

148 FERC ¶ 61,160
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Tesoro High Plains Pipeline Company LLC

Docket No. OR14-32-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 2, 2014)

1. On May 30, 2014, Tesoro High Plains Pipeline Company LLC (THPP) filed a Petition for Declaratory Order seeking approval of THPP's tariff rates and terms proposed in its recently-concluded open season for the Dunn Center Gathering System, and confirmation that such rates and terms set forth in the Transportation Service Agreement (TSA) entered into by each shipper will be honored. THPP also seeks approval of its proposed rate design and proposed initial rate for uncommitted shippers. The Commission grants in part, and denies in part, THPP's Petition.

Project Details

2. The THPP pipeline system consists of approximately 221 miles of trunk line and a 200-mile gathering system located in Eastern Montana and Western North Dakota, capable of transporting approximately 110,000 barrels per day (bpd). In response to the recent growth of crude production in the Bakken region of North Dakota, THPP has reconfigured the pipeline system to transport crude from numerous origin points in North Dakota to delivery points at Richey Station in Eastern Montana as well as Dry Fork Station, Enbridge Beaver Lodge and Stampede in North Dakota.

3. The proposed Dunn Center Gathering System is an effort to expand system capacity to receive Bakken crude oil. The Dunn Center Gathering System will consist of approximately 150 miles of gathering lines designed to enable THPP to gather crude from various points in Dunn County, ND for delivery to the THPP mainline system. The capacity of the Dunn Center Gathering System has been set at 40,000 to 60,000 bpd. Construction of the Dunn Center Gathering System is expected to be completed by the end of 2015, and entail a capital investment of approximately \$140 million to \$160 million.

4. In order to determine shipper interest and offer potential shippers the opportunity to enter into firm TSAs, THPP conducted a widely-publicized open season commencing on April 9, 2014 and concluding on May 15, 2014. A Binding Open Season Notice

& Information Memorandum stated that priority service that was not subject to prorationing under normal operating conditions would be offered to committed shippers that agreed to ship crude on the Dunn Center Gathering System for a ten-year term. The memorandum stated that 10 percent of the new system would be reserved for uncommitted shippers, and that committed shippers who were not subject to prorationing would pay a higher rate than the uncommitted rate.

5. The terms of the TSA included a tiered rate structure for committed shippers based on volumes committed. The minimum capacity bid would be 1,250 bpd over a ten-year period. Shippers with bids of at least 15,000 bpd would be considered “Tier 1” shippers, whereas commitments of less than 15,000 bpd would result in “Tier 2” status.¹ Tier 1 shippers were offered a rate of \$2.80 per barrel, with Tier 2 shippers offered a rate of \$2.85. THPP revised the initial uncommitted rate, which was initially estimated at \$2.78 per barrel, to \$2.25 per barrel. As stated by THPP, “committed rates would always be higher than the uncommitted rate.”²

6. Pursuant to the TSA, provisions related to priority service include: (a) yearly committed rate adjustments that differ from FERC’s indexing methodology; (b) an initial term of ten years from the date the Dunn Center Gathering System is completed, with automatic three-year renewals subject to cancellation by either party; (c) the possibility of early service on completed segments of the Dunn Center Gathering System; (d) provisions regarding shortfall payments and crediting mechanisms; (e) the ability to commence negotiations on a quality bank for the Dunn Center Gathering System; and (f) the ability of Tier 1 shippers to increase their daily minimum volume commitment in a given month by up to 25 percent. Committed shippers are also permitted to assign their rights to their affiliates without THPP consent, and to other companies with THPP’s consent.

Requested Rulings

7. THPP requested that the Commission approve THPP’s proposed tariff and rate structure for the Dunn Center Gathering System. In particular, THPP requests the Commission make the following determinations:

- a. THPP may charge different rates to committed and uncommitted shippers;

¹ No shipper opted to be a Tier 2 shipper during the open season.

² Petition for Declaratory Order at 13.

