

169 FERC ¶ 61,254
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

TransCanada Keystone Pipeline, LP

Docket No. IS20-108-000

ORDER ACCEPTING AND SUSPENDING TARIFF, SUBJECT TO REFUND, AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 30, 2019)

1. On November 29, 2019, TransCanada Keystone Pipeline, LP (Keystone) submitted Tariff No. 6.47.0,¹ in accordance with 18 C.F.R. § 342.4(c) to increase the committed rates for transportation service from the international boundary with Canada near Haskett, Manitoba, to delivery points throughout the United States, including Wood River and Patoka, Illinois; Cushing, Oklahoma; and Port Arthur and Houston, Texas to be effective January 1, 2020. Keystone states that the rate increase is due to estimated increases in variable costs for 2020. As discussed below, we accept and suspend the tariff filing, to be effective January 1, 2020, subject to refund and establish hearing and settlement judge procedures.

I. Proposed Tariff

2. Keystone states that the tariff would increase the committed rates for 2020 by approximately seven percent due to estimated changes in operating, maintenance, and administration costs for the transportation service. Keystone states that its tariff requires a true-up of the variable component of its committed rates at the end of each calendar year to ensure that the final variable component will be either refunded or charged to each shipper based on the Term Shippers Contract.²

3. Keystone states that footnote 11 of its currently effective tariff requires an annual true-up of the variable component of the committed rate for term shippers at the end of

¹ TransCanada Keystone Pipeline, LP, FERC Oil Tariff, Oil Pipeline Tariffs; [Tariff, F.E.R.C. No. 6.47.0, 6.47.0](#).

² Keystone F.E.R.C. No. 6.47.0, n. 11.

each calendar year. Keystone asserts that this annual true-up was agreed to by term shippers in accordance with its Transportation Service Agreement (TSA). Keystone also states that in Docket No. OR11-7-000 the Commission granted its request for a waiver of the requirement in 18 C.F.R. § 342.4(c).³ Keystone explains that the Commission directed Keystone to provide an explanation of any changes to the committed rates and include a reference to the June 2011 Order. Keystone also states that subsequent to the June 2011 Order, Keystone established the committed rates to Port Arthur and Houston. Keystone therefore included a verified statement for changes to the variable component of these committed rates in accordance with the requirements of 18 C.F.R. § 342.4(c).

4. Additionally, Keystone proposes to re-establish a temporary discounted uncommitted rate from the ceiling level in effect for transportation to Wood River, Patoka, and Cushing. Keystone states that the re-established temporary discounted uncommitted rates will be in effect from January 1, 2020 to January 31, 2020.⁴

II. Intervention, Protests, and Answer

5. On December 16, 2019, Husky US Marketing LLC, Phillips 66 Company, and Suncor Energy Marketing Inc. (collectively, Joint Protesters) and Coffeyville Resources Refining & Marketing, LLC (Coffeyville) protested this filing.

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), all unopposed and timely filed motions to intervene and any unopposed motion to intervene out of time filed before this order issues are granted.

7. Coffeyville requests that the Commission reject Keystone's proposed increase to the variable component of the committed rates. Coffeyville asserts that Keystone failed to provide an explanation for the increase to the variable component and that Keystone violated the terms of the TSA by failing to provide such an explanation. Additionally, Coffeyville alleges that Keystone did not provide notice of the increased estimated variable component as required by Keystone's tariff.

8. Joint Protesters request that the Commission reject Keystone's filing on the basis that the proposed increase would make the committed rates unjust and unreasonable. Alternatively, Joint Protesters request that the Commission conditionally accept the tariff

³ Keystone Transmittal Letter at 1 (*citing TransCanada Keystone Pipeline, LP*, 135 FERC ¶ 61,259 (2011) (June 2011 Order)).

⁴ Keystone Transmittal Letter at 2.

filing subject to refund and order a hearing, settlement procedures or a technical conference.

