168 FERC ¶ 61,087
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

White Cliffs Pipeline, L.L.C. Docket No. OR18-35-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued August 13, 2019)

1. On August 16, 2018, White Cliffs Pipeline, L.L.C. (White Cliffs) filed a petition for declaratory order (Petition) requesting that the Commission approve its proposed terms of service, rate structure, and various other aspects of the agreements associated with a joint pipeline project (Joint Project). The Commission grants in part and rejects in part the Petition, subject to conditions, as discussed below.

I. Background

2. According to the Petition, the Joint Project involves White Cliffs, DCP Wattenberg Pipeline, LLC (DCP Wattenberg) and DCP Southern Hills Pipeline, LLC (DCP SoHi) (DCP Wattenberg and DCP SoHi together are referred to as DCP Parties) (all three together are referred to as the Joint Carriers).[1] White Cliffs states that the Joint Project will provide natural gas liquids (NGL) transportation service from receipt points located in Weld County, Colorado, which is within the Denver-Julesburg Basin (DJ Basin) to Mont Belvieu, Texas. White Cliffs and DCP Parties intend to construct and develop the Joint Project by combining new pipeline capacity, converted pipeline capacity and existing, but unutilized, pipeline capacity.[2]

3. White Cliffs states that there is a need for the Joint Project due to the recent increase in natural gas and NGL production in the DJ Basin.[3] It states that there are

[1] Petition at 1 n.2.

[2] *Id.* at 1.

[3] White Cliffs states that natural gas production in Weld County, Colorado averaged 56.6 billion cubic feet per month in 2017 and that it has increased to an average of 59.94 billion cubic feet per month during the first quarter of 2018, and natural gas production in the DJ Basin is expected to increase for the foreseeable future. Petition at 3 & n.9.

limited options available to transport DJ Basin NGL production to a market hub where the NGLs can be fractionated into constituent components (e.g., ethane, propane, and butane) to then be sold, and that those limited options are operating at capacity.[4] White Cliffs states that given the tie between natural gas production and NGL production, it is possible that DJ Basin natural gas production could be reduced or wells could be shut-in if there is not a sufficient outlet for the transportation of the NGLs out of the production area. White Cliffs contends that the Joint Project will provide a much-needed outlet for DJ Basin NGL production by transporting up to approximately 50,000 barrels per day (bpd) of NGLs from the DJ Basin to Mont Belvieu, Texas—a major NGL market hub. White Cliffs states that the Joint Project is expected to be operational in the fourth quarter of 2019.[5]

II. Description of the Joint Project

4. As described in more detail below, White Cliffs states that the Joint Project will be completed in three segments corresponding to each pipeline company, respectively: DCP Wattenberg, White Cliffs, and DCP SoHi.

A. Wattenberg Segment

5. White Cliffs states that DCP Wattenberg will be responsible for the construction of the first segment of the Joint Project, which will consist of a new 25-mile, 12.75-inch diameter pipeline that will extend from various gas processing plants in Weld County, Colorado to an interconnect with White Cliffs' pipeline in Platteville, Colorado (Wattenberg Segment). White Cliffs notes that movements on the Wattenberg Segment will be on entirely new pipeline capacity.[6]

B. White Cliffs Segment

6. The second segment of the Joint Project, consisting of the construction of a new pipeline infrastructure and the conversion of one of White Cliffs' existing pipelines from crude oil service to NGL service (White Cliffs Segment), will be White Cliffs' responsibility. White Cliffs states that the White Cliffs Segment will extend from

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[4] *Id.* at 4.

[5] *Id.* at 5.

[6] White Cliffs states that shippers that currently utilize DCP Wattenberg's system for NGL transportation service under FERC Tariff 11.9.0 will not be affected by the development of the Joint Project. *Id*. at 6.

Platteville, Colorado and tie to an interconnect with DCP SoHi's pipeline near Cushing, Oklahoma.[7]

7. White Cliffs states that it currently has two parallel 12.75-inch pipelines that provide crude oil transportation service from Platteville, Colorado to Cushing, Oklahoma and its pipeline has a total capacity of 185,000 bpd.[8] White Cliffs notes that, although it currently has the ability to transport 180,000 bpd of crude oil from its Platteville, Colorado receipt point to its Cushing, Oklahoma delivery point, a large portion of its available capacity has been and remains unutilized.[9] White Cliffs states that despite temporary rate reductions to incentivize shippers to ship additional volumes on its system, significantly decreasing its general commodity base rate by approximately 39 percent, as well as consolidating and decreasing its volume incentive rate, White Cliffs' pipeline system continues to have unutilized capacity.[10] White Cliffs anticipates that the volumes currently transported on its system would likely decline should it elect to cancel the temporary rate reductions.[11] Additionally, White Cliffs currently has long-term volume commitments on its system that were entered into during various open seasons held by White Cliffs, the initial terms of which are expiring in 2019 and 2020. It predicts even further crude oil volume declines once the long-term commitments expire.[12]

