157 FERC ¶ 61,024
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Caliber Bear Den Interconnect LLC — Docket No. OR16-24-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued October 14, 2016)

1. On August 31, 2016, Caliber Bear Den Interconnect LLC (Caliber) filed a petition for declaratory order (Petition) requesting confirmation that the overall structure and terms of its proposed new crude petroleum pipeline project, the Caliber Bear Den Interconnection Pipeline (Project), are consistent with the Commission's policies and precedents under the Interstate Commerce Act (ICA)[1] and may be approved. Caliber also requests that the provisions of the transportation services agreement (TSA) signed with Caliber's committed shipper will be upheld and will govern the services provided to the committed shipper during the term of the TSA. Caliber requests the Commission act on the Petition no later than October 15, 2016 to permit Caliber to meet the contractual obligations set forth in the TSA. Based on the representations in the Petition, the Commission grants the unopposed Petition and the specific declaratory rulings requested by Caliber, as discussed below.

Background

2. According to the Petition, the Project is a new 5.7-mile crude oil pipeline that will extend from an interconnect with Enable Midstream Partners, L.P.'s Bear Den Gathering System in McKenzie County, North Dakota to an interconnect with Energy Transfer Partners, L.P.'s planned Dakota Access Pipeline in Watford, North Dakota. The Project will have an initial capacity of 50,000 barrels per day (bpd).[2]

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

[2] Petition at 3.

3. The Petition states that the Project will provide producers in the Williston Basin access to downstream markets in the Midwest and Gulf Coast regions by providing a link to the planned Dakota Access Pipeline. Caliber states that the Project will alleviate truck congestion and provide competitive pricing options for Williston Basin production to access downstream markets. Caliber states that the Project will also provide cost-effective options to access certain markets that are currently only accessible by rail transportation.[3]

4. The Petition states that Caliber conducted an open season for the Project from August 8, 2016 to August 22, 2016, offering interested shippers the opportunity to make an acreage dedication to the Project and receive firm service subject to a premium rate. The notice of open season was published on Caliber's website and in Business Wire and republished in numerous publications. The open season materials were made available to any party that executed a confidentiality agreement. Caliber offered up to 90 percent of the Project's capacity to committed shippers, and reserved ten percent of the capacity for uncommitted shippers. At the close of the open season, one shipper had signed the TSA.[4]

5. The TSA requires Caliber to provide service to the committed shipper by the later of November 15, 2016 or the in-service date of the Dakota Access Pipeline. Caliber expects that the Project will be ready to enter service by November 15, 2016. Caliber requests that the Commission act on the Petition by October 15, 2016 to allow Caliber to file initial tariffs prior to the in-service date and provide assurance to the committed shipper that the Project will proceed consistent with the terms of the TSA.[5]

TSA and Proration Policy

6. The committed shipper dedicated 62,080 acres (Dedicated Properties) for a term of ten years and agreed to pay a deficiency payment for any volumes produced from the Dedicated Properties during the TSA term that are not shipped on the Project.[6] As described in the Petition, the TSA provides that up to 30,000 bpd of the Project's capacity will be available for the committed shipper (Guaranteed Volume). The committed shipper will pay the premium committed rate for volumes up to the 30,000 bpd ceiling and those volumes will not be subject to prorationing under normal operating conditions.

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[3] *Id.* at 3-4.

[4] *Id.* at 4-6, 17.

[5] *Id.* at 1-2.

[6] *Id.* at 7-8.

