169 FERC ¶ 61,001
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

SFPP, L.P. Docket No. OR19-29-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued October 1, 2019)

1. On June 27, 2019, SFPP, L.P. (SFPP) filed a petition for declaratory order (Petition) requesting approval of the proposed rate structure, terms of service, and prorationing methodology for a new committed interstate transportation service from El Paso, Texas, to the Annex Terminal in Tucson, Arizona, on new capacity (Expansion Capacity) created through an expansion of SFPP's East Line (Expansion). SFPP requests that the Commission act on the Petition no later than October 1, 2019, so that SFPP and its shippers may receive necessary certainty regarding their commitments to the Expansion project. Tesoro Refining & Marketing Company LLC (Tesoro) protested the Petition.

2. As discussed below, we grant the Petition.

I. Background

3. SFPP's East Line consists of approximately 400 miles of pipeline transporting refined petroleum products such as natural gasoline, diesel, and jet fuel from El Paso, Texas, to destinations in Tucson and Phoenix, Arizona.[1]

4. According to SFPP, Mexico recently enacted regulatory changes that have led to increased demand for imports of refined petroleum products from the United States.[2] SFPP states that several shippers have expressed interest in transporting additional volumes of Mexican-grade gasoline and Mexican-grade diesel from El Paso to Tucson on the East Line.[3] SFPP states that in response to these requests, it determined that it can

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[1] Petition at 3.

[2] *Id.*

[3] *Id.* Upon delivery in Tucson, SFPP understands that the shippers will transport the products into the Mexican market via trucks and other modes of transportation. *Id.*

increase capacity on the East Line between El Paso and Tucson by installing new pumps and modifying existing piping.[4]

5. SFPP anticipates that the Expansion will create approximately 7,500 barrels per day (bpd) in Expansion Capacity for delivery to the Annex Terminal, thereby increasing the total East Line capacity between El Paso and Tucson from 41,000 bpd (Existing Tucson Capacity) to 48,500 bpd (Total Tucson Capacity).[5] According to SFPP, the Annex Terminal has been able to receive, store, and deliver Mexican-grade gasoline over a truck rack since April 2019. SFPP estimates that the Annex Terminal will be able to receive, store, and deliver Mexican-grade diesel over a truck rack around February 2020.[6]

6. SFPP represents that it expects the Expansion to enter service by July 1, 2019.[7] Due to the timing of work at the Annex Terminal, SFPP states that shippers will be able to ship Mexican-grade gasoline on the Expansion Capacity beginning on July 1, 2019 (Phase I In-Service Date) and Mexican-grade diesel beginning on or about February 1, 2020.[8]

7. SFPP states that it conducted an open season from May 23, 2019, to June 24, 2019, during which it solicited shipper support for the Expansion and offered potential shippers the opportunity to become a committed shipper by executing a Transportation Services Agreement (TSA).[9] SFPP represents that it issued a press release describing the Expansion on May 23, 2019, and posted a copy of the press release on its parent company's website.[10] SFPP states that it made the following documents available to any interested shipper during the open season: (1) an open season notice (Notice) providing a high level summary of the open season procedures and the terms and conditions of the TSA; (2) a pipeline map showing the Expansion Capacity; (3) a form TSA including the proposed terms and rate structure for committed shippers; and (4) a copy of SFPP's

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[4] *Id.* at 4.

[5] *Id.* (citing Petition, Ex. 1 at P 6 (Affidavit of Doug Meyers)).

[6] *Id.*

[7] *Id.*

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

[9] *Id.* at 5-6.

[10] *Id.* at 6.

May 31, 2019 tariff filing in Docket No. IS19-633-000 implementing revisions to SFPP's proration policy to account for the Expansion.[11]

8. SFPP states that it provided the Notice to its existing shippers and posted a copy of the Notice on its website.[12] The Notice explained that SFPP would provide the form TSA to any interested shipper that executed a confidentiality agreement.[13] The Notice also stated that SFPP would reserve all of the contracted Expansion Capacity for shippers that made volume commitments during the open season (Committed Shipper Capacity) and would continue to reserve the Existing Tucson Capacity for allocation under SFPP's existing prorationing policy to shippers requesting service on an uncommitted walk-up basis (uncommitted shippers).[14] The Notice explained that if volume commitments exceeded Committed Shipper Capacity at the end of the open season, SFPP would allocate the Committed Shipper Capacity among committed shippers using a net present value (NPV) methodology.[15]

9. SFPP represents that eight potential shippers, none of which were SFPP affiliates, received copies of the open season documents.[16] SFPP states that one of these entities executed a TSA to become a committed shipper and that this commitment was sufficient for SFPP to proceed with developing the Expansion.[17]

10. SFPP filed the instant Petition on June 27, 2019. One day after filing the Petition, on June 28, 2019, SFPP filed in Docket No. IS19-675-000 FERC Tariff No. 202.0.0 to establish an initial local committed rate (Committed Rate) on the Expansion Capacity (Committed Rate Tariff). Tesoro filed a protest contending that: (a) existing East Line shippers would improperly subsidize shipments on the Expansion Capacity unless the Expansion resulted in lower rates for existing shippers; (b) SFPP could not justify the proposed contract rate as SFPP placed the Expansion Capacity into service one week after the open season ended and this timing indicates that construction of the Expansion

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[11] *Id.*

[12] *Id.*

[13] *Id.* (citing Petition, Ex. 4 at 1-2 (Open Season Notice)).

[14] *Id.* at 7 (citing Petition, Ex. 1 at P 13; Ex. 4 at 2).

[15] *Id.* (citing Petition, Ex. 1 at P 13; Ex. 4 at 7-8).

[16] *Id.* at 8.

