

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ONEOK Elk Creek Pipeline, L.L.C.

Docket Nos. IS19-688-000
IS19-689-000

STATEMENT OF COMMISSIONER McNAMEE

(Issued August 2, 2019)

1. Yesterday, ONEOK's uncontested, revised tariffs, filed on July 2, 2019 (July 2 filing), for its uncommitted and committed rates on its Elk Creek Pipeline went into effect by operation of law. My colleagues have issued a joint statement expressing their objection that the Commission did not choose to act on the uncontested, revised tariff filings in order to reject ONEOK's July 2 filing as not complying with the June 28 Order.¹

2. In the June 28 Order, the Commission rejected the May 30 tariff for ONEOK's committed rates, determining that ONEOK did not meet its burden to demonstrate the proposed committed rate was just and reasonable.² The Commission found that ONEOK's May 30 tariff did not meet the requirements of section 342.2 of the Commission's regulations.³

3. Contrary to my colleagues' assertion, ONEOK's July 2 filing provided additional information to ONEOK's May 30 filing. This information includes ONEOK's statement that "[t]he Committed Rate . . . is equal to the maximum cost-of-service based transportation rate of 206.89 cents per barrel."⁴ In addition, the July 2 filing includes the cost, revenue, and throughput data supporting such rate for a 12-month test period as required by part 346 of the Commission's regulations.⁵ Moreover, the July 2 filing adds language to the revised tariff stating, "[t]he Committed Rate(s) charged pursuant to such TSA shall be 1.0000 cent per Barrel higher than the currently effective Uncommitted

¹ *ONEOK Elk Creek Pipeline, L.L.C.*, 167 FERC ¶ 61,277 (2019) (June 28 Order).

² June 28 Order, 167 FERC ¶ 61,277 at P 4.

³ *Id.* at P 3.

⁴ July 2 filing in Docket No. IS19-689-000 at 2.

⁵ *Id.* at 5-22.

Rate(s) under Elk Creek Pipeline, L.L.C. F.E.R.C. Tariff No. 1.2.0.”⁶ ONEOK states that it added the language to “expressly state that the Committed rate is directly a function of the Uncommitted Rate and therefore subject to the Commission’s indexing and other regulations”⁷ Further, ONEOK states “over the twenty-year term of the TSA, the Uncommitted Rate will be subject to cost-of-service based regulations, including the ability to challenge on a cost-of-service basis. In the event the Uncommitted Rate is adjusted based on a new cost-of-service to a level the Commission determines is just and reasonable as a result of such challenge, the Committed rate will necessarily be adjusted as well to reflect the just and reasonable Uncommitted Rate plus 1.00 cent per barrel.”⁸

4. Nothing in the June 28 Order changes the methodology for establishing initial rates or for changing existing rates under the Commission’s regulations.⁹ The Commission’s regulations require a carrier proposing an initial rate (or initial contract rate) that lacks a non-affiliate’s agreement to file “cost, revenue, and throughput data supporting such rate as required by part 346” so that potential shippers and the Commission have information to make a reasoned judgment as to whether the initial rate for the new service is just and reasonable.¹⁰ Among other reasons, the Commission

⁶ *Id.* at 57.

⁷ *Id.* at 2.

⁸ *Id.* at 3.

⁹ It is worth noting that the June 28 Order’s language “subject to the Commission’s indexing and cost of service regulations, including the ability to challenge on a cost-of-service basis” merely provides examples from our regulations—not an exhaustive list—of how an oil pipeline (carrier) may demonstrate a proposed initial rate, including an initial rate established in conjunction with settlement rates or other rate change, is just and reasonable. The June 28 Order’s reference to *Express Pipeline Partnership*, 76 FERC ¶ 61,245 (1996), is cited as an example of how rates for a new service could be designed and supported. The June 28 Order did not change our regulations or policies to establish the *Express* method as the only way rates for new service with an affiliate could be established as just and reasonable. June 28 Order, 167 FERC ¶ 61,277 at n.10.

¹⁰ Part 346 of the Commission’s regulations set forth the information that a carrier must provide in support of cost-of-service rates. *See* 18 C.F.R. § 346.1 and 346.2 (2018). Potential shippers and the Commission can use this information to assess whether the rates to be established through a contract involving new service are just and reasonable. However, the burden to demonstrate that the rates for new service are just and reasonable remains with the carrier.

requires cost, revenue, and throughput data to address the “concern that potential market power could be exercised against shippers who did not agree to the negotiated rate.”¹¹

5. I am mindful of stakeholder uncertainty. I am concerned that due to the nature of incrementally responding to specific factual issues the Commission has created confusion as to what our regulations and policies require. The law and the Commission’s regulations and policy have not changed. In my view, carriers may still propose contract rates in conjunction with initial rates where only an affiliate contracts for a new service so long as they comply with our regulations and policy and meet their burden to demonstrate that the proposed rates are just and reasonable.

6. As my colleagues acknowledge, it is not uncommon for tariff filings to become effective by operation of law and without a Commission order. In 2018, there were 720 oil tariff filings of which the Commission acted on only twelve and approximately 98 percent of the tariff filings went into effect by operation of law.

Bernard L. McNamee
Commissioner

¹¹ *Seaway Crude Pipeline Co. LLC*, 146 FERC ¶ 61,151, at P 30 (2014). The Commission also requires carriers to demonstrate they offered the same terms and conditions to all potential shippers during the open season. *See Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235 (2007) (“[A]ll shippers must be given an equal opportunity to obtain the expansion capacity.”)