169 FERC ¶ 61,105
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

ONEOK Elk Creek Pipeline, L.L.C. Docket No. OR19-13-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued November 12, 2019)

1. On December 20, 2018, ONEOK Elk Creek Pipeline, L.L.C. (Elk Creek) filed a petition requesting the Commission issue a declaratory order approving its open season process, as well as certain terms and conditions for transportation on the Elk Creek pipeline system (the Pipeline) that will transport volumes of unfractionated natural gas liquids (NGL) from the Rocky Mountain region to available fractionation and interconnections in Bushton, Kansas. We grant Elk Creek's petition, as discussed below.

## I. Background

2. Elk Creek states that NGL production is expected to increase in the Rocky Mountain area, including the Williston Basin region, Bakken formation region and the Powder River Basin, creating a growing need for NGL pipeline takeaway capacity. In response to the need for takeaway capacity, Elk Creek began accumulating rights-of-way and planning for construction of a pipeline to meet this need. Ultimately, Elk Creek formally gauged potential shipper interest through an open season process that included an initial and a supplemental period (collectively, the Open Season) for priority transportation service on the Pipeline. Any shipper that signed a Transportation Service Agreement (TSA) for this priority service had the opportunity to become a committed shipper (Committed Shipper).[1]

3. The Pipeline will be approximately 900 miles long, consisting of 20-inch diameter pipe that will initially originate at two interconnections with ONEOK Bakken Pipeline, L.L.C. and terminate in Bushton, Kansas. The Pipeline will later be extended to add an additional origin point in eastern Montana. The Pipeline will have the capacity to transport up to 180,000 barrels per day (bpd) with the capability to be expanded in the future if shipper interest warrants. Elk Creek states that the additional takeaway capacity the Pipeline will offer is critical to meeting the needs of producers that seek to increase

[1] Petition at 3.

production. Based on the interest that potential shippers expressed before and during the Open Season and the progress in construction, Elk Creek expects to begin transportation service on the Pipeline in 2019.[2]

## II. Open Season

4. On October 26, 2018, Elk Creek issued a press release announcing it was conducting a binding Open Season seeking term and volume commitments from potential shippers on the Pipeline. On November 29, 2018, Elk Creek published a supplemental Open Season notice amending the initial Open Season announcement and extending the Open Season through December 13, 2018. Elk Creek states that all interested parties had an equal opportunity to participate in the Open Season. Interested shippers were required to execute a Confidentiality Agreement.[3] Elk Creek states that, at the end of the Open Season, at least one Committed Shipper signed a TSA.[4]

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[2] *Id*.

[3] According to the Open Season instructions, interested parties were provided with a *pro forma* Rules and Regulations Tariff, a Pipeline map and copies of the Highly Confidential Elk Creek Open Season Rate Guidance and a *pro forma* TSA. A copy of the *pro forma* Tariff, map, Confidentiality Agreement and Highly Confidential Elk Creek Open Season Rate Guidance and *pro forma* TSA were attached as Exhibits to the petition.

[4] Petition at 5. Subsequent to the filing of the Petition, on July 2, 2019, in Docket No. IS19-689-000, Elk Creek filed FERC Tariff 2.0.0, which set forth initial committed rates, rules and regulations governing operations of the Pipeline, and in Docket No. IS19-688-000, Elk Creek filed FERC Tariff 1.2.0, which specified the uncommitted transportation rates on the Pipeline. Tariff No.1.2.0 in Docket No. IS19-688-000 and Tariff No. 2.0.0 in Docket No. IS19-689-000 became effective July 5, 2019 (ONEOK Elk Creek Pipeline, L.L.C., FERC Oil Tariff, Elk Creek FERC Tariffs Database, FERC Tariff No. 1.2.0, FERC Tariff No. 1.2.0, 1.2.0 and ONEOK Elk Creek Pipeline, L.L.C., FERC Oil Tariff, Elk Creek FERC Tariffs Database, FERC Tariff No. 2.0.0, FERC Tariff No. 2.0.0, 2.0.0). On October 4, 2019, Elk Creek filed to update its uncommitted rates and committed rates to reflect new transportation service upon completion of the northern segment of its system. Tariff 1.3.0 in Docket No. IS20-12-000 and Tariff 2.1.0 in Docket No. IS20-13-000 became effective November 4, 2019 (ONEOK Elk Creek Pipeline, L.L.C., FERC Oil Tariff, Elk Creek FERC Tariffs Database, FERC Tariff No. 1.3.0, FERC Tariff No. 1.3.0, 1.3.0 and ONEOK Elk Creek Pipeline, L.L.C., FERC Oil Tariff, Elk Creek FERC Tariffs Database, FERC Tariff No. 2.1.0, FERC Tariff No. 2.1.0, 2.1.0).