8. Given the unutilized capacity on its existing system, White Cliffs proposes to abandon crude oil transportation service on one of its existing pipelines and to convert that pipeline into NGL transportation service, such that White Cliffs will be able to transport NGLs from Platteville, Colorado to Cushing, Oklahoma on one of its pipelines, while continuing to transport crude oil from Platteville, Colorado to Cushing, Oklahoma on the other pipeline. By converting one of its existing crude oil pipelines to NGL service, White Cliffs argues that it will be able to provide a much-needed outlet for NGL

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[7] *Id.* at 5.

[8] White Cliffs provides transportation service under FERC Tariff 4.8.0. *Id.*

[9] *Id.* at 6-7. White Cliffs further states that during the 12-month period ending November 2017, it transported, on average, approximately 98,500 bpd of crude oil, leaving approximately 81,500 bpd (or 45 percent) of its capacity unutilized. In November 2017, White Cliffs' volumes dropped even further to an average of 77,000 bpd of crude oil transported, leaving 103,000 bpd (or 57 percent) of its capacity unutilized. *Id*. at 7.

[10] *Id.* at 7 (referencing FERC Tariff No. 4.7.0).

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

[12] *Id.* at 8.

production in the DJ Basin, while also reducing the inefficiencies of running two pipelines well below their operational capacity. To complete the process of converting a pipeline, White Cliffs will need to undertake a number of activities, including: (1) completing mechanical and chemical cleaning of the pipeline in order to prepare it for NGL service; (2) upgrading mainline valve seals; and (3) installing new pumps and pump stations. White Cliffs also intends to construct a new 12-mile, 12.75-inch diameter pipeline that will extend from the terminus of the converted pipeline to an interconnect with DCP SoHi's system near Cushing, Oklahoma. White Cliffs estimates that the conversion of White Cliffs' existing infrastructure and the construction of the new 12-mile extension will cost approximately $66 million[13]

9. After converting the pipeline, White Cliffs states that it will continue to have approximately 95,000 bpd capacity available for crude oil transportation.[14] White Cliffs states that it currently has long-term volume commitments totaling 72,000 bpd that qualify for firm service, which leaves over 23,000 bpd, or 24 percent, of its crude oil pipeline capacity available to transport volumes that do not qualify for firm service.[15] As further assurance of sufficient crude oil transportation service to accommodate uncommitted shippers, White Cliffs states that it is arranging additional crude oil transportation capacity from Platteville, Colorado to Cushing, Oklahoma, which, with the 95,000 bpd of remaining capacity, would ensure that White Cliffs' current shippers will continue to have access to crude oil pipeline capacity sufficient to transport the volumes that they have historically shipped on White Cliffs' system following the completion of the converted pipeline.[16] Therefore, White Cliffs does not expect its current shippers to be negatively affected by its proposal to convert one of its crude oil pipelines to NGL service.

C. DCP SoHi Segment

10. White Cliffs states that DCP SoHi will be responsible for construction of the third segment of the Joint Project consisting of new pipeline infrastructure, repairing or replacing currently idle pipeline infrastructure and the use of existing, but unutilized, capacity to provide NGL service (DCP SoHi Segment).[17]

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[13] *Id.* at 9.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 5.

11. According to White Cliffs, DCP SoHi has a mainline that consists of approximately 500 miles of pipeline that varies from 16 to 20 inches in diameter, with a total capacity of approximately 192,000 bpd transporting NGLs from various points in Kansas and Oklahoma to Mont Belvieu, Texas (DCP SoHi Mainline). Additionally, DCP SoHi owns approximately 47 miles of 18-inch diameter pipeline that extends from Panova Station, located southeast of Oklahoma City, Oklahoma to the Cushing, Oklahoma area, which is not currently operational (Idle DCP SoHi Segment).[18] To provide NGL transportation service on the Joint Project, White Cliffs states that DCP SoHi intends to repair or replace, as needed, the Idle DCP SoHi Segment so that it can receive NGLs from White Cliffs' system near Cushing, Oklahoma and can deliver NGLs to DCP SoHi's Mainline for further transportation south to Mont Belvieu, Texas.[19]

