141 FERC ¶ 61,249
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Kinder Morgan Pony Express Pipeline LLC and Hiland Crude, LLC — Docket No. OR13-5-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued December 21, 2012)

1. On October19, 2012, Kinder Morgan Pony Express Pipeline LLC (Pony Express) and Hiland Crude, LLC (Hiland) (jointly, Petitioners) filed a Petition for a Declaratory Order (Petition) approving proposed rate structures, services, and prorationing terms applicable to joint and local transportation to be offered via new crude oil pipeline capacity that will consist of (a) a new, approximately 342-mile long pipeline to be constructed by Hiland from the Seiler Station near Baker, Montana, to an interconnection with certain Pony Express facilities (H2 Pipeline); (b) Pony Express's acquisition of approximately 432 miles of an existing natural gas pipeline and conversion of that line to crude oil service (Pony Express Mainline); and (c) Pony Express's construction of approximately 260 miles of new pipeline and ancillary facilities from the Pony Express Mainline to Cushing, Oklahoma (Cushing Extension).[1]

2. Petitioners contend that the Project will create a much needed, major new pipeline route for delivery of crude oil from the Bakken formation directly to the Phillips 66 Ponca City, Oklahoma refinery or indirectly to the refinery via the Phillips 66-owned tank farm and other facilities located in Cushing, Oklahoma, as well as for deliveries to other locations in Cushing (Destinations). Petitioners anticipate that the Project will commence operation in the third quarter of 2014.

3. Petitioners request Commission action by December 21, 2012. As discussed below, the Commission grants the requested declaratory order.

[1] The H2 Pipeline, the Pony Express Mainline, and the Cushing Extension are referred to collectively as the Project.

I. **Background**[2]

4. Petitioners point out that production from the Bakken formation is projected to reach 1.2 million barrels of crude oil per day (bpd) by 2015 and that significant additional production is expected to be available from nearby parts of that region. Petitioners explain that this rapidly increasing production has resulted in a shortage of pipeline capacity to U.S. refineries, which in turn has caused significant prorationing of the existing pipelines from the Bakken region, as well as the large-scale use of railroad tank cars to transport the production.

5. Petitioners state that, on August 17, 2012, Pony Express and Belle Fourche Pipeline Company (Belle Fourche) filed a petition for a declaratory order in Docket No. OR12-26-000 (August 17 PDO) seeking approval of certain rate and other provisions for transportation by Belle Fourche and Pony Express from near Baker, Montana, and Guernsey, Wyoming.[3] Petitioners further state that the August 17 PDO sought approval for Pony Express to recover costs associated with the conversion of certain Kinder Morgan Interstate Gas Transmission LLC (KMIGT) facilities from natural gas to crude oil service, as well as approval to recover the capital costs and expenses incurred by KMIGT in providing continued natural gas service to its firm customers following the conversion.

6. Petitioners state that the H2 Pipeline will provide approximately 46,000 bpd of capacity from Seiler Station to Guernsey. From that point, the Pony Express Mainline and the Cushing Extension will provide approximately 230,000 bpd of additional light petroleum pipeline export capacity for the regional production, as well as maximizing the use of existing pipeline infrastructure. Petitioners explain that the shipper commitments associated with the Hiland/Pony Express Joint Committed Rates will provide adequate support for constructing facilities to increase the capacity of the Pony Express System by an additional 46,000 bpd above the capacity that would have been established if Pony Express were to be configured to accommodate only the local and joint Belle Fourche/Pony Express shipper commitments and related uncommitted capacity.

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[2] Throughout the Petition, Petitioners refer extensively to the affidavits of John Eagleton and Jim Smith, which are attached to the Petition as Attachments A and B.

[3] On November 30, 2012, the Commission granted the petition for a declaratory order in Docket No. OR12-26-000. *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180 (2012). That proceeding relates to Pony Express's planned construction of the Cushing Extension and its conversion of certain facilities from natural gas to oil pipeline service, as well as another pipeline expansion from Sandstone, Montana, to Guernsey, Wyoming.