- b. At least 10 percent of the Dunn Center Gathering System shall be reserved for uncommitted shippers;
 - c. Committed rates for Tier 1 shippers may be set at \$2.80 per barrel as set forth in the TSA;
 - d. Committed rates may be increased by 3.5 percent annually;
 - e. Committed Tier 1 rates may be filed as settlement rates that have been agreed to by each shipper pursuant to Section 342.4(c) of the Commission's regulations;
 - f. The rates and terms for committed shippers as specified in each TSA shall be honored and not subject to challenge during the term specified in the TSA;
 - g. Shipments for committed shippers will not be prorated under normal operating conditions;
 - h. Committed shippers will be allowed to assign their priority rights as permitted under the TSA; and
 - i. The rate of \$2.25 per barrel for uncommitted shippers is accepted and approved as an initial rate.
8. THPP claims it is Commission policy to honor the rates, terms and conditions set forth in TSAs entered into upon a well-publicized open season.³ Specifically, THPP cites *CCPS Transportation, LLC*, for the proposition that it is appropriate for a pipeline proposing committed and uncommitted service to reserve at least 10 percent of the project's capacity for uncommitted shippers.⁴ THPP claims that because the Dunn Center Gathering System is offering at least ten percent of new capacity to uncommitted shippers, it is acting consistently with Commission precedent. THPP also cites to numerous Commission decisions which approved prior requests to file committed rates agreed upon through an open season as consistent with settlement rates consistent with

³ Petition for Declaratory Order at 16-18 (citing *Seaway Crude Pipeline Co., LLC*, 146 FERC ¶ 61,151 (2014) (*Seaway*)).

⁴ *CCPS Transp., LLC*, 122 FERC ¶ 61,123 (2008).

Section 342.4(c).⁵ THPP states its committed rates are consistent with those approved by the Commission in similar cases.

9. The TSA for the Dunn Center Gathering System permits committed shippers to assign their contractual rights to other companies. In one section of the petition, THPP states that assignment requires the consent of THPP.⁶ In a separate section, consent is not required for assignment of rights to a shipper's affiliates.⁷ Nothing in the petition or its attachments resolves this inconsistency.

10. THPP states that allowing committed shippers to assign their contractual rights in consistent with Commission precedent. THPP contends in *Shell Pipeline Co.*⁸ the Commission approved such a provision, holding it was just and reasonable and will allow shippers to step into the shoes of the original shipper and provide the necessary financial support for the project. THPP argues that in *NuStar*,⁹ the Commission approved a similar proposal as just and reasonable and consistent with Commission precedent.

11. Under the terms of the TSA, THPP will increase committed rates by 3.5 percent on an annual basis. THPP argues that the Commission has never required that committed rate increases utilize the FERC Oil Pipeline Index.¹⁰ Further, states THPP, the Commission has approved projects that allowed changes to committed rates pursuant to the agreed-upon terms of the TSA and not the Commission's index.¹¹

12. Under the TSA, the initial ten-year term for committed shippers automatically renews for successive three-year periods, unless or until cancelled by either party at least one year before the end of the term. THPP states the Commission approved similar

⁵ See, e.g., *CenterPoint Energy Bakken Crude Svcs., LLC*, 144 FERC ¶ 61,130 (2013) (*CenterPoint Energy*).

⁶ Petition for Declaratory Order at 19.

⁷ *Id.* at 15.

⁸ *Shell Pipeline Co. LP*, 141 FERC ¶ 61,017 (2012).

⁹ *NuStar Crude Oil Pipeline L.P.*, 146 FERC ¶ 61,146 (2014) (*NuStar*).

¹⁰ Petition for Declaratory Order at 21 (citing *Colonial Pipeline Co.*, 119 FERC ¶ 61,183 (2007)).

¹¹ *CenterPoint Energy*, 144 FERC ¶ 61,130 (discussing committed and uncommitted rate adjustments).

provisions in prior instances.¹² THPP seeks approval of a similar provision in the Dunn Center Gathering System TSA.