12. White Cliffs explains that the DCP SoHi Segment will involve both an extension of DCP SoHi's existing pipeline system by repairing or replacing the Idle DCP SoHi Segment, and the use of existing, but unutilized, capacity to provide NGL service on the Joint Project. The current capacity of DCP SoHi Mainline is approximately 192,000 bpd. However, according to White Cliffs, since January 2017, the average daily volume per month transported on the DCP SoHi Mainline has never exceeded 136,000 bpd and since January 2017, there has always been at least 56,000 bpd of unutilized capacity on the DCP SoHi Mainline each delivery month.[20] White Cliffs states that the DCP SoHi Mainline will dedicate 50,000 bpd of its capacity to the Joint Project and at least 142,000 bpd of capacity will remain on the DCP SoHi Mainline following completion of the Joint Project, which meets the historical usage of the DCP SoHi Mainline and still ensures that capacity remains available to new shippers.[21] White Cliffs contends that the NGL transportation service provided to existing shippers on the DCP SoHi Mainline will not be degraded as a result of the Joint Project and the Joint Project will not affect any of DCP SoHi's existing shippers' access to capacity from all of the existing DCP SoHi Mainline receipt points to the destination points.[22]

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[18] *Id.* at 10.

[19] The Idle DCP SoHi Segment and the DCP SoHi Mainline are collectively referred to as the DCP SoHi Segment. *Id*. at 10 n.47.

[20] *Id*. at 10-11.

[21] *Id.* at 11.

[22] *Id.*

III. Joint Open Seasons

13. White Cliffs states that it, along with DCP Parties, elected to conduct a widely-publicized joint open season from May 24, 2018 to July 2, 2018 due to the significant capital investment required to develop the Joint Project.[23] During the joint open season, White Cliffs made the following documents available to any interested shipper: (1) the Notice of Open Season, which included a summary of the terms and conditions of the transportation service agreements (TSA);[24] (2) a *pro forma* copy of the White Cliffs' TSA, *pro forma* FERC tariffs, and the proposed prorationing policy; (3) a pipeline map; and (4) a confidentiality agreement. Prior to providing interested shippers with a *pro forma* copy of the White Cliffs TSA, White Cliffs states that it asked such shippers to execute a confidentiality agreement with Joint Carriers in order to protect the confidential nature of the information Joint Carriers shared with the interested shipper during the joint open season process.[25] It states that the confidentiality agreement did not prohibit interested shippers from raising concerns about the Joint Project with the Commission; rather, it just required that the shipper disclose any confidential information received during the joint open season process under seal.[26]

14. White Cliffs required interested shippers that were willing to make long-term volume commitments of at least 2,000 barrels per day (Committed Volumes) for a minimum 10-year term to execute a TSA with White Cliffs (White Cliffs TSA) covering movement on the White Cliffs Segment and a separate TSA with DCP Wattenberg and DCP SoHi (DCP TSA) covering movement on the Wattenberg Segment and DCP SoHi Segment. White Cliffs states that the TSAs required shippers to commit to ship, or pay for not shipping, a specified volume of NGLs on the Joint Project (Committed Shippers), and in exchange for such commitments, Committed Shippers qualify for discounted transportation rates on the Joint Project.[27] White Cliffs notes that the TSAs do not provide Committed Shippers with priority or firm service for the transportation of their volume commitments. White Cliffs explains that because it will serve as the operator of the White Cliffs Segment and DCP Wattenberg and DCP SoHi, which are affiliated entities, will serve as the operators of the Wattenberg Segment and the DCP SoHi

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[23] The open season was initially expected to conclude on June 25, 2018, but due to shipper interest in the Joint Project, was extended a week to July 2, 2018. White Cliffs publicized the extension by posting a notice on its website. *Id.* at 12 n.59.

[24] *See id.,* Ex. 4.

[25] *Id.* at 13.

[26] *Id.* at 13-14, Ex. 1 at P 22.

[27] *Id.* at 12.

Segment, Committed Shippers were required to execute both a White Cliffs TSA and a DCP TSA during the joint open season. White Cliffs states that the White Cliffs TSA and the DCP TSA contain terms and conditions that are substantively identical and any Committed Shipper that participated in the joint open season was required to make the same volume commitment to the DCP SoHi Segment as it made to the White Cliffs Segment.[28] White Cliffs states that this requirement was essential because there is no outlet other than the anticipated connection with DCP SoHi for NGLs at the terminus of the White Cliffs Segment at Cushing, Oklahoma and therefore, all volumes that are shipped on the White Cliffs Segment must be delivered into the DCP SoHi Segment for transportation to Mont Belvieu, Texas.[29]