[17] *Id.*

Capacity was not contingent on shipper commitments; and (c) SFPP improperly limited the Expansion Capacity to specific grades of Mexican-grade gasoline and diesel.

11. On July 26, 2019, the Commission accepted the Committed Rate Tariff and found that Tesoro lacked standing.[18] The Commission found that Tesoro did not demonstrate that it would pay the Committed Rate or that service on the Expansion Capacity would affect the rate it paid or the service it received on the East Line.[19] Thus, the Commission found that Tesoro lacked a substantial economic interest in the Committed Rate Tariff sufficient to confer standing to protest under 18 C.F.R. § 343.2(b).[20] In addition, the Commission rejected Tesoro's cross-subsidization claims as unsupported[21] and dismissed Tesoro's objection that SFPP only offered committed rate service on the Expansion Capacity for specific grades of Mexican-grade gasoline and diesel. The Commission found that pipelines have discretion to decide whether to offer a particular service and that Tesoro had failed to show that the limitation granted an undue preference or advantage in violation of the Interstate Commerce Act (ICA).[22] Finally, the Commission rejected Tesoro's challenge to the validity of the open season because the Commission has previously approved rate and service structures derived from open seasons held when development of the relevant project was near completion.[23]

II. TSA Terms, Rates, and Prorationing Policy

12. The TSA provides that, in exchange for making a commitment to ship or pay a specified volume of Mexican-grade gasoline and Mexican-grade diesel (Products) on the Expansion Capacity each month, the committed shipper will receive priority service[24] on the Expansion Capacity equal to the committed shipper's monthly volume commitment.[25] The percentage of the volume commitment for which the committed shipper has a ship-or-pay obligation will increase over three phases of the Expansion, such that the

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[18] *SFPP, L.P.*, 168 FERC ¶ 61,058, at PP 12-13, 17 (2019) (Tariff Order).

[19] *Id.* P 16.

[20] *Id.* PP 13, 16.

[21] *Id.* P 14.

[22] *Id.* P 15. Tesoro did not request rehearing of the Tariff Order.

[23] *Id.* P 15 n.31 (citing *Stateline Crude, LLC*, 162 FERC ¶ 61,245 (2018)).

[24] Priority service refers to capacity that is exempt from prorationing under normal operating conditions.

[25] Petition at 8.

committed shipper will have a ship-or-pay obligation for the full volume commitment by July 1, 2020.[26]

13. The TSA provides that any shortfall payments the committed shipper makes for failing to ship its monthly volume commitment during Phase II of the Expansion will generate credits that may be used against transportation charges incurred during the first twelve months of Phase III. The TSA limits the number of credits the committed shipper can accrue from Phase II shortfall payments or use to offset its transportation charges during the first twelve months of Phase III. Any credits not used during the first twelve months of Phase III will expire.[27]

14. The TSA allows the committed shipper to nominate volumes in excess of its monthly volume commitment (Incremental Barrels) for transportation. SFPP will charge the committed shipper the applicable uncommitted rate for any Incremental Barrels shipped, and the transportation of Incremental Barrels is ineligible for priority service.[28]

15. SFPP states that the rate structure for transportation on the Expansion Capacity requires the committed shipper to pay the Committed Rate,[29] which is at least one cent ($0.01) per barrel higher than the rate applicable to the same transportation movements by a similarly-situated uncommitted shipper (Uncommitted Rate).[30] The Uncommitted Rate is the then-effective rate set forth in SFPP's tariff for movements from El Paso to Tucson on the Existing Tucson Capacity. SFPP states that under the TSA, the Committed Rate will never exceed the Uncommitted Rate by more than $0.10 per barrel.[31]

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[26] *Id.* Phase I will take place from July 1, 2019, to February 1, 2020, Phase II will take place from February 1, 2020, to July 1, 2020, and Phase III will begin on July 1, 2020. *See id.* at 10 n.38, 20; Ex. 1 at P 7 (Meyers Affidavit). SFPP states that it offered this ramp-up to allow shippers adequate time to develop markets for Products in Mexico. Petition at 8.

[27] *Id.* at 9.

[28] *Id.* at 9-10.

[29] As discussed above, on July 26, 2019, the Commission accepted SFPP's tariff filing implementing the Committed Rate. Tariff Order, 168 FERC ¶ 61,058 at P 17.

[30] Petition at 10. SFPP states that it expects the differential between the Committed Rate and the Uncommitted Rate to be at least $0.05 per barrel as of the Phase I In-Service Date. *Id.*

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

16. SFPP explains that the TSA provides for future adjustments to the Committed Rate. The TSA authorizes SFPP to increase the Committed Rate annually in accordance with the most recent index adjustment promulgated pursuant to 18 C.F.R. § 342.3(d).[32] In the event of a negative index adjustment, SFPP will not be required to reduce the Committed Rate.[33] The TSA also allows SFPP to adjust the Committed Rate or impose a surcharge if a change in rule or regulation increases the capital or operating costs of the Expansion Capacity.[34] Moreover, the TSA provides that SFPP may file any changes to the Committed Rate as a settlement rate under 18 C.F.R. § 342.4(c) and that the committed shipper agrees to support such filings.[35]

17. SFPP states that the TSA has an initial term of five years beginning on February 1, 2020. After the initial term expires, the TSA will automatically renew for consecutive one-year periods unless terminated by either party with written notice.[36]

18. SFPP's proposed revised proration policy (Revised Proration Policy)[37] describes how SFPP will allocate Expansion Capacity during times of prorationing.[38] Under this policy, SFPP will allocate Expansion Capacity to each committed shipper in an amount equal to the lesser of (1) the committed shipper's volume commitment with respect to the Expansion Capacity as set forth in its TSA, or (2) the committed shipper's nomination. If the total volume of Products nominated on the Expansion Capacity in a given month exceeds available capacity, then SFPP will allocate the available Expansion Capacity to each committed shipper on a *pro rata* basis. SFPP states that prorationing on the Existing Tucson Capacity is unaffected by the Revised Proration Policy. As a result, SFPP asserts that the Revised Proration Policy ensures that the full amount of Existing Tucson Capacity will remain available for existing and new shippers on SFPP's system and that

[32] *Id.* at 11.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 13.