## III. TSA Terms, Rates, and Prorationing Policy

5. In exchange for receiving Committed Capacity rights on the Pipeline each month equal to the shipper's monthly committed volume (Monthly Committed Volume), Elk Creek states that the TSA requires a Committed Shipper to pay Elk Creek the Committed Rate except in cases of *force majeure*. Elk Creek states that the TSA requires that a Committed Shipper pay Elk Creek a rate of at least one cent per barrel higher than the Uncommitted Rate for the same movement. A Committed Shipper would also have an obligation to pay Elk Creek an amount equal to the Monthly Committed Volume times the then-current Committed Rate[5] regardless of the Committed Volumes actually shipped (Committed Payment Obligation), except in cases of *force majeure*.[6]

6. Elk Creek explains that the period between the commencement of service and the addition of an eastern Montana origin point is referred to as the Initial Service Period. During the Initial Service Period, ninety percent of the Pipeline capacity will be available to Committed Shippers who will receive priority service not subject to proration (Committed Capacity) in exchange for a Committed Rate. The remaining 10 percent of the Pipeline capacity will be reserved for shippers that did not execute a TSA for Committed Capacity during the Open Season (Uncommitted Shippers).[7]

7. The period between the commencement of service from the eastern Montana origin point until the first, if any, offering of expansion capacity is referred to as the Second Service Period. Elk Creek states that the Second Service Period is expected to commence in 2020. During the Second Service Period, the aggregate capacity of the Pipeline will remain at 180,000 bpd. Ten percent of the capacity offered from the eastern Montana origin point during the Second Service Period will be reserved for Uncommitted Shippers.[8]

8. The Open Season notices stated that capacity would be awarded using a net present value (NPV) methodology. This NPV method awards capacity to the shipper(s) who will produce the greatest total revenue. If two or more shippers have the same NPV and there is insufficient capacity to meet such requests, those shippers would receive a pro-rata share of the capacity. Elk Creek offered interested shippers an opportunity

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[5] A Committed Rate is defined as a premium rate of at least one cent per barrel above the Uncommitted Rate. Petition at 3.

[6] *Id.* at 6.

[7] *Id*. at 8.

[8] *Id*. at 4.

during the Open Season to enter into a TSA for Committed Capacity and to have the first rights to Committed Capacity on any Expansion Capacity that the Pipeline offers, at its sole discretion, during any future period.[9]

9. Elk Creek has reserved 10 percent of the Pipeline's total aggregate capacity for Uncommitted Shippers (Uncommitted Capacity) and has developed a proration policy that governs the proration of Uncommitted Capacity (Proration Policy). If the Pipeline receives nominations for transportation service that exceed the Uncommitted Capacity available to each class of Uncommitted Shippers, i.e., Regular Shippers and New Shippers, as defined below, during any month, then the Uncommitted Capacity will be allocated between Regular Shippers as a class and New Shippers as a class and, if necessary, within those classes pro rata. Regular Shippers are shippers that have shipped or deemed to have shipped unfractionated NGLs utilizing Uncommitted Capacity on the Pipeline at any time during the twelve-month period preceding the first day of the month in which the Pipeline is being allocated. New Shippers are shippers that are not Regular Shippers.[10]

10. Elk Creek represents that the Proration Policy reserves 50 percent of the Pipeline's Uncommitted Capacity, which is equal to five percent of the Pipeline's total aggregate capacity, for all New Shippers. A New Shipper will become a Regular Shipper after it has shipped any amount on the Pipeline during a twelve-month period, and will then have access to the portion of the Pipeline's Uncommitted Capacity not reserved for or being used by New Shippers. The Uncommitted Capacity that is not allocated to New Shippers will be available to Regular Shippers each month. Under the Proration Policy, each Regular Shipper will be allocated a pro-rata volume of the Uncommitted Capacity available to Regular Shippers based on historical transportation movements including any volumes deemed to have been shipped.

11. Elk Creek states that the proposed Proration Policy is consistent with the proration methods previously approved by the Commission, and ensures that Uncommitted Shippers have access to 10 percent of the aggregate capacity of the Pipeline and that any New Shipper can become a Regular Shipper.