15. White Cliffs states that by the close of the open season, White Cliffs and the DCP Parties determined that they had received a sufficient level of volume commitments to proceed forward with developing the Joint Project.[30]

IV. Terms and Conditions and Rates

16. White Cliffs reiterates that it submits this Petition on its own behalf and therefore, White Cliffs focused the discussion of the terms of service for the Joint Project on the terms and conditions set forth in the White Cliffs TSA. However, White Cliffs notes that, as confirmed in an affidavit, the terms and conditions set forth in DCP Parties' TSA are substantively identical to the term and conditions set forth in the White Cliffs TSA.[31]

17. The White Cliffs TSA designates two categories of Committed Shippers: (1) an Anchor Committed Shipper, which is any Committed Shipper that makes a volume commitment of at least 10,000 bpd,[32] and (2) a Non-Anchor Committed Shipper, which is any Committed Shipper that makes a volume commitment of less than 10,000 bpd, but at least 2,000 bpd.[33] White Cliffs states that an Anchor Committed Shipper will receive the discounted Committed Rate for the transportation of its Volume Commitment, plus any

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[28] *Id.*

[29] *Id.*

[30] *Id.* at 14.

[31] *Id.*

[32] *Id.* at 15 (citing Ex. 5 at § 1.4).

[33] *Id.* (citing Ex. 5 at § 1.59).

Incremental Barrels[34] that it ships on the Joint Project during a month in recognition of the greater commitment such Anchor Committed Shipper made to the Joint Project.[35] It states that a Non-Anchor Committed Shipper will receive the discounted Committed Rate for the transportation of its volume commitment, but will be subject to the applicable Uncommitted Rate for the transportation of any Incremental Barrels on the Joint Project.[36]

18. White Cliffs states that if a Non-Anchor Committed Shipper tenders less than 80 percent of its monthly volume commitment during any month, then the Non-Anchor Committed Shipper must pay White Cliffs an amount equal to the Non-Anchor Committed Shipper's deficiency multiplied by the then-applicable Deficiency Payment Rate.[37] If an Anchor Committed Shipper fails to tender the full amount of its monthly volume commitment during any month, the Anchor Committed Shipper must pay White Cliffs an amount equal to the Anchor Committed Shipper's deficiency multiplied by the then-applicable Deficiency Payment Rate.[38]

V. Prorationing Policy

19. During any month in which Joint Carriers receive nominations for transportation service on the Joint Project, or any portion thereof, that exceeds the capacity available for that month, White Cliffs states that it, along with DCP Parties, developed the following proration policy to govern the allocation of capacity (Proration Policy). White Cliffs states that the Proration Policy allocates the available capacity between New Shippers (i.e., any shipper that does not qualify as a Regular Shipper) as a class and Regular Shippers (i.e., any Committed Shipper or any shipper that has shipped NGLs on the Joint

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[34] Incremental Barrels means the barrels of NGLs that a Committed Shipper nominates and tenders for shipment on the White Cliffs Segment or the Joint Project, as applicable, in a month that exceeds the Committed Shipper's monthly volume commitment. *Id*. at 15 n.71.

[35] *Id*.

[36] *Id*.

[37] Deficiency Payment Rate is a stated per-barrel rate that is identified in the White Cliffs TSA that will be applied to deficient barrels for purposes of calculating any deficiency payment owed by a Committed Shipper. Section 5.1(c) of the White Cliffs TSA provides that White Cliffs shall have the right to adjust the Deficiency Payment Rate to reflect any positive inflation adjustments, or any portion thereof, promulgated annually by the Commission pursuant to 18 C.F.R. § 342.2 (2018) or any successor methodology that the Commission may adopt.

[38] Petition at 15-16.

Project during each month of the applicable 12-month historical base period) as a class.[39] It notes that a Committed Shipper will be deemed to be a Regular Shipper as of the in-service date of the Joint Project. According to White Cliffs, the Proration Policy provides that up to five percent of the Joint Project's capacity will be available (provided that no New Shipper shall be allocated more than one percent of the total available capacity) and allocated to New Shippers on a *pro rata* basis respective to their nominations with the remaining available capacity allocated to Regular Shippers in proportion to the greater of their historical shipments during the applicable 12-month base period or their monthly volume commitment over the applicable 12-month base period (Historical Volumes).[40] Particularly, White Cliffs states that each Regular Shipper will be allocated an amount of capacity that is equal to its Historical Volumes divided by the total Historical Volumes for all Regular Shippers multiplied by the total capacity available on the Joint Project to such Regular Shippers.[41] Because any New Shipper has the opportunity to graduate to Regular Shipper status, White Cliffs contends that the Proration Policy ensures that every shipper has the ability to obtain access to 95 percent of capacity reserved for Regular Shippers. Moreover, it argues that the Proration Policy guarantees that Uncommitted Shippers will continue to have access to at least five percent of the available capacity at all times and will have the opportunity to receive Regular Shipper status.[42]