II. Details of the Proposed H2 Pipeline

7. Petitioners state that Hiland currently has gathering and transportation facilities located north of the Seiler Terminal in North Dakota and Montana. They state that Hiland intends to build its H1 pipeline to gather and transport volumes to the Seiler Terminal, and further, that it will build the H2 Pipeline to transport volumes from the Seiler Terminal to the proposed interconnection with Pony Express near Guernsey, Wyoming. Petitioners explain that, while the H2 Pipeline's initial capacity will be up to 46,000 bpd, it will be capable of expansion up to an ultimate capacity of 73,000 bpd. According to Petitioners, the H2 Pipeline initially will consist of approximately 342 miles of 10-inch diameter pipeline and related facilities at a Hiland affiliate's Seiler Station, as well as a delivery metering station at the Hiland Guernsey terminal.

8. Additionally, Petitioners state that the proposed Pony Express System will provide local transportation service from Guernsey to the Destinations. Petitioners further explain that, to provide transportation, Pony Express plans to acquire from KMIGT certain pipeline and compression facilities, which it plans to convert for crude oil transportation service, and to construct other pipeline facilities as part of the new pipeline system from Guernsey to the Destinations.

III. Joint Transportation Services

9. Petitioners state that, beginning in 2014, they will offer Joint Transportation Services from the Seiler Terminal to the Pony Express delivery points at the Destinations. They explain that the Joint Transportation Services will be provided in part on the approximately 46,000 bpd of new capacity to be constructed between Baker and Guernsey as part of the Hiland H2 Pipeline. Further, they state that Hiland and Pony Express will offer a series of Joint Committed Rates for the Joint Transportation Services pursuant to the terms of a Joint Tariff.

10. Petitioners state that, in the open seasons, they offered each potential shipper the opportunity to make a five-year volume commitment. According to Petitioners, they also offered potential shippers the opportunity to extend their agreements and volume commitments for an additional five-year term at the Joint Committed Rates. Petitioners explain that Committed Shippers were eligible for different Joint Committed Rates, depending on their individual volume commitments, with larger volume commitments entitling them to lower rates. In addition, continue Petitioners, Committed Shippers that signed transportation and deficiency agreements (T&DA)[4] with each of the carriers will

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[4] Petitioners cite Attachments D and E, which are copies of the T&DAs. They state that interested shippers tendered separate executed T&DAs to each Petitioner (individually, the Hiland T&DA and the Pony Express T&DA, and collectively the Joint T&DAs).

have specified initial historical capacity rights on the two systems, and those shippers will have the right under the Joint Tariff to pay $0.01 per barrel above the prevailing uncommitted rate for the monthly right to obtain priority capacity for their committed volumes whenever transportation on the Project is prorated.

11. Petitioners describe the key terms of the Joint T&DAs. They state that the proposed initial Joint Committed Rates are subject to annual adjustment under the Commission's indexing regulations.[5] In addition, state Petitioners, the Joint T&DAs have provisions for deficiency payments and limited make-up rights to provide shipper flexibility.[6] Petitioners point out that the five-year contract term and the five-year extension right include the right to reduce committed volumes by 20 percent during the extension term.

IV. Notice and Interventions

12. Notice of the Petition was issued October 23, 2012. Interventions and protests were due November 13, 2012. Pursuant to Rule 214 of the Commission's regulations,[7] all timely-filed motions to intervene and any unopposed motion 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.

V. Discussion

13. Petitioners assert that their proposal is just and reasonable and not unduly discriminatory or preferential, and that it is consistent with provisions of the Interstate

[5] Petitioners state that they also have the right to pass through or otherwise be compensated for any regulatory-imposed costs and to account for pipeline handling shrinkage.