13. THPP seeks Commission approval for the provisions in the TSA that allow THPP to place initial portions of the project in service as each segment becomes available. THPP states that offering service as it becomes available is in the interest of all parties, preserving priority service to committed shippers while ensuring at least ten percent availability of each segment as it comes on line to uncommitted shippers.

14. THPP cites to *Kinder Morgan Pony Express* as a similar project that consisted of three phases, where the pipeline allowed any shipper, committed and uncommitted, to ship on completed segments prior to the overall completion date.¹³ Another case cited by THPP in support of its proposal, *Sunoco Pipeline L.P.*,¹⁴ allowed for committed shippers to have priority service over completed segments of the project as it became available. The Commission, states THPP, approved both proposals.

15. The THPP TSAs include provisions related to shortfall payments and a shortfall crediting mechanism for committed shippers. Committed shippers who fail to ship their minimum monthly volumes will make shortfall payments. The payments will be calculated by taking the quantity of the shortfall and multiplying it by the rate currently in effect. According to THPP, these shortfall payments may later apply as credits toward payments owed in future months for shipments above the committed volumes during those future months. THPP claims these mechanisms provide shippers with flexibility to respond to market forces and to meet their minimum monthly volume commitments. THPP claims these mechanisms provide shippers with flexibility to respond to market forces and to meet their minimum monthly volume commitments.

16. THPP states the Commission previously approved petitions for declaratory orders containing shortfall or deficiency payment provisions.¹⁵ In *Crosstex NGL Pipeline, L.P.*,

¹² Petition for Declaratory Order at p. 23 (citing *Enbridge Pipelines (FSP) LLC*, 146 FERC ¶ 61,148 (2014) (*Enbridge (FSP)*); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180 (2012) (*Kinder Morgan Pony Express*)).

¹³ Petition for Declaratory Order at 24 (citing *Kinder Morgan Pony Express*, 141 FERC ¶ 61,180 at P 58).

¹⁴ 141 FERC ¶ 61,212 (2012).

¹⁵ Petition for Declaratory Order at 26 (citing *Crosstex NGL Pipeline, L.P.*, 146 FERC ¶ 61,182 (2014) (*Crosstex*); *NuStar*, 146 FERC ¶ 61,146; *Enbridge Pipelines (FSP) LLC*, 146 FERC ¶ 61,148; *Kinder Morgan Pony Express*, 141 FERC ¶ 61,180).

the Commission, states THPP, approved a petition involving an analogous but more detailed shortfall payment calculation, finding it just and reasonable and not resulting in undue discrimination or preference.¹⁶ THPP cites *Enbridge Pipelines (FSP)* as a case where the Commission approved a shortfall crediting mechanism similar to that proposed by THPP.¹⁷

17. THPP states the Dunn Center Gathering System TSA contemplates good faith negotiations may occur regarding the implementation of a quality bank if there is a material difference in the gravity or sulfur content of delivered crude oil. THPP refers to the system approved for the Trans-Alaska Pipeline System (TAPS) as applicable precedent. THPP states quality banks are necessary where different shippers inject different quality oils into a pipeline.¹⁸ A quality bank, states THPP, makes monetary adjustments that offset the effects of differences in quality.¹⁹ THPP states the same objectives for the quality bank on TAPS justify inclusion of provisions for good-faith negotiations concerning the Dunn Center Gathering System.

18. Finally, THPP states its proposal to allow any committed shipper the ability to increase its daily minimum volume commitment by 25 percent is consistent with Commission precedent. THPP states committed shippers may make such an increase and, if space is available, these volumes would not be subject to apportionment. Increases above 25 percent will not receive priority service. THPP confirms uncommitted shippers will always have access to at least 10 percent of the total capacity of the Dunn Center Gathering System.

19. THPP cites two Commission cases where it argues that similar provisions were approved. In *Dominion NGL Pipelines, LLC*, the pipeline, states THPP, allowed for committed shippers to tender volumes in excess of its original volume commitment at the committed rate in any month the pipeline was not in prorationing.²⁰ In *CenterPoint*

¹⁶ Petition for Declaratory Order at 27 (citing *Crosstex*, 146 FERC ¶ 61,182).

