140 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Explorer Pipeline Company Docket No. OR12-10-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued August 1, 2012)

1. On March 23, 2012, Explorer Pipeline Company (Explorer) filed a petition for a declaratory order approving (1) priority capacity and (2) the overall rate structure for Explorer's proposed diluent pipeline extension project (Diluent Extension Project).[1] Explorer originally sought expedited consideration so that the proposed Diluent Extension Project could be completed in a timely manner. No motions to intervene or protests were filed. On May 17, 2012, Explorer filed an amendment to its Petition, wishing to make the priority capacity and overall rate structure it requested in the original Petition available to shippers who commit to the Cochin Interconnection Project.[2] As discussed below, the Commission conditionally grants the requested declaratory order.

Background

2. Explorer is a joint common carrier pipeline owned in various percentages by subsidiaries of Chevron, American Capital Strategies Ltd, ConocoPhillips, Marathon, Sunoco Logistics and Shell.[3] Explorer states that it owns and operates a 1,900 mile pipeline system that transports various refined petroleum products (including diluent) from refineries located on the U.S. Gulf Coast, Oklahoma and St. Louis to terminals and

[1] Explorer Pipeline Company March 23, 2012 Petition for Declaratory Order at 5 (Petition).

[2] Explorer Pipeline Company May 17, 2012 Amendment (Amendment).

[3] Petition at 5.

pipeline connections in Texas, Oklahoma, Missouri, Illinois, and Indiana. Diluent, explains Explorer, is a light hydrocarbon that aids in the transportation of heavy crude oils. Demand for diluent in Western Canada has been steadily increasing, states Explorer, as it facilitates heavy crude oil transport particularly during periods of cold weather.

The Diluent Extension Project

3. Explorer states that the Diluent Extension Project is designed to provide a new, long-distance diluent transportation alternative to shippers. The project will involve the construction of an approximately 18 mile, 24-inch pipeline segment from Explorer's existing mainline system in Peotone, Illinois to Manhattan, Illinois. From Manhattan, the diluent will be transported to Enbridge's Southern Lights pipeline for delivery to Western Canada. The new pipeline segment will have a capacity of 350,000 barrels per day, which can be expanded by an additional 100,000 barrels per day.[4]

4. Explorer states that the Diluent Extension Project will involve a substantial financial commitment and significant capital investment over a significant time period.[5] Explorer requests issuance of a declaratory order by May 25, 2012, to provide assurances to shippers that transportation service will be available. Explorer anticipates that, with sufficient shipper commitments obtained during the open season, permitting and construction of the Diluent Extension Project will commence in the second and third quarters of 2012, with start up expected to occur in the first half of 2014.[6]

Description of the Open Season

5. Explorer explains that due to the substantial capital investment required to fund the Diluent Extension project, it initiated an open season process in October of 2011 seeking shipper commitments.[7]

6. Accordingly, Explorer held two open seasons, the first seeking non-binding expressions of interest, the second seeking Throughput Agreements (TAs) with any

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[4] *Id*. at 5.

[5] Explorer currently estimates that the Diluent Extension Project will cost in excess of $65 million. Petition at 4, n.2.

[6] *Id*. at 5.

[7] *Id*. at 4.

interested shipper.[8] Shippers who execute TAs with Explorer will make term and volume commitments to ship a specified volume for 10 years, or pay a deficiency fee of $0.90 per barrel. In exchange for these term and volume commitments, so-called Committed Shippers receive rate discounts relative to the uncommitted rate for deliveries to Manhattan during periods when Explorer is not in prorationing.[9] The individual volume commitments available under Explorer's binding open season range from 5,000 to 50,000 barrels per day, with corresponding rates of between $2.79 and $2.04 per barrel for shipments from the U.S. Gulf Coast to Manhattan.[10]

7. When the Explorer pipeline system is under prorationing, Committed Shippers may elect to obtain priority capacity, whereby upon payment of a premium rate their contract volumes will not be subject to prorationing.[11] The premium applicable to Committed Shippers for priority capacity will be $0.01 per barrel above the prevailing uncommitted rate for shipments to Manhattan.[12]

8. Explorer explains that while the system has not been under prorationing since December 2007, and it does not expect the new volumes attracted by the Diluent Extension Project to lead to increased periods of prorationing, when and if the pipeline is under prorationing Explorer will reserve approximately 71 percent of the capacity on the new segment from Peotone to Manhattan for Committed Shippers with priority service.[13]

<u>Explorer's Amendment to the Petition</u>

9. On May 17, 2012, Explorer filed an amendment to its Petition. The pipeline explains that it did not receive sufficient shipper commitments to move forward with the

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[8] *Id*. at 4.

[9] *Id*. at 4.

[10] *Id*. at Attachment 2, p. 3. The uncommitted rate for shipments from the U.S. Gulf Coast to Manhattan as listed in the Notice of Binding Open Season is $2.907 per barrel. Explorer states however that it will file a rate for shipments by uncommitted shippers to Manhattan under its existing market-based rate authority. Petition at 10.