[37] On May 30, 2019, SFPP submitted a tariff filing in Docket No. IS19-633-000 to revise its Rules and Regulations tariff to incorporate the Revised Proration Policy. The tariff revision became effective by operation of law.

[38] *See* Petition, Ex. 6 at 11-15 (Revised Proration Policy).

committed shippers will only receive priority capacity rights with regard to the Expansion Capacity.[39]

III. Requested Rulings

19. SFPP asks that the Commission confirm the following requested rulings as just and reasonable and not unduly discriminatory or preferential.[40]

A. The TSA provisions will be upheld and will govern the transportation services SFPP provides to committed shippers during the term of the TSA.

B. The rate structure applicable to the Expansion Capacity that is set forth in the TSA is appropriate, and a committed shipper may receive priority service on the Expansion Capacity in exchange for paying a premium rate for such transportation (i.e., the Committed Rate), as compared to the rate applicable to the same movement by an uncommitted shipper.

C. SFPP's shortfall payment structure is appropriate and consistent with Commission precedent.

D. SFPP may contract the full amount of the Expansion Capacity (7,500 bpd) to committed shippers during the open season, leaving approximately 41,000 bpd of capacity (or 84 percent of SFPP's total capacity to Tucson) available for use by uncommitted shippers.

E. SFPP may adjust the Committed Rate pursuant to the terms of the TSA.

F. SFPP may, at its election, file changes to the Committed Rate as a settlement rate during the term of the TSA, and SFPP may be granted a waiver of the verified statement requirements set forth in section 342.4(c) for purposes of filing this amount as a settlement rate.

G. The portion of the Revised Proration Policy that will govern the allocation of Expansion Capacity during months when the Expansion Capacity is in prorationing is reasonable and not unduly discriminatory.

H. SFPP's proposal to use an NPV methodology to allocate the Expansion Capacity in the event of an over subscription during the open season is appropriate.

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[39] Petition at 13.

[40] *Id.* at 14.

I. SFPP may implement extensions of the initial term of the TSA in accordance with the provisions of the TSA.

IV. Public Notice, Intervention, Comment and Protest

20. Notice of the Petition was issued on July 2, 2019, providing for motions to intervene, comments, and protests to be filed on or before July 26, 2019. On July 26, 2019, Windstar Midstream, LLC (Windstar) filed a motion to intervene and comments in support of the Petition. Tesoro filed a motion to intervene on July 25, 2019, and an amended motion to intervene, comment, and protest on July 26, 2019. On August 13, 2019, SFPP filed an answer to Tesoro's amended motion to intervene, comment, and protest.

A. Windstar's Motion to Intervene and Comments

21. Windstar states that it is a distributor of propane and refined fuel throughout the southwestern United States and Mexico.[41] Windstar identifies itself as the entity that executed a TSA with SFPP to become a committed shipper on the Expansion Capacity and argues that it will be directly impacted by the rulings that SFPP requests in the Petition.[42] Windstar states that it supports the Petition in its entirety and asserts that the Expansion provides an important transportation service in response to changing market conditions in the United States and Mexico.[43]

B. Tesoro's Amended Motion to Intervene, Comment, and Protest

22. Tesoro states that it is a past, current, and future shipper on the East Line.[44] Tesoro argues that it has standing to protest the Petition because it has a substantial economic interest in the Petition, the Committed Rate, and the terms set forth in FERC Tariff No. 202.0.0.[45] Tesoro maintains that the Commission has rejected the notion that a party be a current or imminent future shipper on the precise tariff rate and route at issue

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[41] Windstar, Motion to Intervene and Comments, Docket No. OR19-29-000, at 1 (filed July 26, 2019).

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

[43] *Id.* at 2.

[44] Tesoro, Amended Motion to Intervene, Comment and Protest, Docket No. OR19-29-000, at 8 (filed July 26, 2019).

[45] *Id.* at 7.

to have standing under the substantial economic interest test to protest a Commission filing regarding rates on an existing line.[46]

23. Tesoro argues that the Commission should reject the Petition for the following reasons: (1) the Petition does not describe the Expansion in sufficient detail to determine whether SFPP has committed to undertake a significant capital investment requiring financial support from shippers; (2) SFPP's proposal does not present adequate infrastructure additions to justify approving committed rates; (3) SFPP has not reserved any portion of the Expansion Capacity for uncommitted shippers; (4) the terms of service offered in the open season were unduly discriminatory in favor of a specific destination, product type, and shipper; and (5) SFPP's proposed rate structure is unjust and unreasonable.[47]

24. Tesoro claims that more detail is required to demonstrate that SFPP will make a significant capital investment requiring financial commitments from shippers. Tesoro states that the Commission has only approved contract rates where contractual commitments from shippers were necessary for the pipeline to determine support for the proposed project, obtain financing, or ensure the project's financial viability.[48] Here, Tesoro claims that it is unclear whether such commitments were necessary because SFPP already owned the Annex Terminal before the open season began, filed its Revised Proration Policy while the open season was ongoing, and placed the Expansion Capacity into service shortly after the open season concluded.[49] Tesoro also argues that the Petition does not describe any capital investment that SFPP made to develop the expanded pump capability discussed in the Petition.[50]