12. The initial term of the Elk Creek TSA is twenty years (Initial Term). Upon expiration of the Initial Term, the Elk Creek TSA will automatically renew on a year-to-year basis thereafter (Renewal Term), unless either Elk Creek or the Committed Shipper provides written notice of its intent to terminate the TSA at least 90 days prior to the expiration of the then-current Renewal Term.

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[9] *Id*. at 3.

[10] *Id*. at 6-7.

13. The Elk Creek TSA affords Elk Creek the right to expand the capacity of the Pipeline. In the event Elk Creek decides to offer Expansion Capacity on the Pipeline, the Elk Creek TSA provides Committed Shippers first rights to increase their Monthly Committed Volumes and receive priority service by an amount up to 90 percent of available Expansion Capacity.

14. If a Committed Shipper does not opt for its available Expansion Capacity, then Elk Creek may choose, at its sole discretion, to hold additional open seasons to gauge potential shipper interest in the new Committed Capacity up to 90 percent of the Expansion Capacity. Ten percent of the Expansion Capacity will be reserved for Uncommitted Shippers in accordance with Elk Creek's Proration Policy.

## IV. Requested Rulings

15. Elk Creek seeks an order from the Commission to confirm that each of the following aspects of the Open Season, TSAs, and proposed service is consistent with Commission policy and precedent, and accordingly, is lawful under the Interstate Commerce Act (ICA).[11]

A. The Open Season process was appropriately conducted and was not unduly discriminatory or unduly preferential.

B. The TSAs will be honored by the Commission and, in conjunction with applicable tariffs consistent with the TSA terms, will govern the transportation for Committed Shippers during the terms of the TSAs.

C. The proposed priority rights for Committed Shippers are lawful and not unduly discriminatory.

D. The proposed process for offering Expansion Capacity first to Committed Shippers is lawful and consistent with Commission policy.

E. The Proration Policy that will govern the proration of Uncommitted Capacity on the Pipeline is reasonable and not unduly discriminatory.

F. The proposed Committed Rate structure and Committed Payment Obligations are consistent with Commission precedent and not unduly discriminatory.

G. The term of the TSA may be extended in accordance with the provisions of the TSA.

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[11] 49 U.S.C. app. § 1 *et seq.* (1988).

## V. Public Notice, Intervention, Protests, and Comments

16. Notice of the Petition was issued on December 26, 2018, providing for motions to intervene, comments and protests to be filed on or before January 22, 2019. No motions to intervene, comments, or protests were filed. The Petition is thus unopposed.

## VI. Discussion

17. Based on the representations in the Petition, we grant the rulings requested by Elk Creek, as set forth below.

18. We confirm that Elk Creek's Open Season was conducted appropriately and in a manner consistent with Commission policy. We find that Elk Creek complied with Commission guidelines that a company offering priority service on interstate common carrier pipelines should hold a widely publicized open season, which offers priority service to any interested shippers that are willing and able to meet the pipeline's contractual requirements.[12]

19. We confirm that the Commission will uphold and apply the provisions of the TSA during the terms of the agreement. A copy of the *pro forma* TSA was provided to all interested parties that signed and submitted a Confidentiality Agreement during the Open Season, and, accordingly, all interested parties had the opportunity to take advantage of the same contractual rights. The Commission has ruled on numerous occasions that the provisions of a TSA executed between a committed shipper and a pipeline in response to an open season will be honored and upheld during the term of such TSA.[13]

20. We find that the proposed priority rights for Committed Shippers are lawful and not unduly discriminatory. The Commission has confirmed that interstate common carrier pipelines may provide priority service, not subject to proration, under certain circumstances.[14] The Commission has affirmed priority service at premium rates, so long as sufficient capacity is reserved for Uncommitted Shippers, and so long as the opportunity to execute a TSA, and therefore to participate in the differing service terms,

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[12] *E.g.*, *NORCO Pipe Line Co., LLC*, 152 FERC ¶ 61,170, at P 16 (2015); *Shell Pipeline Co. LP*, 139 FERC ¶ 61,228, at P 21 (2012); *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130, at PP 26-27 (2013).

[13] *E.g.*, *NORCO*, 152 FERC ¶ 61,170 at P 15; *Belle Fourche Pipeline Co.*, 151 FERC ¶ 61,139, at P 18 (2015).