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

[12] *Id*. at 5.

[13] *Id*. at 10.

Diluent Extension Project.[14]

10. Explorer states that in late April, 2012, Kinder Morgan Energy Partners, L.P. (Kinder Morgan) initiated an open season seeking shipper commitments for a reversal project (the Cochin Interconnection Project) that would allow for the transport of at least 75,000 barrels per day of diluent from Kankakee County, Illinois, where it would connect with the Explorer pipeline system, and Fort Saskatchewan, Alberta.[15]

11. Explorer seeks to amend its Petition to allow it the flexibility to offer shippers who commit to ship volumes on Explorer that are bound for Kinder Morgan's Cochin pipeline the same priority capacity and the overall rate structure originally sought for the Diluent Extension Project to both that project and the Cochin Interconnection Project.[16] Explorer states that it will hold a transparent and widely publicized open season for the Cochin Interconnection Project, just as it did for the Diluent Extension Project.[17]

Explorer's Argument for a Declaratory Order[18]

12. Explorer asserts that a declaratory order is appropriate in this case, as the rulings sought are consistent with the Commission's prior orders regarding priority service terms and rate structures that can be offered to shippers that commit volumes through an open season to support a new infrastructure project.[19] Explorer states that the Commission has

[14] Amendment at 3.

[15] Amendment at 3.

[16] *Id*.

[17] *Id*. at 4.

[18] Explorer's Amendment to its Petition adopted the same arguments raised in the original Petition.

[19] Explorer cites, for example, *Express Pipeline System*, which states:

> [I]t is better to address these issues [term rate structure and validity of proposed rates] in advance of an actual tariff filing than to defer until the rate filing is made, when the decision-making process would be constrained by the deadlines inherent in the statutory filing process. The public interest is better served by a review of the issues presented before a filing to put rates into effect.

76 FERC ¶ 61,245, at 62,253, *order on reh'g*, 77 FERC ¶ 61,188, at 61,755 (1996).

repeatedly recognized the need for pipelines to obtain up-front regulatory approvals before undertaking major capital expenditures.[20]

13. Explorer argues that the Commission has the authority to approve capacity allocation and rate structure proposals where such proposals are reasonable and not unduly discriminatory.[21] Explorer states that under section 1(4) of the Interstate Commerce Act (ICA), pipelines are required to furnish transportation service upon a reasonable request. However, Explorer argues that a common carrier may make "reasonable and appropriate rules regarding the acceptance and transportation of traffic" as long as those rules do not violate the common carrier obligations under section 1(4).[22]

14. Explorer also cites to section 3(1) of the ICA, stating carriers may not cause any undue or unreasonable preference or advantage to any particular person.[23] Explorer argues that the anti-discrimination provisions of the ICA do not require identical treatment to all shippers.[24] First discussing the issue of establishing committed rates at a discount from uncommitted rates, Explorer argues that committed shippers are not similarly situated with uncommitted shippers because committed shippers on Explorer are not able to choose whether to ship or not, and they provide revenue assurances, planning assurances, and the basis for constructing the new 24-inch pipeline segment from Peotone to Manhattan.[25] In discussing its priority capacity proposal, Explorer argues that its approach comports with the ICA and Commission precedent by

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[20] *See, e.g., Skelly-Belvieu Pipeline Co., L.L.C.*, 138 FERC ¶ 61,153, at P 10 (2012); *Sunoco Pipeline, L.P.*, 137 FERC ¶ 61,107, at PP 14-15 (2011); *Mid-America Pipeline Co.*, 136 FERC ¶ 61,087, at P 18 (2011); *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167, at P 40 (2010); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at P 14 (2007), *order on reh'g*, 122 FERC ¶ 61,123 (2008); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073, at P 23 (2007); *Enbridge Energy Co. Inc.*, 110 FERC ¶ 61,211 (2005); *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002).

[21] Petition at 13.

[22] *Id*. at 13, *citing Lakehead Pipe Line Co.*, 71 FERC ¶ 61,388, at 62,325 (1995), *reh'g denied*, 75 FERC ¶ 61,181 (1996).

[23] Petition at 13, *citing* ICA § 3(1).

[24] Petition at 13.

[25] *Id*. at 14-15, *citing Express Pipeline P'ship*, 76 FERC ¶ 61,245, at 62,254 (1996).

(1) charging a premium rate to committed shippers, and (2) affording an appropriate amount of capacity for uncommitted shippers.[26]

Notice and Interventions

15. Public notice of the Petition was issued on April 4, 2012, with interventions and protests due on or before April 20, 2012. Public notice of the amended Petition was issued on June 5, 2012, with interventions and protests due on or before June 14, 2012. No interventions, protests or adverse comments were filed.