¹⁷ Petition for Declaratory Order at 28 (citing *Enbridge (FSP)*, 146 FERC ¶ 61,148).

¹⁸ Petition for Declaratory Order at 30 (citing *Trans Alaska Pipeline Sys.*, 57 FERC ¶ 63,010 (1991)).

¹⁹ *Id.*

²⁰ Petition for Declaratory Order at 31-32 (citing *Dominion NGL Pipelines, LLC*, 145 FERC ¶ 61,133 (2013)).

Energy, THPP notes the Commission approved a proposal where committed shippers could nominate additional incremental barrels in excess of the committed shipper's volume commitment for the month.²¹ THPP claims its proposal is consistent with this Commission precedent and urges the Commission to approve its proposal.

Notice and Interventions

20. Notice of the Petition issued May 30, 2014. Interventions and protests were due June 30, 2014. Pursuant to Rule 214 of the Commission's regulations, 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.²² 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.

Discussion

21. The Commission will grant, in part, and deny in part the requested rulings in the Petition. Granting the Petition in part will provide regulatory certainty for the substantial capital investment required for the Dunn Center Gathering System. The project will provide much needed infrastructure in the Bakken region, and THPP demonstrated that most of its requested rulings are consistent with Commission precedent.

22. The Commission confirms that the provisions of the TSA will govern transportation service provided to committed shippers for the duration of the contract. The requested rulings are consistent with similar requests previously approved by the Commission.²³ The Commission generally approves committed-service TSA contract provisions if the process for entering into the TSA was fair, and the result of a well-publicized open season.²⁴

23. The Commission, however, denies THPP's request for approval of the proposed initial rate of \$2.25 per barrel for uncommitted shippers. There is no precedent for use of the declaratory order process to obtain approval of specific, initial *uncommitted* rates. Further, even were the Commission to allow consideration of specific uncommitted rates

²¹ Petition for Declaratory Order at 32 (citing *CenterPoint Energy*, 144 FERC ¶ 61,130).

²² 18 C.F.R. § 385.214 (2014).

²³ See, e.g., *CenterPoint Energy*, 144 FERC ¶ 61,130.

²⁴ *Seaway*, 146 FERC ¶ 61,151 (2014).

as part of a declaratory order process, which it is not, THPP provided no factual data to support its uncommitted rate calculation, nor any affidavit that the rate is agreed to by at least one non-affiliated shipper who intends to use the service, as required by section 342.2 of the Commission's Regulations.²⁵ Moreover, THPP is obligated to file the uncommitted rates before it goes into service and if those rates are protested then it must justify those rates on a cost of service basis.²⁶ The Commission therefore denies THPP's request for approval of its proposed uncommitted rate.

24. In addition, there are inconsistencies in THPP's petition which, though minor, require clarification so the scope and application of the Commission's approvals are clear. As discussed *supra*, THPP's petition is unclear on the question of whether it requires permission before a shipper can assign contractual rights under the TSA to an affiliate.²⁷ It is imperative that parties provide a clear understanding of proposals to the Commission. For purposes of this order, the Commission understands THPP to require its consent only for the assignment of contractual rights to non-affiliated companies. The Commission will approve this provision so far as it comports with the non-discrimination requirements of the Interstate Commerce Act (ICA) and other Commission precedent.²⁸

25. Putting aside THPP's misplaced request for approval of a specific uncommitted rate, THPP's general proposed rate structure and other tariff provisions are consistent with those approved by the Commission in previous declaratory orders, and may also be approved here. The Commission has held that priority service, not subject to prorationing, is permissible under the ICA, so long as committed shippers pay a premium rate compared to uncommitted shippers, and the committed rates and priority service were offered during a fully transparent open season.²⁹ The Commission also has authorized pipelines to reserve up to 90 percent of capacity for priority service to

²⁵ 18 C.F.R. § 342.2 (2014).

