UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ONEOK Elk Creek Pipeline, L.L.C. Docket No. IS19-303-001

(Issued July 3, 2019)

Attached is the statement by Commissioner Glick, concurring to an order issued on June 28, 2019, in the above referenced proceeding, *ONEOK Elk Creek Pipeline, L.L.C.*, 167 FERC ¶ 61,277 (2019).

Kimberly D. Bose,
Secretary.

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GLICK, Commissioner, *concurring*:

1. In this order, the Commission rejects the Amended Tariff filed by ONEOK Elk Creek Pipeline, L.L.C. (ONEOK), finding that it does not meet the requirements for establishing initial rates set forth in 18 C.F.R. section 342.2 (initial rate regulation). I fully support the decision to reject the Amended Tariff because ONEOK failed to meet its burden of demonstrating that its proposed rates and charges are just and reasonable.[1] The Commission's initial rate regulation is clear that a carrier must justify an initial rate for new service, like ONEOK proposes here, by either filing a cost-of-service rate or a sworn affidavit that the rate is agreed to by at least one non-affiliated shipper who intends to use the service in question.[2] The second method—filing a sworn affidavit from a non-affiliated shipper—will only suffice if no protest is filed; otherwise, the carrier must file a cost-of-service rate.[3] As ONEOK failed to justify the initial Committed Rates at issue under either method set forth in our initial rate regulation, the Commission properly rejects the Amended Tariff. I write separately for two reasons: (1) to reiterate the rationale underlying our initial rate regulation; and (2) to express my belief that the Interstate Commerce Act and associated Commission regulations do not permit the Commission to accept a long-term contract that a carrier files as part of an initial rate

[1] *See ONEOK Elk Creek Pipeline, L.L.C.*, 167 FERC ¶ 61,277, at P 4 (2019) (citing *Laurel Pipe Line Co., L.P.*, 167 FERC ¶ 61,210, at P 24 (2019); *Chaparral Pipeline Co., LLC*, 152 FERC ¶ 61,068, at P 7 (2015); *Colonial Pipeline Co.*, 156 FERC ¶ 61,001, at P 15 (2016), *order on reh'g*, 158 FERC ¶ 61,024 (2017); *Mars Oil Pipeline Co.*, 150 FERC ¶ 61,148, at P 7 n.7 (2015)).

[2] 18 C.F.R. § 342.2 (2018); *see, e.g.*, *Magellan Pipeline Co., L.P.*, 166 FERC ¶ 61,181, at P 34 (2019); *Enterprise TE Prods. Pipeline Co. LLC*, 166 FERC ¶ 61,180, at P 11 (2019); *EnLink Del. Crude Pipeline, LLC*, 166 FERC ¶ 61,226, at P 18 (2019); *EnLink Crude Pipeline, LLC*, 166 FERC ¶ 61,225, at P 16 (2019); *Plantation Pipe Line Co.*, 167 FERC ¶ 61,025, at P 15 (2019); *EnLink NGL Pipeline, LP*, 167 FERC ¶ 61,024, at P 18 (2019); *EPIC Crude Pipeline, LP*, 167 FERC ¶ 61,026, at P 25 (2019); *Targa NGL Pipeline Co. LLC*, 166 FERC ¶ 61,179, at P 20 (2019).

[3] 18 C.F.R. § 342.2(b).

filing under the cost-of-service method that lacks cost-of-service justification and sufficient consumer protections for the duration of the contract.

2. When the Commission proposed the initial rate regulation, including the ability to charge a negotiated rate so long as it is agreed to by at least one non-affiliated shipper, shippers expressed concern with the potential for carriers to exercise market power in negotiating initial rates.[4] The Commission, sharing these concerns, explained that "the requirement that at least one non-affiliated prospective shipper . . . agree to the initial rate . . . should provide some measure of protection against a pipeline exercising market power to dictate the rate it will charge."[5] The Commission rejected the suggestion that an initial rate be entitled to a presumption of lawfulness, reasoning that "[t]his should help to ensure that the remedies of protest or complaint are adequate to ensure that the initial rate is not established through the exercise of market power."[6] In short, the Commission was concerned about the ability of carriers to exercise market power in negotiating initial rates, potentially charging excessive rates to non-affiliated shippers or unduly preferential rates to affiliated shippers, contrary to the requirements of the Interstate Commerce Act.[7]

3. I believe that the Interstate Commerce Act and associated Commission regulations do not permit the Commission to accept a long-term contract that a carrier files as part of an initial rate filing under the cost-of-service method that lacks cost-of-service

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[4] *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985, at 30,959–60 (1993) (cross-referenced at 65 FERC ¶ 61,109), *order on reh'g & clarification*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 (1994) (cross-referenced at 68 FERC ¶ 61,138), *aff'd sub nom. Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

[5] *Id.* at 30,960.

[6] *Id.* at 30,960–61.