Commission Analysis

16. Explorer seeks Commission approval of both a discounted rate structure for Committed Shippers and a premium rate structure for priority capacity during periods of prorationing. As Explorer correctly states, its proposal represents a blending of two separate proposals that, individually, have been accepted by the Commission in prior declaratory orders. While such a blended proposal is novel, the Commission agrees with Explorer that a declaratory order is the appropriate mechanism for securing advance approval.[27] The Commission will first address each element of Explorer's rate proposal separately before analyzing the blended proposal as a whole.

17. The first element of Explorer's rate structure proposal is a discounted rate for Committed Shippers who enter into volume and term commitments with the pipeline. This proposed rate structure does not violate the anti-discrimination or undue preference provisions of the ICA because the rate discount was made available to all interested shippers and reflects the difference between firm and non-firm shippers.[28] Explorer conducted a two-phase open season in which it offered all interested shippers an

[26] Petition at 15-16, *citing Sunoco Pipeline, L.P.*, 137 FERC ¶ 61,107, at PP 14-15 (2011) (offering committed shippers priority capacity, not subject to prorationing, at a premium of $0.01 per barrel to the uncommitted shipper rate), *Skelly-Belvieu Pipeline Co., L.L.C.*, 138 FERC ¶ 61,153, at PP 16-18 (2012) (approving the reservation of 35 percent of post-expansion capacity for committed shippers paying a premium rate).

[27] Petition at 11.

[28] *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310, at P 31 (2007)

opportunity to enter into TAs with the pipeline.[29] Shippers who enter into TAs are not similarly situated with other shippers who are unwilling or unable to do so.[30]

18. The second element of Explorer's rate structure proposal is the proposal to charge a premium rate in connection with priority capacity that will not be subject to prorationing. The Commission finds that this element of Explorer's proposal is consistent with applicable policy and precedent. Explorer provides an appropriate amount of capacity for uncommitted shippers (approximately 29 percent), while affording protection to the committed shippers who enter into long-term TA agreements. Committed shippers may elect to pay a premium rate above the existing general commodity rates, in exchange for the assurance that their volumes will not be prorated under normal operating conditions.[31]

19. Explorer's premium rate proposal differs, however, from previous premium rate designs approved by the Commission. The difference lies in the open season held by Explorer and its relationship to the proposed premium service. In *Skelly-Belvieu*, the pipeline conducted an open season that sought volume commitments at premium rates in exchange for premium service.[32] Explorer's open season, by contrast, sought volume commitments at discounted rates. Those shippers entering into TAs, and becoming Committed Shippers, would then have the ability to secure priority capacity in times of prorationing. However, shippers who did not enter into TAs, and thus were not eligible for discounted rates, could not obtain premium service at any time.

20. Another element of Explorer's rate proposal is that premium rates are incurred at any time Explorer's pipeline system as a whole is in prorationing, not merely the proposed extension between Peotone and Manhattan.[33] Explorer lists numerous origin and destination markets throughout its 1900 mile system. The proposal states that prorationing on any portion of the Explorer system would trigger premium rates, even if the proposed extension is below capacity. In addition, however, the Notice of Binding

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[29] Petition at 4.

[30] *Express Pipeline P'ship*, 76 FERC ¶ 61,245, at 62,254 (1996).

[31] *Skelly-Belvieu Pipeline Co., L.L.C.*, 138 FERC ¶ 61,153, at PP 16-18 (2012) (approving the reservation of 35 percent of post-expansion capacity for committed shippers paying a premium rate).

[32] *Id*. P 6.

[33] Petition at 4.

Open Season merely states that premium service would be triggered if the open season is oversubscribed. Thus, it is unclear from the Petition when the Explorer pipeline system could enter into a condition of prorationing even if the open season were not over-subscribed, and whether this could trigger Committed Shippers' incurrence of premium rates to avoid prorationing.

21. The Commission finds, however, that Explorer's proposed combination of discount rates and premium rates into one open season is reasonable. Shippers are sophisticated parties who can determine for themselves whether entering into TAs for discount service is a sufficient motivation for having access to premium service when and if the Explorer system is under prorationing. Yet Explorer must set forth in its tariff the specific conditions that will place the pipeline into a condition of prorationing. The Commission therefore conditionally grants the Petition subject to Explorer identifying in its tariff with sufficient specificity the prorationing conditions necessary for Committed Shippers to be able to obtain priority capacity.

22. Finally, as there is no material difference between the proposals for either the Diluent Extension Project or the Cochin Interconnection Project, approval of priority capacity and overall rate structures on both projects is appropriate, and will allow Explorer the flexibility it seeks in offering shippers the opportunity to commit to either project.

23. Accordingly, the Commission grants Explorer's Petition for a declaratory order approving priority capacity and the overall rate structure for the Diluent Extension Project and the Cochin Interconnection Project, pursuant to the clarification identified above.

<u>The Commission orders</u>:

Explorer's Petition for declaratory order, as amended, is conditionally granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.