20. White Cliffs states that in *Enbridge* and *TransCanada Keystone Pipeline, L.P*. the Commission approved proration policies that allocated capacity between regular shippers as a class and new shippers as a class, with five percent of the pipeline's capacity reserved for new shippers.[43] White Cliffs states that the "amount of expansion capacity available to Committed Shippers for commitment will not exceed 90 percent of the total expansion capacity."[44]

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[39] *Id.* at 16.

[40] *Id.*

[41] *Id.* at 17 (citing White Cliffs TSA at § 2.3).

[42] *Id.* at 33 (citing *Enbridge Pipeline (North Dakota) LLC*, 140 FERC ¶ 61,193, at P 20 (2012) (*Enbridge*); *TransCanada Keystone Pipeline, LP*, 131 FERC ¶ 61,139, at P 9 (2010) (*TransCanada*); *ConocoPhillips Transp. Alaska, Inc.*, 112 FERC ¶ 61,213, at P 26 (2005) (denying complaint to prorationing policy reserving five percent of capacity to new shippers)).

[43] Petition at 33-34 (citing *Enbridge*, 140 FERC ¶ 61,193 at P 20 and *TransCanada*, 131 FERC ¶ 61,139 at P 9).

[44] *Id*. at 28.

21. White Cliffs states that the Commission has previously approved a pipeline's ability to offer preferential rights on a project that involved the combination of new capacity with existing, but unutilized, capacity in order to offer a new transportation service. White Cliffs notes that in *Palmetto Prods. Pipe Line LLC,* the Commission approved the pipeline's proposal to offer firm transportation service on a project that combined unutilized capacity with new infrastructure in order to provide a new transportation service.[45] White Cliffs states that the Commission noted that the use of existing capacity on another pipeline would not negatively affect that pipeline's shippers because the capacity that was going to be dedicated to the new project was unutilized.

22. The White Cliffs TSA provides that it will establish both a local Committed Rate and, with DCP Parties, a joint Committed Rate that will apply to movements by a Committed Shipper on the Joint Project.[46] Further, it provides that a Committed Shipper has the option to ship under either the local or joint Committed Rate and the Committed Rate applicable to a Committed Shipper will be discounted compared to the rate applicable to an Uncommitted Shipper seeking what is otherwise the same transportation service (Uncommitted Rate). The White Cliffs TSA provides that the joint Committed Rate shall at all times be equal to or less than the sum of the local Committed Rates set forth in each Joint Carrier's respective local tariff.[47]

23. The White Cliffs TSA provides that, "White Cliffs has the ability to adjust the Committed Rate and Deficiency Payment Rate … to reflect any positive inflation adjustments, or any portion thereof, promulgated annually by [the Commission] pursuant to 18 C.F.R. § 342.2 (1994) or any successor indexing methodology that [the Commission] may adopt."[48] White Cliffs TSA also provides that in no event shall White Cliffs be required to reduce the then-effective Committed Rate or Deficiency Payment Rate to reflect any negative inflation adjustments promulgated by the Commission. According to the White Cliffs TSA, if during the term of the TSA, White Cliffs becomes

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[45] *Id*. at 34 (citing *Palmetto Prods. Pipe Line LLC*, 151 FERC ¶ 61,090, at P 33).

[46] *Id*. at 17.

[47] *Id.*

[48] *Id.* at 18 (citing White Cliffs TSA at § 5.1(c)). White Cliffs also notes that Joint Carriers have the same ability to adjust the joint Committed Rate.

obligated as a result of a Change in Law Event[49] to bear Compliance Costs,[50] White Cliffs has the right to file to increase the then-effective rates, or to impose a surcharge on the Committed Shippers and Uncommitted Shippers to enable it to recover such Compliance Costs in a manner that is reasonable and equitable to all shippers on the Joint Project.[51]

24. The White Cliffs TSA provides that, to the extent permitted by applicable law, White Cliffs may file the Committed Rate, including the initial Committed Rate and any subsequent changes thereto, as a settlement rate under 18 C.F.R. § 342.4(c), and that the Committed Shipper executing the White Cliffs TSA expressly agrees to support such filings in accordance with the terms of the White Cliffs TSA.[52]