[6] The Deficiency Payment Accounts and the Incremental Barrels Accounts are described in detail in Section 5 of each T&DA (Attachments D and E to the Petition). In essence, each Petitioner will create both accounts for each shipper. Deficiency payments for committed volumes not shipped will be maintained in the Deficiency Payment Accounts and may be applied during the term of the T&DA against transportation charges for Incremental Barrels. Any unused amount in a Deficiency Payment Account at the end of the term may be applied as a credit against transportation charges due for up to six month after the end of the term of the T&DA. This will allow a shipper that made Deficiency Payments during a force majeure event that prevents it from shipping its monthly minimum volume commitment to avoid forfeiting those payments.

[7] 18 C.F.R. § 385.214 (2012).

Commerce Act (ICA)[8] and Commission precedent addressing the rates and terms of service for proposed oil pipeline projects.

14. Petitioners contend that, commencing with *Express Pipeline Partnership* (*Express*),[9] the Commission has recognized that advance rulings relating to the lawfulness of rate structures and terms of service for proposed oil pipeline projects can create regulatory certainty and allow the Commission to consider the issues without being limited by tariff filing timetables.[10]

A. Filing Joint and Local Committed Rates as Settlement Rates

15. Petitioners maintain that, although the Commission's regulations do not specifically provide for a negotiated rate[11] with agreed-to subsequent rate changes, in cases where shippers have signed throughput and deficiency agreements and committed to pay for the contract volumes over a period of years, the Commission has treated these rates as effectively achieving the role of the settlement rates described in section 342.4(c) of the Commission's regulations.[12]

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[8] 49 U.S.C. app. §§ 1, *et seq*. (1988).

[9] 76 FERC ¶ 61,245, *reh'g denied*, 77 FERC ¶ 61,188 (1996).

[10] Petitioners cite, *e.g*., *Shell Pipeline Co*., 139 FERC ¶ 61,228 (2012); *Skelly-Belvieu Pipeline Company, L.L.C.*, 138 FERC ¶ 61,153 (2012); *Sunoco Pipeline L.P*, 137 FERC ¶ 61,107 (2011); *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167 (2010) (*Enbridge North Dakota*); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073, at P 23 (2007); *Colonial Pipeline Co*., 116 FERC ¶ 61,078 (2006); *Enbridge Energy Company, Inc.*, 110 FERC ¶ 61,211 (2005) (*Enbridge*); *Plantation Pipe Line Co*., 98 FERC ¶ 61,219 (2002).

[11] Rates charged under the T&DAs here may have volume differentiated discounts, i.e., a shipper shipping greater volumes is eligible for a lower price per barrel.

[12] 18 C.F.R. § 342.4(c) (2012). Petitioners cite, *e.g., Express Pipeline Partnership,* 76 FERC ¶ 61,245, at 62,258-59 (1996), in which the Commission approved a request that committed rates and later, agreed-to changes be treated consistently with settlement rates. The Commission stated:

> The Commission will grant the request for waiver, so that prospective shippers may be substituted for current shippers in the verified statement required by section 342.4(c). The Commission will also grant the request for waiver that Express not be required to re-apply for alternative rate treatment under sections 342.1 and 342.4(c) each time the

(continued…)

16. Petitioners state that the Joint T&DAs provide that the Committed Shipper Rates will be no greater than the uncommitted rate (or any other committed rate) for equivalent service. According to Petitioners, the Commission's policy for joint rates is that they should be no more than the sum of the underlying local rates,[13] and that the Commission has cited this policy in a declaratory order approving joint rates in the context of a contract arrangement.[14] However, Petitioners acknowledge that there is no local rate currently on file for the Pony Express System or for Hiland's planned service. Despite that, Petitioners contend that the Commission may approve this aspect of their Petition because they have provided that Committed Shipper rates will be no greater than the uncommitted rate or any other committed rate for equivalent service.

17. *Commission Analysis.* The Commission will grant the Petitioners' request. Although the local rates are unknown at this time because the Project has not been completed, Petitioners agree that the Committed Rates will be no greater than the uncommitted rate or any other committed rate for equivalent service.

