14</sup> However, in this case CCPS itself guaranteed that 10 percent would be available for spot shippers in seeking its initial authorization from the Commission under the ICA. The CCPS tariff and prorationing policy thus reflect the 10-percent set-aside established as part of the initial Commission authorization. The Commission shall

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<sup>12</sup> *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at P 17 (2007).

<sup>13</sup> *Id.*

<sup>14</sup> Request for Rehearing of *CCPS Transportation, LLC*, January 10, 2008, at 9.

require CCPS to apply the 10 percent set-aside to the Expansion capacity as well as to the existing capacity of the Spearhead Pipeline, consistent with the obligation CCPS undertook, and the Commission accepted, as part of its initial authorization. Accordingly, the Commission denies rehearing of the December 11, 2007 Order.

The Commission orders:

Rehearing of the December 11, 2007 Order is denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.