9. Joint Protesters raise several issues with Keystone's proposed committed rate increase. According to Joint Protesters, Keystone failed to describe, justify, or explain the estimated costs supporting the increased variable components or provide "any assurance that the true-up will be based on properly incurred and allocated costs."⁵ In addition, Joint Protesters state that Keystone failed to demonstrate that costs between U.S. and Canadian operations have been properly allocated. Also, according to Joint Protesters, while Keystone issued a two-page memorandum on December 12, 2019 to its committed shippers outlining the reasons supporting the increased variable component of its committed rates, Joint Protesters argue that there is no way to know if the costs included in the memorandum and supporting the increased rate are accurately attributed, related to earlier incidents on the pipeline, or prudent. Joint Protesters argue that "it is not clear whether income tax expenses"⁶ are included in the costs supporting the increased variable costs for committed rates. Joint Protesters question whether Keystone has been compensated for some of the costs underlying the rate increase through insurance or if some of those costs supporting the rate increase are a result of Keystone's negligence. Finally, Joint Protesters argue that Keystone has not explained the volume projections utilized in calculating the proposed increase in rates.

10. Coffeyville and Joint Protesters reference the *pro forma* contract Keystone filed as part of the original Petition for Declaratory Order in 2008 for contract rates on this pipeline as requiring certain information and notice to contract shippers.⁷ Section D.4 of the TSA requires Keystone to provide notice to contract shippers of the estimated Interim Term Variable Rate annually on or before December 1 of each year. In addition to the notice required in Section D.4, Section D.5 of the TSA requires Keystone to provide "details of [Keystone's] calculation and explanation for any adjustments"⁸ to the variable component of the committed rate. Both Coffeyville and Joint Protesters argue that they did not receive adequate notice of the change, and they also allege that they did not

⁵ Joint Protesters Filing at 8.

⁶ *Id.* at 10.

⁷ Coffeyville Protest at 5 (*citing* Keystone TSA § D.4, Ex. A to Petition for Declaratory Order in Docket No. OR08-9-000); Joint Protesters Filing at 8 (*citing* Keystone TSA § D.5).

⁸ Keystone TSA, § D.5.

receive information and calculations to support or satisfactorily explain the increase to the variable component of the committed rate.

11. Accordingly, Joint Protesters request that the Commission reject Keystone's proposed rate increase or, alternatively, accept the rate subject to refund and establish hearing and settlement procedures or a technical conference to determine the proper basis for any rate increase for variable component of the committed rates.

12. On December 23, 2019, Keystone filed an answer to the protests arguing that the Commission should dismiss the protests and approve the tariff effective January 1, 2020. Keystone argues that, under the terms of the TSA, Coffeyville and Joint Protesters were on notice that the variable component of the committed rates may change.⁹ Keystone further argues that the arguments Coffeyville and Joint Protesters make are issues of contract law and the Commission is not the proper venue to adjudicate such issues.¹⁰

II. Discussion

13. As discussed below, we accept and suspend the tariff to be effective January 1, 2020, subject to refund and establish hearing and settlement judge procedures to investigate issues related to the variable rate component increase for the committed rates. Under the TSA, Keystone is required to provide the details of the calculation and an explanation for adjustments to the variable rate component.¹¹ Coffeyville and Joint Protesters raise concerns that Keystone has not sufficiently supported the proposed variable rate component increase. We find that these issues cannot be resolved absent the development of a full record at hearing.

14. While we are setting this matter for hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹² If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements

⁹ Keystone Answer at 10.

¹⁰ *Id.* at 11.

¹¹ Keystone TSA, § D.5. The temporary discounted uncommitted rate, which is not challenged by any party, will not be within the scope of the hearing investigation.

¹² 18 C.F.R. § 385.603 (2019)

which determine judges' availability.¹³ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Pursuant to the authority contained in the ICA, Keystone's Tariff No. 6.47.0 is accepted and suspended, to become effective January 1, 2020, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority conferred on the Commission by the ICA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the ICA, a public hearing shall be held concerning the issues raised in the protest of Keystone's tariff filing to increase the variable component for committed rates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief ALJ within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress towards settlement.

¹³ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.