25. Next, Tesoro renews its argument from its protest to the Committed Rate Tariff that SFPP's proposal violates the Commission's policy on cross-subsidization. Tesoro claims that because the Expansion Capacity will use the East Line, existing East Line

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[46] *Id.* at 8-11 (citing *Buckeye Pipe Line Co., L.P.*, 163 FERC ¶ 61,066, at PP 14, 20 (2018); *Shell Pipe Line Co., LP*, 148 FERC ¶ 61,208, at P 31 (2014); *Mid-America Pipeline Co.*, 111 FERC ¶ 61,128 (2005); *White Cliffs Pipeline, L.L.C.*, 163 FERC ¶ 61,120, at P 15 (2018); *Shell Pipeline Co. LP*, 157 FERC ¶ 61,158, at P 13 (2016)).

[47] *Id.* at 1.

[48] *Id.* at 14-15 (quoting *Colonial Pipeline Co.*, 146 FERC ¶ 61,206, at P 35 (2014)).

[49] *Id.* at 4, 13.

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

shippers will be subsidizing shipments on the Expansion Capacity unless the revenues SFPP receives through the Committed Rate result in lower rates for existing shippers.[51]

26. Tesoro argues that the Commission should reject the Petition because SFPP has not reserved any portion of the Expansion Capacity for uncommitted shippers and it is unclear whether SFPP will accommodate any uncommitted volumes of Mexican-grade gasoline and diesel.[52] Tesoro states that the Commission has previously rejected contractual terms providing firm service to committed shippers where the pipeline has not provided uncommitted shippers with reasonable access to the pipeline.[53]

27. In addition, Tesoro contends that the terms of the open season are unduly discriminatory in favor of a particular destination, product type, and shipper in violation of sections 1(4), 1(6), and 3(1) of the ICA.[54] Tesoro claims that SFPP has unduly discriminated in favor of the Annex Terminal over other destinations by limiting transportation on the Expansion Capacity to movements to the Annex Terminal without any operational justification.[55]

28. Tesoro asserts that SFPP improperly favored a particular product type by restricting the Expansion Capacity to specific grades of Mexican-grade gasoline and diesel, even though the East Line is capable of transporting other types of petroleum products.[56] Tesoro states that, because of this restriction, the TSA effectively limited participation in the open season to potential shippers with the ability to ship the specified grades of Mexican-grade gasoline as of July 1, 2019, one week after the open season concluded.[57] Tesoro claims that SFPP knew that these terms would make it unlikely that

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[51] *Id.* at 5.

[52] *Id.* at 21, 23-24.

[53] *Id.* at 15 (citing *TransCanada Keystone Pipeline, L.P.*, 125 FERC ¶ 61,025, at PP 47-48 (2008); *Enbridge (U.S.) Inc.*, 124 FERC ¶ 61,199 (2008); *Texaco Pipeline Inc.*, 74 FERC ¶ 61,071 (1996)).

[54] *Id.* at 16-17 (quoting 49 U.S.C. app. §§ 1(3), 1(6), 3(1) (1988)).

[55] *Id.* at 18-19 (quoting *Suncor Energy Mktg. Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 97 (2010)) (citing *Belle Fourche Pipeline Co.*, 126 FERC ¶ 61,054, at PP 10, 17, 24 (2009)).

[56] *Id.* at 19.

[57] *Id.* at 21, 23.

Tesoro would qualify as a participant.[58] In addition, Tesoro argues that a term of the TSA improperly permits SFPP and the committed shipper to ship whatever product the shipper desires on the Expansion Capacity notwithstanding the product grade restrictions imposed in the open season.[59]

29. Additionally, Tesoro alleges that SFPP crafted the terms of the open season to favor a particular shipper. Tesoro points out that, although eight potential shippers expressed interest in shipping on the Expansion Capacity before learning of the TSA's terms, only one shipper ultimately executed a TSA. Tesoro states that by requiring committed shippers to begin shipping on the Expansion Capacity just one week after the open season concluded, the TSA effectively required any party interested in becoming a committed shipper to have 7,500 bpd of qualifying Mexican-grade products on hand and ready for shipment to the Mexican market before the end of the open season. According to Tesoro, these circumstances suggest that SFPP tailored the terms of the TSA to provide an undue advantage to a specific shipper.[60]

30. Lastly, Tesoro argues that the rate structure described in the Petition is improper because the presiding administrative law judge in proceedings in Docket No. OR16-6-000 has held that SFPP's existing East Line rates, which form the basis of the Committed Rate, are unjust and unreasonable.[61]

C. SFPP's Answer to Tesoro's Amended Motion to Intervene, Comment, and Protest

31. SFPP contends that, contrary to Tesoro's claim, the Petition adequately describes the scope and purpose of the Expansion and the nature of the work required to develop the Expansion Capacity.[62] SFPP provides additional information about the capital investment associated with developing the Expansion Capacity, stating that it expanded

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[58] *Id.* at 21.

[59] *Id.*

[60] *Id.* at 22 (citing *Enterprise Crude Pipeline LLC*, 166 FERC ¶ 61,224, at P 9 (2019)).

[61] *Id.* at 24-25 (citing *SFPP, L.P.*, 160 FERC ¶ 63,006 (2017)).