18. The Commission's approval of Petitioners' request is consistent with Commission precedent in similar cases, including *Enbridge North Dakota*.[15] As Petitioners acknowledge, the Commission's regulations do not provide specifically for negotiated initial rates with agreed-to future rate changes. However, the Commission will continue to apply its policy of honoring contracts signed by committed shippers, such as the T&DAs here, which include the commitment to pay for contract volumes and other agreed-to charges during the terms of the contracts. The Commission finds that such rates are consistent with the spirit of section 342.4(c).[16]

> agreed-to rate adjustment exceeds the generic index under 342.3. Express does not have current shippers because its pipeline has not been constructed. Its statement that all of its term shippers have agreed to the two percent adjustment, while not consistent with the letter of section 342.4(c), is certainly consistent with the spirit of that section.

[13] Petitioners cite, *e.g.*, *Texaco Pipeline Inc*., 72 FERC ¶ 61,313 (1995).

[14] Petitioners cite *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167 (2010).

[15] 133 FERC ¶ 61,167 (2010).

[16] 18 C.F.R. § 342.4(c) (2012). *See Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,258-59 (1996).

B. Whether Key Provisions of the Joint T&DAs and the Joint Tariff Will Govern Joint Transportation Services

19. Petitioners state that the proposed initial Joint Committed Rates will be subject to annual adjustment under the Commission's indexing regulations. Additionally, they state that they will have the right to pass through or otherwise be compensated for any regulatory-imposed costs and to account for pipeline handling shrinkage. In addition, state Petitioners, the Joint T&DAs have provisions for deficiency payments and limited make-up rights to provide shipper flexibility. They also point out that the five-year contract term, with the five-year extension right, includes the right to reduce committed volumes by 20 percent during the extension term. Petitioners claim that Commission approval of these provisions of the T&DAs would be consistent with the Commission's decision in *Mid-America Pipeline Company, LLC (MAPL),*[17] and other cases. The *pro forma* Joint T&DA's are found in Attachments D and E to the Petition.

20. *Commission Analysis*. The Commission will grant this requested ruling because it is consistent with Commission precedent, such as *MAPL*. In that case the Commission approved a requested finding that the terms of the agreements executed by committed shippers (including the agreed-to tariff, rate, and priority service structure) would be applied during the established terms of the agreements between the pipeline and the shippers that made volume commitments during the open season.[18]

C. Structure of the Joint Committed Rates

21. Petitioners state that the Joint Committed Rates will vary with the size of the Committed Shippers' volume commitments. Petitioners explain that the greater the committed volume, the greater the discount relative to the rates to be paid by lower-volume Committed Shippers. Petitioners point out that the Commission has approved this type of rate structure in earlier cases.

22. *Commission Analysis*. The Commission previously has recognized that it is appropriate for shippers committing to larger volumes to pay discounted rates, versus shippers that do not commit to transport larger volumes.[19] Since its decision in *Express*, the Commission has recognized that uncommitted shippers are not similarly situated with

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[17] 136 FERC ¶ 61,087 (2011).

[18] *Mid-America Pipeline Company, LLC*, 136 FERC ¶ 61,087, at P 9 (2011); *Enbridge Pipelines (Southern Lights) LLC*, 122 FERC ¶ 61,170, at P 13 (2008) ("[T]he Commission clarifies that the agreed-upon terms of the TSA will govern the determination of the committed shippers' rates over the term of the TSA[.]").