If the committed shipper produces volumes greater than the 30,000 bpd ceiling in a given month, the committed shipper must nominate the excess volumes as uncommitted volumes at the applicable uncommitted rate and such volumes will not receive firm service. However, if the committed shipper ships at least 30,000 bpd for six consecutive months, the committed shipper has a one-time option to increase the firm capacity ceiling from 30,000 bpd to 45,000 bpd. The Petition states that even if the committed shipper exercises this option, ten percent of the Project's capacity will remain available for uncommitted shippers.[7]

7. According to the Petition, following the allocation of guaranteed capacity to the committed shipper, Caliber will allocate capacity to Regular Shippers.[8] In the event of prorationing, a Regular Shipper will be allocated the lesser of its nomination or a volume based on the shipper's total shipments during the 12-month base period divided by the total throughput of all shippers' volumes during that period. In addition, each New Shipper will be allocated up to 2.5 percent of the Project's capacity, subject to a cap of ten percent of capacity for all New Shippers.[9] If four or more New Shippers submit nominations, the nominations for each New Shipper will be totaled and divided into ten percent of the Project's capacity. The resulting percentage is the New Shipper's proration factor. A New Shipper will be allocated the lesser of 2.5 percent, its nomination, or its nomination multiplied by the proration factor. Allocations to Regular Shippers may be reduced pro rata to accommodate the reservation of ten percent of capacity for New Shippers.[10]

8. According to the Petition, the TSA provides that the committed rate will be at least one cent ($0.01) per barrel higher than the rate applicable to uncommitted shippers at all times. The initial committed rate will be $0.20 per barrel. The committed rate will be subject to an annual increase of 1.5 percent, and will not be adjusted under the Commission's indexing methodology.[11]

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[7] *Id.* at 8-10.

[8] Regular Shippers are uncommitted shippers that ship crude petroleum during each month of a 12-month base period. *Id.* at 13.

[9] New Shippers are uncommitted shippers that do not qualify as Regular Shippers. *Id.*

[10] *Id.*; *see also id.* at Attachment B (*Pro Forma* Tariffs).

[11] *Id.* at 7.

9. The Petition states that the committed shipper has the option to extend the TSA for consecutive one-year terms after the initial term.[12] The TSA also provides that the committed shipper has a duty not to oppose the Project prior to its in-service date, the Petition, or the tariff filings Caliber will make to institute the committed rate, so long as they are consistent with the TSA.[13]

Requested Rulings

10. Caliber requests that the Commission confirm the following structure and terms of its proposed new crude petroleum pipeline Project are consistent with the Commission's policies and precedents under the ICA:

A. The open season process followed Commission guidelines and was not unduly discriminatory;

B. The ability to offer up to 90 percent of the Project's total capacity to committed shippers, with ten percent of capacity reserved for uncommitted shippers;

C. The rate structure and treatment of the committed rate as a settlement rate under 18 C.F.R. § 342.4(c);

D. The TSA provision conferring committed shipper status in exchange for an acreage dedication;

E. A deficiency payment provision that is based on the committed shipper's monthly shipments in relation to volumes produced on Dedicated Properties;

F. The TSA provision granting a ten-year contract term with contract extension rights to the committed shipper;

G. The committed shipper's option to increase its guaranteed firm capacity from 30,000 bpd to 45,000 bpd, provided that uncommitted shippers at all times have access to at least ten percent of the Project's capacity;

H. The provision of firm service at a premium rate to the committed shipper for up to its Guaranteed Volume;

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[12] *Id*.

[13] *Id.* at 13-14.

I. An annual 1.5 percent increase, but no decrease, of the committed rate, provided that the committed rate will at all times be at least one cent per barrel more than the uncommitted rate;

J. The ability of Caliber to impose on the committed shipper a duty not to oppose the Petition or tariff filings to institute the committed rate; and,

K. A prorationing policy that treats Regular Shippers that have shipped volumes on the Project during the entire base period differently than New Shippers that have not established a history of shipments.

Public Notice, Intervention, Protests and Comments

11. Notice of the Petition was issued on September 1, 2016, providing for motions to intervene, comments and protests to be filed on or before September 30, 2016. No motions to intervene, comments, or protests were filed. The Petition is thus unopposed.

Discussion

12. Based upon the representations made in the Petition, the Commission grants the unopposed Petition as briefly summarized below.