[62] SFPP, Motion for Leave to Answer and Answer, Docket No. OR19-29-000, at 3-4 (filed Aug. 13, 2019).

the pump capability on its East Line by installing a new pump that added over 16 percent more horsepower at a cost of approximately $3 million.[63]

32. SFPP also refutes Tesoro's contention that SFPP did not require financial backing from shippers to pursue the Expansion. SFPP maintains that it held the open season because it had previously concluded that it would only be willing to develop the Expansion Capacity if it received shipper support for the project.[64] SFPP contends that the fact that it placed the Expansion Capacity into service shortly after the open season concluded does not prove otherwise.[65] Rather, SFPP states that it decided to proceed with developing the Expansion Capacity before the open season ended based upon the level of interest received during the open season from multiple potential shippers and requests from potential shippers to place the Expansion Capacity into service as soon as possible.[66] SFPP adds that it was able to place the Expansion Capacity into service shortly after the open season ended because the Expansion did not require SFPP to install new piping or obtain additional permits or rights-of-way.[67]

33. SFPP further argues that the fact that it made the tariff filing implementing its Revised Proration Policy while the open season was ongoing likewise does not support Tesoro's assertion that SFPP did not require shipper commitments to develop the Expansion.[68] Rather, SFPP states that the timing of the tariff filing was dictated by the Commission's regulations, which required SFPP to submit the filing at least thirty days before the Expansion Capacity's anticipated in-service date.[69]

34. SFPP contends that the terms of service related to the Expansion Capacity are just and reasonable. SFPP maintains that, contrary to Tesoro's claims, existing East Line shippers are not subsidizing shipments on the Expansion Capacity,[70] SFPP's decision to offer 100 percent of the Expansion Capacity to committed shippers is consistent with Commission precedent where reasonable post-expansion access remains available to

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[63] *Id.* at 5-6.

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

[65] *Id.* at 6.

[66] *Id.* at 7.

[67] *Id.*

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

[69] *Id.* at 8 (citing 18 C.F.R. § 341.3 (2019)).

[70] *Id.* at 9-10.

other East Line shippers,[71] and uncommitted shippers are not barred from using the Expansion Capacity, and, in fact can utilize any portion of the Expansion Capacity that the committed shipper does not use in a given month.[72]

35. SFPP rebuts Tesoro's challenges to the open season, arguing that the Commission determined in the Tariff Order that SFPP did not engage in undue discrimination by offering specific grades of Mexican-grade products[73] and has previously approved open seasons offering expansion capacity to a single destination[74] and open seasons in which only one committed shipper agreed to the pipeline's terms.[75] In addition, SFPP contends that the precedent Tesoro cites in support of its discrimination claims are inapposite because unlike the circumstance set forth in this Petition, which involves newly-created capacity that was not available to any shipper before July 1, 2019, those decisions examined the effects of pipeline actions upon existing shippers.[76]

36. SFPP argues that it did not discriminate in favor of a particular shipper because the open season provided all interested shippers, including Tesoro, the opportunity to execute the TSA.[77] SFPP refutes Tesoro's argument that the TSA allows the committed shipper to ship whatever product it desires on the Expansion Capacity. Rather, SFPP states that transportation on the Expansion Capacity is limited to Mexican-grade diesel and gasoline

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[71] *Id.* at 11-13 (citing *Plantation Pipe Line Co.*, 167 FERC ¶ 61,025, at P 13 (2019) (*Plantation*); *Marathon Pipe Line LLC*, 164 FERC ¶ 61,014, at P 25 (2018); *Marathon Pipe Line LLC*, 152 FERC ¶ 61,005, at P 12 (2015); *Tesoro High Plains Pipeline Co. LLC*, 148 FERC ¶ 61,129, at P 19 (2014)).

[72] *Id.* at 13-14. SFPP notes that at least one uncommitted shipper has, in fact, used the Expansion Capacity to transport products to the Annex Terminal since the Expansion Capacity entered service on July 1, 2019. *Id.* at 14.

[73] *Id.* at 15 (quoting Tariff Order, 168 FERC ¶ 61,058 at P 15).

[74] *Id.* at 16 (citing *MPLX Ozark Pipe Line LLC*, 160 FERC ¶ 61,057, at PP 1-2 (2017) (*MPLX Ozark*)).

[75] *Id.* (citing *EnLink Crude Pipeline, LLC*, 157 FERC ¶ 61,120, at P 5 n.8 (2016); *Caliber Bear Den Interconnect LLC*, 157 FERC ¶ 61,024, at P 4 (2016); *JBBR Pipeline LLC*, 150 FERC ¶ 61,012, at P 9 (2015)).

[76] *Id.* at 19-21 (citing *Suncor Energy Mktg. Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242 (2010); *BP Prods. N. Am. Inc. v. Sunoco Pipeline L.P.*, 159 FERC ¶ 63,020, at PP 36-38, 49-52 (2017)).

[77] *Id.* at 15-17, 19.

and SFPP reaffirms that, in any case, all provisions of the TSA were offered to open season participants.[78]

37. SFPP also argues that Tesoro lacks standing to protest the Petition. SFPP states that it does not challenge the fact that a current shipper with valid concerns about a pipeline's open season can challenge a petition for declaratory order seeking approval of that open season, but it does not believe that Tesoro's concerns here are valid.[79] SFPP explains that Tesoro showed no interest in the Expansion Capacity until SFPP moved to place it into service and did not participate in the open season, execute a confidentiality agreement, or request the open season documents.[80] SFPP therefore maintains that Tesoro has no standing to protest, because it lacks a substantial economic interest in the Petition.[81]

V. Discussion

A. Procedural Matters

38. Pursuant to Rule 214 of the Commission's regulations,[82] 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. Rule 213 of the Commission's Rules of Practice and Procedure[83] prohibits answers to protests unless otherwise ordered by the decisional authority. We accept SFPP's answer to Tesoro's protest because it has assisted us in our decision-making process.