[19] *E.g., Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002); *Williams Pipe Line Co.*, 80 FERC ¶ 61,402 (1997).

respect to shippers making longer term commitments, incurring greater costs and liabilities, and undertaking greater risks.[20]

D. Petitioners' Prorationing Policies

23. Petitioners state that they have separate but compatible prorationing policies to govern allocations of capacity to shippers on their respective segments when capacity is over-subscribed in any month.[21] Petitioners list the following key features of the policies:

- Use of an historical volume-based methodology to allocate Project capacity under the Joint Committed Rates;
- A base period of 12 months for historical volumes;
- At least 10 percent of the capacity set aside for New Shippers;
- Each New Shipper will be limited to two and one-half percent of capacity; and
- Each New Shipper can become a Regular Shipper after shipping for 12 consecutive months.[22]

24. Petitioners explain that, for the first 12 months of their operations, up to 90 percent of the available volumes will be allocated to Committed Shippers. However, continue

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[20] *Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,254 (1996) in which the Commission stated:

> Each class of term shipper presents unlike circumstances because the longer term commitments provide greater assurances than the shorter term commitments, and hence, more long-term revenue stability. Term volume shippers committing to longer terms assume greater risks than shippers assuming lesser shipment obligations because 15 and 10 year terms present very long lead times in the oil business.

[21] Petitioners state that these policies are included in the *Pro Forma* Rules and Regulations Tariffs attached to the respective T&DAs.

[22] A "Regular Shipper" is a shipper that has shipped Petroleum in each month of the Base Period or is a Committed Shipper that has shipped Petroleum pursuant to a T&DA in each month of the Base Period; provided, however, that each Committed Shipper shall be deemed to be a Regular Shipper upon the In-Service Date. A shipper not meeting these criteria is considered a "New Shipper."

Petitioners, in the subsequent rolling 12-month base periods, New Shippers that shipped during all 12 months of the applicable base period will become Regular Shippers, displacing the applicable portion of Committed Shipper volumes and so on through the term of the T&DAs. In particular, as New Shippers move into the Regular Shipper category, the allocations to Regular Shippers (including Committed Shippers) will be eroded. The failure of Committed Shippers to ship their monthly minimum volume commitments frees space for other Regular and New Shippers to use, resulting in further erosion of the allocations for such Committed Shippers and increased allocations for Regular and New Shippers that use this unutilized capacity, unless they elect the premium rate/priority service option.

25. Petitioners next state that they will grant Committed Shippers the right to obtain priority capacity equal to their Committed Volumes in any month by paying a premium rate of $0.01 per barrel above the uncommitted rate. Petitioners acknowledge that their *Pro Forma* Rules and Regulations tariffs do not include this priority right, but they state that they will include the option when they file the Joint Rates.

26. Petitioners maintain that this proposal is similar to the proposal approved in *Explorer Pipeline Co.*,[23] which would afford contract shippers discounted tiered rates while giving them the right to avoid prorationing by paying a premium.[24] Petitioners emphasize that the priority provided under this option will not apply to the capacity rights of committed shippers who executed the T&DAs addressed in Docket No. OR12-26-000.

27. Moreover, continue Petitioners, under their proposed historical volume-based prorationing policy, a Committed Shipper will be deemed to be a Regular Shipper as of the in-service date of the Project and also will be deemed, for the first 13 months following the in-service date of the Project, to have shipped its minimum volume commitment[25] during each month of the base period. Petitioners explain that a Committed Shipper's base period shipment history will be calculated using the greater of the shipper's actual shipments during the base period or the volumes otherwise paid for.

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[23] 140 FERC ¶ 61,098, at P 26 (2012).

[24] Petitioners further cite *Sunoco Pipeline L.P.*, 137 FERC ¶ 61,107, at PP 14-15 (2011) (offering committed shippers priority capacity, not subject to prorationing at a premium of $0.01 per barrel); *Skelly-Belvieu Pipeline Co*., L.L.C., 138 FERC ¶ 61,153, at PP 16-18 (2012) (approving reservation of 35 percent of post-expansion capacity for committed shippers paying a premium rate).

[25] Minimum volume commitment is the total minimum daily volume that the shipper agrees to ship, as designated in Exhibit A to its T&DAs with the Petitioners.