25. White Cliffs states that the initial term of the White Cliffs TSA is ten years and upon expiration of the initial term, the TSA will automatically renew for an additional five-year period, unless either White Cliffs or the Committed Shipper provides written notice of its intent to terminate such TSA at least 12 months prior to the expiration of the initial term. Following the expiration of the five-year extension, White Cliffs states that the TSA will automatically renew on a year-to-year basis unless terminated and where a Committed Shipper elects to terminate the White Cliffs TSA, that notice of termination will cause the termination of the DCP TSA and vice versa.[53]

26. In the event White Cliffs and DCP Parties decide to expand the capacity of the Joint Project (at any time or from time to time according to the TSA), the White Cliffs

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[49] The Petition defines a Change in Law Event as "the occurrence of a Change in Law that necessitates the expenditure of Compliance Costs (citing White Cliffs TSA at § 1.11). A Change in Law is the adoption, implementation or amendment of any applicable law by any governmental authority after the effective date of the White Cliffs TSA that is (a) effective as to similarly situated pipelines, (b) imposes additional requirements with respect to the Converted Pipeline (including the operation thereof), and (c) causes White Cliffs to incur additional expenses in order to comply with such applicable law." *Id.* at 18 n.87.

[50] According to the Petition, Compliance Costs are all expenses in excess of $1,000,000 for a Change in Law Event incurred by White Cliffs to comply with a Change in Law, irrespective of whether such expenses are to be incurred as a one-time expenditure or periodically for an extended period. *Id.* at 18 n.88 (citing White Cliffs TSA at § 1.16).

[51] *Id*. at 18.

[52] *Id*. at 18-19.

[53] *Id*. at 19.

TSA specifies that Joint Carriers will offer each Committed Shipper a first right to submit a binding nomination to ship a committed volume of NGLs on the expansion capacity.[54] However, White Cliffs notes that the amount of such expansion capacity will not exceed 90 percent of the total expansion capacity.[55]

VI. Requested Rulings

27. White Cliffs requests that the Commission approve the following aspects involving the rates and terms of service as consistent with the Interstate Commerce Act (ICA)[56] and Commission precedent for similar liquids pipelines:

A. The joint open season process followed by White Cliffs and DCP Parties was appropriately conducted and was not unduly discriminatory or unduly preferential.

B. The proposal to calculate any owed deficiency payments using a Deficiency Payment Rate is reasonable.

C. White Cliffs may adjust the Committed Rates and Deficiency Payment Rate pursuant to the terms of the White Cliffs TSA.

D. White Cliffs may file, at its election, the Committed Rate, including the initial Committed Rate, as settlement rates under 18 C.F.R. § 342.4(c) during the term of the White Cliffs TSA.[57]

E. A Committed Shipper may receive a discounted transportation rate compared to the rate charged to Uncommitted Shippers for movements on the Joint Project.

F. It is reasonable and appropriate for White Cliffs to provide a Committed Shipper with the expansion commitment rights specified in the White Cliffs TSA in the event White Cliffs and DCP Parties mutually decide to develop new or additional capacity.

G. White Cliffs may offer Anchor Committed Shippers certain additional rights, in relation to the rights offered to Non-Anchor Committed Shippers and Uncommitted Shippers.

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[54] *Id.* at 19-20.

[55] *Id*. at 19, 28.

[56] 49 U.S.C. app. § 1 *et seq.* (1988).

[57] Petition at 24-25.

H. The proration policy that will govern the allocation of capacity on the Joint Project during months when the Joint Project is in proration is reasonable and not unduly discriminatory.

I. The term of the White Cliffs TSA may be extended in accordance with the provisions of the White Cliffs TSA.

VII. Public Notice, Intervention, and Comments

28. Notice of the Petition was issued on August 20, 2018, providing for motions to intervene, comments and protests to be filed on or before September 20, 2018. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[58] all timely filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted. 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.

VIII. Discussion

29. Based on the representations in the Petition, the Commission grants in part and rejects in part the rulings requested by White Cliffs, subject to the conditions set forth below.

30. The Commission finds that the open season appropriately followed Commission guidelines, offered all interested parties an equal opportunity to become Committed Shippers, and was neither unduly discriminatory nor unduly preferential. The Commission affirms that it will uphold and apply the key provisions of the White Cliffs TSA, and that these provisions will govern the transportation service that White Cliffs provides to Committed Shippers during the terms established in the White Cliffs TSA. In previous proceedings, the Commission has approved the terms of the agreements executed between Committed Shippers and pipelines for TSAs entered into during a widely-publicized and transparent open season and confirmed that those terms would be applied during the established agreement.[59]

31. The Commission approves the Deficiency Payment Rate. The Commission has previously approved deficiency rate provisions that require shippers to compensate

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[58] 18 C.F.R. § 385.214 (2018).