39. We reject SFPP's argument that Tesoro lacks standing to protest the Petition. Both Tesoro and SFPP incorrectly rely upon the "substantial economic interest" standard set forth in section 343.2(b) of the Commission's regulations, which governs standing to protest tariff filings rather than petitions for declaratory order.[84] Accordingly, this

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

[79] *Id.* at 22-23.

[80] *Id.* at 23.

[81] *Id.*

[82] 18 C.F.R. § 385.214 (2019).

[83] *Id.* § 385.213(a)(2).

[84] *Id.* § 343.2(b) ("Only persons with a substantial economic interest in the tariff filing may file a protest to a *tariff filing* pursuant to the Interstate Commerce Act.") (emphasis added).

standard is not applicable here, and Tesoro, as a current shipper on SFPP, has standing to protest the Petition.

B. Substantive Matters

40. As discussed below, we reject Tesoro's protest and, based upon the representations in the Petition, grant the rulings requested by SFPP.

1. Tesoro's Protest

41. We disagree with Tesoro's contention that the Petition fails to adequately describe the Expansion in sufficient detail to determine whether SFPP committed to undertake a significant investment requiring financial commitments from shippers. The Petition explains that creating the Expansion Capacity involved installing new pumps and modifying existing piping.[85] SFPP provides additional detail about the project in its answer, explaining that it developed the Expansion Capacity by installing a new pump that added over 16 percent more horsepower at a cost of approximately $3 million.[86] SFPP's description of the Expansion is similar to descriptions of expansion projects in petitions for declaratory order that the Commission has approved.[87]

42. We dismiss Tesoro's challenge to the validity of the open season based on the fact that SFPP conducted the open season when development of the Expansion was near completion. The Commission previously dismissed this claim in the Tariff Order and we reject it again here. Consistent with its policy allowing pipelines and shippers to agree to committed rates for new services resulting from new investment, the Commission has approved rate and service structures derived from open seasons held under similar circumstances.[88]

43. Likewise, we disagree with Tesoro's renewed claims that the revenues SFPP receives through the Committed Rate "should result in lower rates for existing East Line shippers" and that prohibiting existing shippers from using the Expansion Capacity

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[85] Petition at 4.

[86] SFPP Answer at 5.

[87] *See* Marathon Pipe Line LLC, Petition for Declaratory Order, Docket No. OR15-12-000, at 7-8 (filed Feb. 18, 2015), *granted in Marathon Pipe Line LLC*, 152 FERC ¶ 61,005; MPLX Ozark Pipe Line LLC, Petition for Declaratory Order, Docket No. OR17-7-000, at 3-4 (filed Feb. 15, 2017), *granted in MPLX Ozark*, 160 FERC ¶ 61,057.

[88] Tariff Order, 168 FERC ¶ 61,058 at P 15 n.31 (citing *Stateline Crude, LLC*, 162 FERC ¶ 61,245 (2018)).

violates the Commission's policy on cross-subsidization.[89] In the Tariff Order, the Commission found that the protesters provided no basis for their claim that the Expansion should result in lower rates for existing shippers and failed to show that SFPP's new service will alter SFPP's East Line base rates, or affect the existing service that the protesters receive on the East Line.[90] Tesoro's protest to the Petition includes no additional support for these claims. Accordingly, we again reject Tesoro's cross-subsidization arguments as unsupported.[91]

44. We disagree with Tesoro's contention that SFPP denied uncommitted shippers reasonable access to the pipeline by reserving 100 percent of the Expansion Capacity for committed shippers. The Commission's committed rate policy allocates a minimum 10 percent reservation of the pipeline's total capacity to uncommitted shippers to ensure reasonable access to the pipeline consistent with the pipeline's common carrier obligation.[92] Consistent with this policy, the Commission has previously approved open seasons in which the pipeline offered 100 percent of expansion capacity to committed shippers where the requirement to reserve capacity for uncommitted shippers was fulfilled by existing capacity.[93] Here, SFPP's reservation of 100 percent of the Expansion Capacity for committed shippers does not impair the post-expansion access of uncommitted shippers because approximately 84 percent of the post-Expansion Total Tucson Capacity on the East Line will remain available to uncommitted shippers.

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[89] Protest at 5.

[90] Tariff Order, 168 FERC ¶ 61,058 at P 14.

[91] As stated in the Tariff Order, to the extent Tesoro is concerned that its existing rate may be improperly subsidizing shipments on the Expansion Capacity, it may file a complaint against SFPP's East Line rates to that affect. *Id.* P 14 n.28.

[92] *White Cliffs Pipeline, L.L.C.*, 168 FERC ¶ 61,087, at P 36 (2019) (citing *Enterprise Liquids Pipeline LLC*, 142 FERC ¶ 61,087, at P 27 (2013); *Kinder Morgan Cochin LLC*, 141 FERC ¶ 61,056, at P 18 (2012); *CCPS Transp., LLC*, 121 FERC ¶ 61,253, at P 17 n.33 (2007)).

[93] *Plantation*, 167 FERC ¶ 61,025 at P 13 (approving proposal to allocate 100 percent of expansion capacity to committed shippers where 70 percent of total pipeline capacity would be available for uncommitted service); *Marathon Pipe Line LLC*, 164 FERC ¶ 61,014, at PP 13, 19, 25 (approving proposal to allocate up to 100 percent of expansion capacity on separate pipeline systems to committed shippers where 68 percent and 75 percent of post-expansion capacity on systems would remain available for uncommitted shippers); *see also Marathon Pipe Line LLC*, 152 FERC ¶ 61,005, at PP 12, 17; *Tesoro High Plains Pipeline Co. LLC*, 148 FERC ¶ 61,129, at PP 4, 6-7, 14, 19.