[7] 49 U.S.C. app. §§ 1(5)(a), 3(1) (1988). In his partial dissent on the final rule adopting the initial rate regulation, Commissioner James J. Hoecker argued that the ability to establish initial rates through negotiation by filing an affidavit from a non-affiliated shipper is "an invitation to find phantom shippers that will, regardless of their future intentions to actually use the service, agree to a rate that then binds future shippers." Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,977-3. He opined that "it is wishful thinking to argue that protests or complaints will prevent the perverse or uneconomic effects of negotiations among parties with potential inequalities in bargaining power." *Id.* I repeat his warning here only to emphasize the importance of the Commission's vigilance in enforcing what protections exist in the initial rate regulation. This bears repeating because the Commission had been, until less than four months ago, inconsistently enforcing its initial rate regulation.

justification and sufficient consumer protections for the duration of the contract. Any such long-term contract necessitates a rigorous, fact-specific review by the Commission to ensure we vigorously defend against the potential for carriers to exercise market power to charge rates that are contrary to the Interstate Commerce Act and detrimental to consumers.

4. Here, ONEOK proposes to establish the initial Committed Rates in question by making a cost-of-service showing under subsection (a) of the initial rate regulation.[8] However, as the Commission's order explains, ONEOK's *pro forma* transportation service agreement has a 20-year term (with automatic annual renewal) and is not "subject to the Commission's indexing and cost-of-service regulations, including the ability to challenge on a cost-of-service basis."[9] In *Express Pipeline Partnership* (*Express*),[10] the Commission approved a long-term negotiated cost-of-service rate that included cost-of-service justification and sufficient consumer protections for the duration of the contract. In *Express*, the carrier included cost-of-service estimates for each year that the rates would be in effect, up to 15 years, whereas ONEOK provides cost-of-service estimates for only a 12-month test period for an at least 20-year contract. Also, in *Express*, the committed rates were discounted to uncommitted rates that could be challenged on a cost-of-service basis, meaning that the committed rates should always be below cost-of-service. ONEOK's Committed Rates, in contrast, do not include the ability to be challenged on a cost-of-service basis—an essential consumer protection mechanism. Note that the committed rates at issue in *Express* were also agreed to by a non-affiliated shipper, but as a result of their being protested, the carrier had to meet the cost-of-service requirement of the initial rate regulation.[11] Finally, the Commission explained in *Express* that the carrier would "underrecover its cost-of-service over the 15-year period covered by its rates on a net present value basis."[12] There is no similar showing here.

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[8] 18 C.F.R. § 342.2(a) (stating that a carrier may justify an initial rate for new service by "[f]iling cost, revenue, and throughput data supporting such rate as required by part 346 of this chapter").

[9] *ONEOK Elk Creek Pipeline, L.L.C.*, 167 FERC ¶ 61,277 at P 3 (citations omitted).

[10] 76 FERC ¶ 61,245 (1996).

[11] *See* 18 C.F.R. § 342.2(b) (explaining that "if a protest to the initial rate is filed, the carrier must comply with paragraph (a)," which requires cost-of-service justification to establish initial rates for new service).

[12] *Express*, 76 FERC at 62,258.

5. While *Express* is only an example of how a carrier could justify a long-term contract, it is instructive here. As noted above, I fully support the decision to reject ONEOK's Amended Tariff because it lacks cost-of-service justification and sufficient consumer protections for the duration of the contract, contrary to the Commission's initial rate regulation and the Interstate Commerce Act.

6. I also believe that the Commission should revisit its settlement rate methodology for rate changes, set forth in 18 C.F.R. section 342.4(c), because it is logically inconsistent with the initial rate regulation. Pursuant to the settlement rate methodology, a carrier can change a rate without regard to the rate ceiling established by the indexing methodology if all current shippers agree to the new rate.[13] Although the Commission adopted this methodology to "further its policy of favoring settlements" to reduce litigation and regulatory burdens on carriers and shippers alike, the Commission expressed an ongoing concern that "a pipeline which has market power can establish a higher rate through 'negotiation.'"[14] In my opinion, this rate change regulation is problematic. It would be illogical and inconsistent with the spirit of the Commission's oil pipeline rate regulation regime under the Interstate Commerce Act to require consumer protections to justify an initial rate, but to allow a carrier to exercise market power without check beyond the initial rate by entering into a long-term settlement rate devoid of consumer protections. The Commission made clear that the cost-of-service, settlement, and market-based rate methodologies were meant to be the exception to the "generally applicable and required indexing approach" to rate changes, only to be used "when certain defined circumstances . . . are shown by the pipeline to exist."[15] It is time for the Commission to reconsider the settlement rate methodology in the context of today's circumstances and marry up its regulations to protect consumers against the exercise of market power.

For these reasons, I respectfully concur.

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Richard Glick
Commissioner

[13] 18 C.F.R. § 342.4(c).

[14] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,959.

[15] *Id.* at 30,947.

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