²⁶ *Id.*

²⁷ Compare Petition for Declaratory Order at 15 (Committed shippers may assign rights to their affiliates without requiring THPP consent and to other companies with THPP's consent) with Petition for Declaratory Order at 19 ("The TSA entered into in this case permits shippers to assign their contractual rights to other companies, with the consent of the carrier.").

²⁸ 49 U.S.C. § 3(1) (1988).

²⁹ See *Shell Pipeline Co.*, 139 FERC ¶ 61,228 (2012), cited in *CenterPoint Energy*, 144 FERC ¶ 61,130 at P 27.

committed shippers, and allowed priority incremental barrels to be offered at a premium rate, not subject to prorationing, if the overall capacity reserved for priority service does not exceed ninety percent.³⁰ The Commission therefore approves THPP's proposals regarding priority service for committed shippers.

26. The Commission approves THPP's proposal to file its committed rates as settlement rates pursuant to section 342.4(c) of the Commission's regulations.³¹ The Commission approved similar requests in previous declaratory orders. Although the Commission's regulations do not provide specifically for negotiated initial rates with agreed-to future rate changes, the commission has ruled that such contracts are consistent with the spirit of section 342.4(c) of the Commission's regulations.³² Section 342.4(c) also requires a carrier to file a verified statement that any proposed rate change has been agreed to by all current shippers.³³ THPP may file a request for waiver of the verified statement when it files its initial tariff.³⁴

27. The Commission will approve THPP's proposal to increase committed rates by 3.5 percent annually, in accordance with the terms of the TSA, and not use the FERC oil pricing index factor. The Commission has approved similar proposals in the past as being consistent with Commission regulations.³⁵ Unlike the proposal in *CenterPoint Energy*, THPP's proposal addresses annual increases of committed rates only.

28. The Commission also will allow the TSA to automatically renew for successive three-year periods. This proposal is consistent with prior Commission decisions upholding similar renewal terms.³⁶

29. Pursuant to the terms of the TSA, the Commission approves THPP's proposal that would allow segments of the Dunn Center Gathering System to begin service on an "as available" basis prior to total completion of the project. The proposal is in the interest of

³⁰ See *CenterPoint Energy*, 144 FERC ¶ 61,130, at PP 29-31 (2013).

³¹ 18 C.F.R. § 342.4(c) (2014).

³² *Seaway Crude Pipeline Co. LLC*, 142 FERC ¶ 61,201, at P 12 (2013).

³³ 18 C.F.R. § 342.4(c) (2014).

³⁴ See *CenterPoint Energy*, 144 FERC ¶ 61,130, at P 19 (2013).

³⁵ See *id.* P 21.

³⁶ *Enbridge (FSP)*, 146 FERC ¶ 61,148 at P 32.

any shipper who may wish to use competed portions of the system, even without entering into a TSA. As the Commission held in *Kinder Morgan Pony Express*, it is in the public interest to provide access to additional capacity to transport crude oil from a region currently experiencing a shortage of available transportation capacity.³⁷

30. The Commission approves THPP's proposed shortfall payment and crediting mechanism set forth in the TSA. Shortfall payments are necessary under ship-or-pay provisions to calculate any deficiency due under the TSA. THPP provides a crediting mechanism to mitigate any risks associated with shortfalls, while allowing flexibility to committed shippers to meet their monthly volume commitments. THPP's proposal is consistent with similar provisions approved by the Commission in prior orders.³⁸

31. Finally, THPP requested the Commission approve of the provision in the TSA that calls for good-faith negotiations concerning implementation of a quality bank. The parties are free to discuss a quality bank at any time. The Commission will rule on the actual provisions agreed to, including whether the terms are just, reasonable, and not unduly discriminatory, when and if THPP publishes them in its tariff.

The Commission orders:

The Commission grants in part, and denies in part, THPP's petition for declaratory order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁷ *Kinder Morgan Pony Express*, 141 FERC ¶ 61,180 at P 62.

³⁸ *See Crosstex*, 146 FERC ¶ 61,182.

Document Content(s)

OR14-32-000.DOC.....1-10