[14] *E.g.*, *Shell Pipeline Co. LP*, 164 FERC ¶ 61,175, at P 28 (2018); *Sunoco Pipeline L.P.,* 139 FERC ¶ 61,259, at P 14 (2012).

is equally available to all interested parties.[15] Committed Shippers obtaining priority service will pay a premium relative to Uncommitted Shippers, which is a rate structure consistent with previous Commission policy and is approved.[16]

21. We confirm that offering Committed Shippers the first right to 90 percent of Expansion Capacity is consistent with Commission precedent. The Commission has found that it "is appropriate for Committed Shippers to have the first opportunity to obtain capacity on any expansion of the Project, up to a total of [ninety] percent of the expansion capacity," provided that such a right is offered through a widely publicized open season.[17]

22. We find that the Proration Policy that will govern the proration of Uncommitted Capacity on the Pipeline is reasonable and not unduly discriminatory. The proposed Proration Policy is consistent with proration policies that the Commission has approved in prior orders and ensures that Uncommitted Shippers will continue to have access to at least 10 percent of the Pipeline's total capacity at all times and that New Shippers will have the opportunity to receive Regular Shipper status.[18]

23. We confirm that Elk Creek's proposed Committed Rate structure and Committed Payment Obligation are consistent with Commission precedent and not unduly discriminatory.[19] The Commission has approved providing priority service in exchange

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[15] *E.g.*, *CenterPoint*, 144 FERC ¶ 61,130 at P 27; *Sunoco Pipeline L.P.*, 145 FERC ¶ 61,099, at P 12 (2013); *Enbridge Pipelines (Ill.) LLC*, 144 FERC ¶ 61,085, at PP 23-24 (2013) (*Enbridge Illinois*).

[16] *E.g.*, *Wolverine Pipe Line Co.*, 153 FERC ¶ 61,109, at P 22 (2015); *Marathon Pipe Line LLC*, 164 FERC ¶ 61,014, at P 24 (2018); *Shell*, 164 FERC ¶ 61,175 at P 28.

[17] *MarkWest Liberty Ethane Pipeline, L.L.C.,* 145 FERC ¶ 61,287, at P 27 (2013).

[18] *E.g.*, *Palmetto Products Pipe Line LLC*, 151 FERC ¶ 61,090, at PP 9, 22 (2015)

[19] *See Enbridge Pipelines (Southern Lights) LLC*, 122 FERC ¶ 61,170, at P 13 (2008) ("the 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"); *Enbridge Energy (N.D.) LLC*, 133 FERC ¶ 61,167, at P 40 (2010) (finding that priority service offered at a premium rate "appropriately distinguishes committed and uncommitted shippers and provides for rates consistent with the obligations of each class of shipper"); *Mid-America Pipeline Co., LLC*, 136 FERC ¶ 61,087, at P 19 (2011); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at P 23 (2012); *NORCO*, 152 FERC ¶ 61,170 at P 15; *Belle Fourche*, 151 FERC ¶ 61,139 at P 18; *CenterPoint*, 144 FERC ¶ 61,130 at P 17.

for premium rates, so long as all interested shippers were allowed to participate in the open season that offered the priority service and so long as sufficient capacity is reserved for Uncommitted Shippers.[20] In *Shell Pipeline Company LP*, the Commission held that Shell's proposed rate structure for committed and uncommitted shippers was appropriate because the committed shippers were "paying a premium rate, *i.e.*, at least one cent higher, compared to Uncommitted Shippers" and such rates "were offered during an open season."[21]

24. We confirm that the term of the TSA may be extended in accordance with the provisions of the TSA. The TSA provides that the Initial Term shall automatically renew on a year-to-year basis thereafter, unless a shipper is in default, or unless Elk Creek or the Committed Shipper chooses to terminate the TSA after the Initial Term. The Commission has approved such term extension options as appropriate and reasonable given that they provide Committed Shippers with an option, but not a requirement, to continue their commitments. As the Commission has recognized, such options provide shippers "with the ability to adjust to changing market conditions."[22]

<u>The Commission orders:</u>

The Petition is granted as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[20] *E.g.*, *CenterPoint,* 144 FERC ¶ 61,130 at P 27; *Sunoco,* 145 FERC ¶ 61,099 at PP 11-12; *Enbridge Illinois,* 144 FERC ¶ 61,085 at PP 23-24.

[21] 139 FERC ¶ 61,228 at P 21.

[22] *Tallgrass Pony Express Pipeline LLC*, 147 FERC ¶ 61,266, at P 20 (2014).