13. The Commission finds that Caliber's open season appropriately followed Commission guidelines and offered all interested parties an equal opportunity to become committed shippers. The Commission also finds that the proposed rate structure and treatment of the committed rate as a settlement rate is consistent with Commission precedent.[14] The request that the committed rates will not be subject to revision or modification except as provided in the TSA is also consistent with Commission precedent.[15]

14. The Commission confirms that the committed shipper may have priority access for up to 90 percent of the Project's capacity, with at least ten percent of the capacity

[14] *See, e.g.*, *Rangeland RIO Pipeline, LLC*, 156 FERC ¶ 61,023, at P 24 (2016); *Grand Mesa Pipeline, LLC*, 156 FERC ¶ 61,163, at P 19 (2016); *NORCO Pipe Line Co., LLC*, 152 FERC ¶ 61,170, at P 21 (2015).

[15] *See Saddlehorn Pipeline Co., LLC*, 153 FERC ¶ 61,067, at P 33 (2015) (*Saddlehorn Pipeline*); *Seaway Crude Pipeline Co. LLC*, 142 FERC ¶ 61,201, at P 13 (2013).

reserved for uncommitted shippers.[16] The Commission has held that priority service is permissible under the ICA provided that the committed shippers pay a premium rate of at least one cent per barrel more than uncommitted shippers and that the committed rates and priority service options were offered during an open season.[17]

15. The Commission finds that the rate increases for the committed shipper,[18] the use of an acreage dedication,[19] the deficiency payment,[20] the one-time option to increase the Guaranteed Volume,[21] and the contract extension rights[22] are consistent with Commission precedent and are approved.

16. The Commission approves the provision that the committed shipper has a duty not to oppose the Petition or related tariff filings to institute the committed rate provided they

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[16] *See Oasis Midstream Servs. LLC*, 156 FERC ¶ 61,083, at P 14 (2016) (*Oasis Midstream*); *Platte River Midstream, Inc.*, 155 FERC ¶ 61,107, at P 12 (2016); *Shell Pipeline Co. LP*, 139 FERC ¶ 61,228, at P 21 (2012).

[17] *See Oasis Midstream*, 156 FERC ¶ 61,083 at P 15; *Platte River Midstream, Inc.*, 155 FERC ¶ 61,107 at P 13; *CenterPoint Energy Bakken Crude Servs., LLC*, 144 FERC ¶ 61,130, at P 27 (2013) (*CenterPoint Energy*).

[18] *See, e.g.*, *Tesoro High Plains Pipeline Co. LLC*, 148 FERC ¶ 61,160, at P 27 (2014); *Saddlehorn Pipeline*, 153 FERC ¶ 61,067 at PP 21, 34.

[19] *See, e.g.*, *Oryx Southern Delaware Oil Gathering and Transp. LLC*, 154 FERC ¶ 61,065, at PP 9, 12 (2016); *Monarch Oil Pipeline, LLC*, 151 FERC ¶ 61,150, at PP 23, 34 (2015); *Enable Bakken Crude Servs., LLC*, 148 FERC ¶ 61,048, at PP 6, 15 (2014).

[20] *See, e.g.*, *Marathon Pipe Line LLC*, 152 FERC ¶ 61,005, at P 20 (2015); *Belle Fourche Pipeline Co.*, 151 FERC ¶ 61,139, at P 24 (2015); *CenterPoint Energy*, 144 FERC ¶ 61,130 at PP 16-17.

[21] *See, e.g.*, *Sunoco Pipeline, L.P.*, 151 FERC ¶ 61,192, at P 14 (2015); *Bayou Bridge Pipeline, LLC*, 153 FERC ¶ 61,322, at PP 15, 29 (2015); *see also Monarch Oil Pipeline, LLC*, 151 FERC ¶ 61,150 at PP 25, 34.