45. We remain unpersuaded by Tesoro's objection that SFPP only offered committed rate service on the Expansion Capacity for specific grades of Mexican-grade gasoline and diesel. As stated in the Tariff Order,[94] a pipeline possesses discretion to decide whether or not to offer a particular service and is "only required to provide services that it holds itself out as offering."[95] It was therefore reasonable for SFPP to define its offer in the open season and to hold itself out to transport only specific grades of Mexican-grade product on the Expansion Capacity. Tesoro has presented no new arguments or information to support this claim which was previously rejected in the Tariff Order, and we again conclude that Tesoro has not demonstrated that this limitation grants an unreasonable preference or advantage in violation of the ICA.[96]

46. We also dismiss Tesoro's claims that SFPP's proposed terms of service are unduly discriminatory in favor of a particular destination or shipper. The Commission has previously approved open seasons in which a pipeline offered expansion service to one destination point,[97] and Tesoro has not shown that SFPP's proposal to provide service on the Expansion Capacity to the Annex Terminal will result in undue discrimination or confer an unreasonable preference or advantage in violation of the ICA. Moreover, the Commission's order in *Suncor Energy Marketing Inc. v. Platte Pipe Line Company*, which Tesoro cites in support of its claim, is distinguishable because it addressed the impact of proposed revisions to a pipeline's prorationing policy on existing shippers.[98] Such concerns are absent here because the Expansion Capacity is new capacity that was not used by any shipper before entering service on July 1, 2019, and 84 percent of relevant East Line capacity remains available to uncommitted shippers.

47. Similarly, we dismiss Tesoro's contention that SFPP structured the open season terms in favor of one particular shipper. SFPP has demonstrated that it offered the open season terms to all interested parties in a well-publicized, transparent open season. Moreover, Tesoro showed no interest in the open season, and the fact that only one entity

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[94] Tariff Order, 168 FERC ¶ 61,058 at P 15.

[95] *CHS Inc. v. Enterprise TE Prods. Pipeline Co., LLC*, 155 FERC ¶ 61,178, at P 14 (2016); *see also Enterprise TE Prods. Pipeline Co. LLC*, 143 FERC ¶ 61,191, at P 23 (2013) ("[U]ltimately it is the oil pipeline's choice what services it will offer.").

[96] Tariff Order, 168 FERC ¶ 61,058 at P 15.

[97] *E.g.*, *Plantation*, 167 FERC ¶ 61,025 at PP 1, 3, 9.

[98] *See Suncor Energy Mktg. Inc. v. Platte Pipeline Line Co.*, 132 FERC ¶ 61,242, at PP 66-121 (2010).

ultimately executed a TSA to become a committed shipper does not demonstrate that SFPP improperly crafted the open season terms to favor that shipper.[99]

48. Tesoro's argument that the TSA allows the committed shipper to ship whatever product it desires on the Expansion Capacity also lacks merit.[100] SFPP represents that committed shippers are limited to shipping Mexican-grade diesel and Mexican-grade gasoline on the Expansion Capacity,[101] as specified in the publicly available advertisements for the open season,[102] in which Tesoro declined to participate.[103] Accordingly, we find Tesoro's argument unpersuasive.

49. Finally, we reject Tesoro's contention that SFPP's proposed rate structure is improper because the presiding administrative law judge in Docket No. OR16-6-000 has held that SFPP's existing East Line rates are unjust and unreasonable. The initial decision in Docket No. OR16-6-000 remains pending before the Commission on exceptions and, as such, is not a final Commission decision that creates binding precedent.[104] Moreover, the rate under the terms of the TSA will adjust, as applicable, following the Commission's ultimate disposition of the rate case in Docket No. OR16-6-000.

2. **<u>The Petition</u>**

50. We approve the rulings that SFPP requests in the Petition. We confirm that the TSA provisions will be upheld and will govern the transportation services that SFPP provides to committed shippers during the TSA's term. The Commission has consistently held that the provisions of a TSA executed between a pipeline and a

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[99] The Commission has previously approved rate structures and terms of service resulting from an open season in which only one shipper executed a TSA. *E.g.*, *EnLink Crude Pipeline, LLC*, 157 FERC ¶ 61,120, at PP 5 nn.8, 13; *Caliber Bear Den Interconnect LLC*, 157 FERC ¶ 61,024, at PP 4, 12.

[100] Protest at 21 (discussing Petition, Ex. 2 at 7).

[101] SFPP Answer at 18-19.

[102] Petition, Ex. 3 (open season press release); Ex. 4 (Notice).

[103] SFPP Answer at 23.

[104] *E.g.*, *SFPP, L.P.*, 137 FERC ¶ 61,220, at P 70 (2011) (citing *Tex. N.M. Power Co. v. El Paso Elec. Co.*, 110 FERC ¶ 61,258, at P 10 (2005); *KeySpan Energy Dev. Corp. v. N.Y. Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,201, at P 4 (2004); *Ill. Power Co.*, 62 FERC ¶ 61,147, at 62,062 n.17 (1993); *S. Co. Servs., Inc.*, 61 FERC ¶ 61,339, at 62,336 n.63 (1992), *reh'g denied*, 63 FERC ¶ 61,217 (1993)).

committed shipper during a fully publicized open season will be upheld during the term of such TSA.[105]

51. We approve the rate structure applicable to the Expansion Capacity whereby the committed shipper may receive priority service on the Expansion Capacity in exchange for paying a premium rate as compared to the rate applicable to the same movement by an uncommitted shipper. The Commission has previously found that priority service is permissible under the ICA provided that committed shippers pay a premium rate of at least one cent per barrel more than uncommitted shippers and the committed rates and priority service options were offered during an open season.[106] We confirm that SFPP may adjust the Committed Rate pursuant to the terms of the TSA.[107]