[59] *See, e.g., Marathon Pipe Line LLC*, 152 FERC ¶ 61,005, at P 16 (2015); *CenterPoint Energy Bakken Crude Servs., LLC*, 144 FERC ¶ 61,130, at P 17 (2013) (*CenterPoint*); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at PP 22-23 (2012) (citing *Mid-America Pipeline Co., LLC*, 136 FERC ¶ 61,087, at P 9 (2011)).

pipelines for unshipped committed volumes.[60] Such provisions ensure pipelines receive finances as agreed upon, which encourages future investment.

32. White Cliffs requests that the Commission approve the Committed Rate as well as subsequent adjustments of that rate made under the terms of the White Cliffs TSA as a settlement rate under 18 C.F.R. § 342.4(c). Commission regulations require that the committed rates must meet the requirements for initial rates under 18 C.F.R. § 342.2(a), file a cost-of-service rate, or 18 C.F.R. § 342.2(b), file a sworn affidavit that the rate is agreed to by at least one non-affiliated shipper who intends to use the service in question, when the tariff is ultimately filed with the Commission.[61] White Cliffs states that it and DCP Parties determined that they received a sufficient level of volume commitments to proceed forward with developing the Joint Project; however, they did not specify whether at least one of those shippers was not an affiliate. The Commission grants White Cliffs' request to treat the committed rates as settlement rates, conditioned upon White Cliffs providing (1) a sworn affidavit that the rate is agreed to by at least one non-affiliated shipper who intends to use the service in accordance with 18 C.F.R. § 342.2(b), or (2) a cost-of-service rate, in accordance with 18 C.F.R. § 342.2(a). The Commission will treat any subsequent rate adjustments thereto pursuant to the TSA as settlement rates under 18 C.F.R. § 342.4(c).[62]

33. The Commission affirms that a Committed Shipper may receive a discounted transportation rate compared to the rate charged to an Uncommitted Shipper. The Commission has recognized that it is appropriate for Committed Shippers to pay discounted rates because Committed Shippers obligate themselves to ship larger volumes compared to Uncommitted Shippers.[63] In the event that White Cliffs and DCP Parties decide to develop new or additional capacity, the Commission confirms that providing Committed Shippers with expansion commitment rights as specified in White Cliffs' TSA is consistent with Commission policy.[64] Also, the Commission finds that White Cliffs' proposal to offer Anchor Committed Shippers certain additional rights in relation

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[60] *CenterPoint*, 144 FERC ¶ 61,130 at PP 16-17; *Belle Fourche Pipeline Co.,* 151 FERC ¶ 61,139, at P 24 (2015) (*Belle Fourche*).

[61] 18 C.F.R. § 342.2 (2018).

[62] *Id*. § 342.4(c).

[63] *See Belle Fourche,* 151 FERC ¶ 61,139 at P 21 (citing *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219, at 61,866 (2002)).

[64] *See Oryx Southern Delaware Oil Gathering and Transp. LLC*, 154 FERC ¶ 61,065, at P 25 (2016) (citing *MarkWest Liberty Ethane Pipeline, L.L.C.*, 145 FERC ¶ 61,287, at P 27 (2013)); *see also CenterPoint*, 144 FERC ¶ 61,130 at PP 32-33.).

to the rights offered to Non-Anchor Committed Shippers and Uncommitted Shippers is consistent with the Commission's policy under the ICA.[65]

34. The Commission confirms that the Committed Rates may be adjusted and/or surcharges imposed by White Cliffs in the future due to a qualifying Change in Law Event as defined in the TSA. The Commission previously has approved provisions that allow for adjustments and surcharges to committed rates, finding that committed shippers freely entered into the contracts and consequently assumed all the rights and obligations thereunder.[66] In the event White Cliffs files a rate increase or surcharge to the uncommitted rates to recover compliance costs due to a Change in Law Event, Uncommitted Shippers will have the ability to protect their interests by submitting protests or raising any issues related to the proposed rate adjustment at that time.[67]

35. The Commission rejects White Cliffs' Proration Policy. Under White Cliffs' proposed Proration Policy, 95 percent of capacity is allocated to Regular Shippers (defined as both Committed Shippers and shippers with history on the pipeline) and five percent of capacity is allocated to New Shippers. Committed Shippers will be the only Regular Shippers as of the in-service date of the Joint Project because no other shippers will have history on the pipeline. This means that on the in-service date Committed Shippers may have access of up to the entire 95 percent of capacity allocated to Regular Shippers. Accordingly, as White Cliffs acknowledges, Uncommitted Shippers (which will all be New Shippers) may only have access to five percent of capacity on the in-service date.[68]