28. Petitioners contend that this provision also is consistent with Commission precedent, including *TransCanada Keystone Pipeline, LP* (*TransCanada Keystone*),[26] in which the Commission approved a provision stating that the base period volume history of committed shippers for the first six months of service would be deemed to equal the committed shippers' volume commitment levels. Petitioners add that TransCanada Keystone's proposed policy provided that uncommitted shippers collectively would be allocated up to five percent of capacity and would not receive the base period volume benefits afforded to committed shippers.[27] Petitioners add that their policies are consistent with Commission precedent in that they set aside at least 10 percent of their newly-added capacity for New Shippers.[28] More recently, continue Petitioners, in *Shell Pipeline Company LP*, the Commission approved a similar prorationing provision that would provide committed shippers with deemed initial capacity, subject to prorationing under the pipeline's rules.[29]

29. Petitioners submit that these limited additional rights for the Committed Shippers on the Project should be approved by the Commission. In addition to the fact that the Committed Shippers provided the economic rationale for the Project, Petitioners maintain that those shippers considered the additional prorationing rights to be an important inducement to execute the T&DAs. Petitioners reiterate that Committed Shippers are not similarly-situated with respect to uncommitted shippers on the Project, and Petitioners further cite the Committed Shippers' related deficiency payment obligations (which are discussed below) as justification for protecting them from allocation erosion during the first base period of pipeline operations. Despite that, state Petitioners, because their prorationing policies afford New Shippers the opportunity to become Regular Shippers and to gain access to 90 percent of the Project's capacity, the policies ensure that Committed Shippers will not receive firm transportation service at discount rates and that uncommitted shippers will have a reasonable opportunity to gain access to significant pipeline capacity.

30. *Commission Analysis*. The Commission will approve the Petitioners' prorationing policies because they are generally consistent with Commission policy and precedent. Petitioners have demonstrated that the Project will be an important link in the constrained

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[26] 131 FERC ¶ 61,139 (2010).

[27] Petitioners cite *TransCanada Keystone Pipeline, LP*, 131 FERC ¶ 61,139, at P 12 (2010).

[28] Petitioners cite, *e.g., Oxy Midstream Strategic Development, LLC*, 141 FERC ¶ 61,005, at P 19 (2012); *see also Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 56 (2006).

[29] 141 FERC ¶ 61,017, at P 14 (2012).

pipeline capacity currently available to move crude oil from the Bakken region and other nearby production areas where production is projected to increase.

31. The Commission recognizes that Committed Shippers that signed T&DAs have agreed to be bound by these prorationing policies, which distinguish their rights and obligations from those of shippers that chose not to commit to the Project. Importantly, Petitioners have set aside an appropriate percentage of their capacity for uncommitted shippers and have provided a process whereby New Shippers can become Regular Shippers. Further, Petitioners conducted public open seasons, which gave all potential shippers the opportunity to become Committed Shippers.

E. Deficiency Payment Crediting and Incremental Barrels Crediting Mechanisms

32. Petitioners state that they have included provisions in the Joint T&DAs that will provide flexibility to a Committed Shipper in the event that the shipper has more or less crude oil available for shipment in a month than it committed to ship. Petitioners state that these provisions require each of them to establish a Deficiency Payment Account and an Incremental Barrels Account for each Committed Shipper.

33. Petitioners further explain that each of them must apply (on a dollar-for-dollar basis) the amounts in each Deficiency Payment Account against any future transportation charges the Committed Shipper incurs for shipping volumes in excess of its monthly minimum commitment. Petitioners also state that the balance in each such account may be used at any time during the term of the T&DA and for six months following expiration of the term in instances where shippers have made Deficiency Payments for barrels they were unable to ship due to *force majeure* events. However, Petitioners point out that amounts in each Committed Shipper's Deficiency Payment Account may not be used as a credit against a future deficiency payment the Committed Shipper may owe. Petitioners also emphasize that incremental barrels for which transportation charges are paid from this account will not be included in the shipper's shipment history for purposes of prorationing. Petitioners further explain that a Committed Shipper's barrels attributable to Deficiency Payments will be included in the shipper's shipment history for that month for purposes of administering prorationing.