52. The TSA sets forth a shortfall payment structure whereby shortfall payments the committed shipper makes during Phase II of the Expansion will generate credits that may be used against transportation charges or shortfall payments incurred during the first twelve months of Phase III. In addition, the TSA limits the number of credits the committed shipper can accrue from Phase II shortfall payments or use to offset Phase III transportation charges, and provides that any credits not used during the first twelve months of Phase III will expire.[108] We approve the TSA provisions establishing SFPP's shortfall payment structure as reasonable terms of service that have been formally agreed to by all shippers to whom they apply.[109]

53. We affirm that SFPP may contract the full amount of the Expansion Capacity to committed shippers during the open season. SFPP represents that 41,000 bpd of capacity,

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[105] *See Belle Fourche Pipeline Co.*, 162 FERC ¶ 61,091, at P 17 (2018); *Platte River Midstream, Inc.*, 155 FERC ¶ 61,107, at P 11 (2016); *Oryx S. Del. Oil Gathering & Transp. LLC*, 154 FERC ¶ 61,065, at P 14 (2016); *Alpha Crude Connector, LLC*, 149 FERC ¶ 61,001, at PP 15, 17, 25 (2014); *Hiland Crude, LLC*, 148 FERC ¶ 61,228, at PP 10-11, 21 (2014).

[106] *Sunoco Pipeline L.P.*, 167 FERC ¶ 61,159, at P 13 (2019); *Plantation*, 167 FERC ¶ 61,025 at P 17; *EPIC Crude Pipeline, LP*, 167 FERC ¶ 61,026, at PP 18, 27 (2019); *EnLink Delaware Crude Pipeline, LLC*, 166 FERC ¶ 61,226, at P 20 (2019); *Oasis Midstream Servs. LLC*, 156 FERC ¶ 61,083, at P 15 (2016).

[107] *See Plantation*, 167 FERC ¶ 61,025 at P 14; *Marathon Pipe Line LLC*, 162 FERC ¶ 61,078, at PP 8 n.7, 16 (2018); *MPLX Ozark*, 160 FERC ¶ 61,057 at PP 8, 18; *EnLink Crude Pipeline, LLC*, 157 FERC ¶ 61,120, at PP 6, 16.

[108] Petition, Ex. 2 at 10-11.

[109] *E.g.*, *Permian Express Terminal LLC*, 162 FERC ¶ 61,129, at PP 6, 15 (2018).

or 84 percent of the East Line's total capacity to Tucson, will remain available for use by uncommitted shippers. As discussed above, we find in these circumstances that reserving the full amount of the Expansion Capacity for committed shippers is not inappropriate because the requirement to reserve capacity on the route to Tucson for uncommitted shippers is fulfilled by Existing Tucson Capacity.[110]

54. SFPP requests that the Commission affirm that SFPP may, at its election, file changes to the Committed Rate as a settlement rate during the term of the TSA. In addition, SFPP requests waiver of the verified statement requirements of 18 C.F.R. § 342.4(c) for purposes of filing changes to the Committed Rate as a settlement rate. As discussed above, SFPP has completed its filing of initial rates pursuant to 18 C.F.R. § 342.2(b), by filing a sworn affidavit in Docket No. IS19-675-000 that the Committed Rate is agreed to by at least one non-affiliated shipper who intends to use the service in question.[111] We will treat any subsequent rate adjustments thereto pursuant to the TSA as settlement rates under 18 C.F.R. § 342.4(c).[112] The request for waiver of the verified statement under 18 C.F.R. § 342.4(c) is granted.

55. We find that SFPP's proposed Revised Proration Policy is reasonable and not unduly discriminatory. Under the Revised Proration Policy, the committed shipper will receive priority service only on the Expansion Capacity in an amount equal to the lesser of its monthly volume commitment or nomination. Prorationing on the East Line's Existing Tucson Capacity is unaffected by the Revised Proration Policy.[113] We find that the Revised Proration Policy reasonably allocates capacity among shippers on the Expansion and ensures that the full amount of the East Line's Existing Tucson Capacity will remain available to new and uncommitted shippers. Moreover, the Commission has previously approved proration policies granting priority service rights to committed shippers during periods of prorationing.[114]

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[110] *See supra* at 17.

[111] 18 C.F.R. § 342.2(b) (2019); *see also* Tariff Order, 168 FERC ¶ 61,058 at P 2.

[112] 18 C.F.R. § 342.4(c) (2019).

[113] Petition, Ex. 1 at P 24.

[114] *Plantation*, 167 FERC ¶ 61,025 at P 17; *Shell Pipeline Co. LP*, 164 FERC ¶ 61,175, at P 28 (2018); *Stateline Crude, LLC*, 162 FERC ¶ 61,245, at P 14 (2018).

56. Finally, we find that the TSA provisions regarding term extensions[115] and SFPP's proposal to use an NPV methodology to allocate the Expansion Capacity in the event of an over-subscription during the open season[116] are reasonable and consistent with Commission precedent.

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.

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[115] *Plantation,* 167 FERC ¶ 61,025 at PP 6, 18; *Buckeye Pipe Line Transp., LLC*, 154 FERC ¶ 61,130, at PP 7, 24 (2016); *Enterprise TE Prods. Pipeline Co. LLC*, 153 FERC ¶ 61,197, at PP 11, 16, 19 (2015).

[116] *NST Express, LLC*, 153 FERC ¶ 61,108, at PP 15, 17 (2015); *Sunoco Pipeline L.P.*, 141 FERC ¶ 61,212, at PP 9, 21 (2012); *Shell Pipeline Co. LP*, 139 FERC ¶ 61,228, at P 22 (2012).