36. This proposed Proration Policy undermines the Commission's committed rate policy, which allocates a minimum 10 percent reservation of the pipeline's total capacity to Uncommitted Shippers to ensure reasonable access to the pipeline consistent with its common carrier obligation.[69] As described above, White Cliffs' Proration Policy may

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[65] *Sunrise Pipeline LLC*, 165 FERC ¶ 61,041, at 10 (2018); *see also Enbridge Pipelines (Southern Lights) LLC*, 141 FERC ¶ 61,244, at P 26 (2012).

[66] *See Saddlehorn Pipeline Co., LLC,* 153 FERC ¶ 61,067, at P 36 (2015); *see also Tallgrass Pony Express Pipeline LLC,* 147 FERC ¶ 61,266, at P 10 (2014).

[67] *See, e.g., EnLink Crude Pipeline, LLC*, 157 FERC ¶ 61,120, at P 17 (2016).

[68] Transmittal at 33.

[69] *See, e.g., Enterprise Liquids Pipeline LLC*, 142 FERC ¶ 61,087, at P 27 (2013) (approving a rate structure guaranteeing a reservation of 10 percent of capacity for uncommitted shippers); *Kinder Morgan Cochin LLC,* 141 FERC ¶ 61,056, at P 18 (2012) (stating that "Cochin provides an appropriate amount of capacity for Uncommitted Shippers, at least ten percent, while affording benefits to Committed Shippers who enter

result in Uncommitted Shippers having access to only five percent of capacity instead of 10 percent of capacity. Accordingly, the Commission rejects White Cliffs' proposal.

37. The cases cited by White Cliffs are distinguishable. *Enbridge* did not involve capacity subject to committed shipper contracts, and thus Enbridge's filing did not raise the same concerns regarding the availability of 10 percent of pipeline capacity for uncommitted shippers.[70] We recognize that *TransCanada* is more factually similar to White Cliffs because it involved both discounted committed capacity as well as a prorationing policy that set aside five percent of available capacity for new shippers. However, the Commission's *TransCanada* decision did not directly address TransCanada's provision that reserved only five percent of capacity for new shippers nor the Commission's policy that 10 percent of capacity must be reserved for uncommitted shippers. Although the Commission addressed a shipper challenge to other aspects of the prorationing policy in *TransCanada*, the shipper did not challenge the pipeline's proposal to only allocate new shippers five percent of capacity during prorationing.[71] Notwithstanding the prorationing approach permitted in *TransCanada,* the Commission's established policy reserving 10 percent of capacity for Uncommitted Shippers supports rejecting White Cliffs' proposal as discussed above. This does not preclude White Cliffs from filing a revised Proration Policy when it files tariffs to place the Joint Project into effect.

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into long-term TSAs."); *CCPS Transp., LLC*, 121 FERC ¶ 61,253, at P 17 n.33 (2007) (requiring 10 percent of the expansion volumes to be reserved for uncommitted shippers in order "to preserve the common carrier obligation.").

[70] Furthermore, when the Commission in *Enbridge* approved the allocation of only five percent of pipeline capacity to new shippers, the Commission considered the significant prorationing problems on Enbridge's system at that time and stated that the proposed reservation was reasonable "given the unique circumstances on Enbridge North Dakota's system." *Enbridge*, 140 FERC ¶ 61,193 at P 22. White Cliffs has not shown that similar circumstances exist here.

[71] *TransCanada*, 131 FERC ¶ 61,139 at PP 6, 12 (discussing shipper challenge to portion of prorationing policy containing a proposal "to allocate available capacity at Port Arthur based on committed shippers' contract volumes…."). We note that "[the Commission]'s acceptance of a pipeline's tariff sheets does not turn every provision of the tariff into 'policy' or 'precedent'." *Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318, 1320 (2007).

38. The Commission approves the contract extension rights for Committed Shippers to renew for an additional five-year period. The Commission has approved similar automatic contract extension/rollover rights for projects.[72]

The Commission orders:

White Cliffs' petition for declaratory order is granted in part and rejected in part, subject to conditions, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[72] *See, e.g., Marathon Pipe Line LLC,* 164 FERC ¶ 61,014, at P 29 (2018); *Oryx Southern Delaware Oil Gathering and Transp. LLC*, 154 FERC ¶ 61,065 at P 14; *CenterPoint*, 144 FERC ¶ 61,130 at P 34.