[22] *See, e.g.*, *Panola Pipeline Co., LLC*, 151 FERC ¶ 61,140, at P 24 (2015); *Alpha Crude Connector, LLC*, 149 FERC ¶ 61,001, at PP 22, 27 (2014); *Monarch Oil Pipeline, LLC*, 151 FERC ¶ 61,150 at PP 29, 34.

are consistent with the terms of the TSA.[23] The Commission evaluates a duty to support clause depending on the facts and circumstances of the particular case.[24] According to the Petition, the TSA provides that the committed shipper is not permitted to take direct or indirect action designed to delay review or approval of the Petition or to oppose the tariff filings Caliber will make to institute the committed rate. However, the committed shipper is not prevented from protesting any regulatory filings that are materially inconsistent with the terms of the TSA or *pro forma* tariffs. Further, if the TSA is terminated or Caliber abandons the Project, the committed shipper may take any action consistent with applicable law.[25] The Petition states that Caliber and the committed shipper discussed the terms and conditions of the Project prior to the committed shipper agreeing to sign the TSA,[26] and there is no evidence in the record that suggests that the committed shipper did not freely enter into the TSA. While the Commission has rejected provisions that require too broad a waiver of a shipper's statutory rights to seek redress before the Commission,[27] the Commission has indicated that it is reasonable for a committed shipper to support the pipeline's efforts to obtain authorization for the project and the specific rates to which it agreed.[28] The Commission finds that based on the representations made in the Petition it appears the duty to support clause is appropriately limited to require the committed shipper not to oppose the Petition or the related tariff filings to institute the committed rate, but does not prevent the committed shipper from protesting any filings that are inconsistent with the TSA or the *pro forma* tariff.

17. The proposed proration policy is reasonable and nondiscriminatory in that, following the allocation of the Guaranteed Volume to the committed shipper, capacity will be allocated on a historical basis to Regular Shippers that ship crude petroleum during a 12-month base period with ten percent of capacity reserved for New Shippers

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[23] The Petition did not seek approval of the requirement that the committed shipper has a duty not to oppose the Project prior to its in-service date. *See* Petition at 15.

[24] *Colonial Pipeline Co.*, 146 FERC ¶ 61,206, at P 32 (2014).

[25] Petition at 13-14.

[26] *Id.* at 4-5.

[27] *Colonial Pipeline Co.*, 146 FERC ¶ 61,206 at P 32; *see also Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235, at PP 51-52 (2007).

[28] *Colonial Pipeline Co.*, 146 FERC ¶ 61,206 at P 32.

that have not shipped on a sufficient basis to qualify as Regular Shippers.[29] The Commission finds that the provision that each New Shipper will be allocated up to 2.5 percent of pipeline capacity up to an aggregate New Shipper reservation of ten percent of capacity is sufficient to provide reasonable access consistent with Caliber's common carrier obligations. The policy provides a process whereby New Shippers can become Regular Shippers by shipping crude petroleum on the Project during the base period consistent with Commission precedent.[30]

The Commission orders:

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.

[29] *See Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,249, at PP 23, 30-31 (2012) (*Kinder Morgan*) (approving proration policy in which ten percent of capacity would be set aside for new shippers with each new shipper limited to 2.5 percent of capacity, and a new shipper could become a regular shipper after shipping for twelve consecutive months); *Oxy Midstream Strategic Dev., LLC*, 141 FERC ¶ 61,005, at PP 15, 19 (2012) (approving proration policy in which capacity would first be allocated to firm committed shippers, then to new shippers up to a total of ten percent of capacity, with an allocation of no more than two percent per new shipper, and next to regular shippers based on their historic shipments); *BridgeTex Pipeline Co., LLC*, 156 FERC ¶ 61,121, at PP 10, 19 (2016) (approving proration policy for expansion capacity in which each new shipper would be allocated up to two percent of the capacity, up to a total for all new shippers of ten percent, and then any remaining capacity would be allocated to regular shippers based on their historical movements); *see also CenterPoint Energy*, 144 FERC ¶ 61,130 at PP 30-31; *Saddlehorn Pipeline*, 153 FERC ¶ 61,067 at PP 25-26, 34; *Hiland Crude, LLC*, 148 FERC ¶ 61,228, at PP 15-16, 23 (2014).

[30] *See Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at P 41 (2012); *Kinder Morgan*, 141 FERC ¶ 61,249 at PP 23-24, 31; *Sunoco Pipeline L.P.*, 147 FERC ¶ 61,204, at P 30 (2014).

Document Content(s)