34. Similarly, state Petitioners, each of them will be required to create an Incremental Barrels Account for each Committed Shipper in which the shipper's payments for the transportation of incremental barrels will be deposited.[30] Petitioners add that amounts in each such account must be applied (on a dollar-for-dollar basis) against any future Deficiency Payments the shipper may owe, but funds from an Incremental Barrels

[30] Petitioners cite Section 5(e) in both the Hiland T&DA in Attachment D and the Pony Express T&DA in Attachment E.

Account may not be used as a credit against any future transportation charges the Committed Shipper may owe for shipment of incremental barrels. Petitioners further state that the balance of each Committed Shipper's account must be used within the term of that shipper's T&DA. Petitioners emphasize that, to the extent that a Deficiency Payment is offset from the shipper's Incremental Barrels Account, the volumes related to such a Deficiency Payment will not be included in the shipper's shipment history for prorationing.

35. Petitioners submit that these provisions will provide flexibility to any Committed Shipper that may have more or less crude oil available to ship in a month than its commitment, and especially when a Committed Shipper was unable to ship its committed volumes due to a *force majeure* event, but had to make a Deficiency Payment to cover the shortage. Petitioners state that the provisions include certain limitations on what volumes can be used for purposes of calculating the Committed Shipper's shipment history, which will prevent "double counting" for shipment history purposes. Petitioners emphasize that such limitations will protect uncommitted shippers in times of prorationing.

36. *Commission Analysis*. The Commission will approve these provisions. They provide flexibility to the Committed Shippers and the Petitioners.

37. Committed Shippers will have the ability to offset both deficiencies and incremental barrels under specified circumstances, but payments for deficiencies may not be credited against future deficiency obligations. Additionally, except in limited situations involving *force majeure*, the volumes for which transportation is paid from the Deficiency Payment Accounts will not be included in a shipper's shipment history when prorationing is required. While this benefits Committed Shippers by affording them flexibility in the payment for their shipments, it also prevents them from obtaining an unfair advantage over uncommitted shippers by having their barrels counted twice when prorationing is necessary.

F. Term Extension Rights

38. Petitioners state that their Joint T&DAs include a provision giving each Committed Shipper the ability to extend the initial term of its T&DA for an additional five-year term. They point out that a Committed Shipper may only make such an election if it extends both T&DAs for the same five-year period. Additionally, state Petitioners, a Committed Shippers that extends its term also may elect to reduce its initial volume commitment by 20 percent, provided that this reduction applies to both T&DAs. Further, Petitioners states that the rates paid by a Committed Shipper that reduces its volume commitment will be adjusted if the reduction moves the Committed Shipper into a different rate and volume tier.

39. *Commission Analysis*. The Commission will approve the contract extension and related rights established in Petitioners' Joint T&DAs. The Commission has approved

similar contract extension/rollover rights in prior declaratory orders addressing new pipeline capacity. For example, in *Enbridge*, the Commission approved the requested findings for a project that gave shippers the right to renew 10-year transportation service agreements for a second 10-year term and also provided the right to increase their volume commitments.[31]

<u>The Commission orders</u>:

The Petition for a Declaratory Order is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[31] 110 FERC ¶ 61,211 at P 10. The Commission stated as follows:

> Enbridge states that the initial term of the Spearhead TSAs is 10 years and that shippers have the option of extending the term for an additional 10 years if the pipeline does not cease operations at the end of the initial term. According to Enbridge, the minimum committed volume is 5,000 BPD, and commitments can either be fixed (i.e., the same fixed volume over the initial term) or escalating (i.e., the committed volume may be stair-stepped, with a greater commitment in later years). Moreover, adds Enbridge, each committed shipper has the right to increase its minimum volume commitment by an amount (the step-up volume commitment) that varies depending upon the level of the average initial commitment.
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> *See also Oxy Midstream Strategic Development, LLC*, 141 FERC ¶ 61,005 at P 19.