

173 FERC ¶ 61,250  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;  
Neil Chatterjee and Richard Glick.

Oil Pipeline Affiliate Contracts

Docket No. PL21-1-000

WITHDRAWAL OF PROPOSED POLICY STATEMENT ON OIL PIPELINE  
AFFILIATE CONTRACTS

(Issued December 17, 2020)

1. On October 15, 2020, the Commission issued a Proposed Policy Statement on Oil Pipeline Affiliate Contracts.<sup>1</sup> We are exercising our discretion to withdraw the Proposed Policy Statement and terminate this proceeding based on our determination that providing additional guidance in this proceeding is not necessary for oil pipelines to demonstrate that Affiliate Contracts are just, reasonable, and not unduly discriminatory under the Interstate Commerce Act.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.  
Commissioner Clements is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

---

<sup>1</sup> *Oil Pipeline Affiliate Contracts*, 173 FERC ¶ 61,063 (2020) (Proposed Policy Statement).

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Oil Pipeline Affiliate Contracts

Docket No. PL21-1-000

(Issued December 17, 2020)

GLICK, Commissioner, *dissenting*:

1. I disagree with the Commission’s decision to withdraw this proposed policy statement, because the proposal would have provided industry with additional information and clarity on the factors the Commission considers when reviewing the initial rates and terms of service that an oil pipeline seeks to enter with an affiliated shipper. Under the Interstate Commerce Act (ICA), the Commission has the statutory mandate to ensure that oil pipeline transportation rates are just and reasonable and not unduly discriminatory or preferential.<sup>1</sup> The proposed policy statement would have aided the Commission in carrying out this responsibility, while also providing greater regulatory certainty and ultimately decreasing the burden of making the long-term investments necessary for oil pipeline expansions. Today, the Commission abandons this effort only days after numerous pipelines and shippers filed comments on the proposal, and with nothing so much as an acknowledgement of the views expressed. Instead of summarily terminating this proceeding, the Commission should have evaluated and carefully considered the comments submitted, so that it could fulfill its promise to “promote regulatory certainty through greater transparency with industry” on what information is relevant to support proposals related to affiliate contracts.<sup>2</sup>

2. Under the ICA, an oil pipeline is a common carrier obligated to provide transportation to shippers upon reasonable request,<sup>3</sup> and the Commission is responsible for ensuring that oil pipeline rates and terms of service are just and reasonable and not unduly discriminatory.<sup>4</sup> In general, an oil pipeline may offer particular rates to shippers that commit to a specified term, so long as the carrier offers the same contract to any

---

<sup>1</sup> 49 U.S.C. app. 1 *et seq.*

<sup>2</sup> *Oil Pipeline Affiliate Contracts*, Proposed Policy Statement, 173 FERC ¶ 61,063, at P 3 (2020).

<sup>3</sup> 49 U.S.C. app. 1(4).

<sup>4</sup> 49 U.S.C. app. 1, 2, 3(1), 5, 7, 15(1).

interested shippers in a public process, typically an open season.<sup>5</sup> The requirement that all interested shippers have an equal opportunity to obtain the rates and terms offered is fundamental to the ICA's nondiscrimination requirements.<sup>6</sup>

3. Where a shipper *unaffiliated* with a pipeline agrees to a rate offered in a transparent open season process involving arm's-length negotiations, the Commission is able to presume that the rate the pipeline offered is just and reasonable and does not violate the ICA's prohibition against undue preference.<sup>7</sup> However, as this Commission recently acknowledged in the proposed policy statement, "affiliates may coordinate in ways that involve self-dealing and anti-competitive behavior" and the "potential exists for an oil pipeline carrier to afford its affiliate an undue preference."<sup>8</sup> Therefore, the Commission concluded that its practice of evaluating contracts agreed-to only by an affiliate under the same framework as those agreed-to by a nonaffiliate "may not be sufficient to ensure such terms are not unduly discriminatory under the ICA."<sup>9</sup> After all, while nonaffiliated shippers can be relied upon to protect their own interests from those of the pipeline, "affiliate transactions may not be the result of arm's-length negotiations."<sup>10</sup> For example, the Commission explained, "[a]n affiliated shipper may be

---

<sup>5</sup> See Proposed Policy Statement, 173 FERC ¶ 61,063 at PP 6-7 & nn.6-10; see, e.g., *Colonial Pipeline Co.*, 146 FERC ¶ 61,206, at P 35 (2014); see also *Express Pipeline P'ship*, 76 FERC ¶ 61,245 (1996); *Sea-Land Serv., Inc. v. I.C.C.*, 738 F.2d 1311, 1317 (D.C. Cir. 1984); *Seaway Crude Pipeline Co. LLC*, 146 FERC ¶ 61,151, at P 37 (2014).

<sup>6</sup> *Enterprise Crude Pipeline LLC*, 166 FERC ¶ 61,224, at P 11 (2019) ("The vital element of the contracting arrangements . . . has been an open season that provided all shippers equal opportunity to avail themselves of the offered capacity."); *Enterprise TE Products Pipeline Co. LLC*, 144 FERC ¶ 61,092 at P 22 (2013) ("Contract rates can only satisfy the principle of nondiscrimination when the carrier offering such rates is required to make them available to 'any shipper willing and able to meet the contract's terms.'") (quoting *Sea-Land*, 738 F.2d at 1317)).

<sup>7</sup> *Tesoro High Plains Pipeline Co. LLC*, 148 FERC ¶ 61,129, at P 23 (2014); *Seaway Crude Pipeline Co. LLC*, Opinion No. 546, 154 FERC ¶ 61,070, at PP 40-42 (2016).

<sup>8</sup> Proposed Policy Statement, 173 FERC ¶ 61,063 at PP 9-10.

<sup>9</sup> *Id.* P 11.

<sup>10</sup> *Id.* P 9.

indifferent to any rate paid to its affiliated pipeline” or “may not be meaningfully bound to any onerous terms in the contract.”<sup>11</sup> In these circumstances, a pipeline carrier may have the opportunity to confer an undue preference on its affiliate shipper or effectively exclude nonaffiliated shippers from the open season entirely.

4. Though the Commission is ultimately responsible for ensuring that oil transportation rates satisfy the ICA, the pipeline has the burden to support its proposed rates and terms of service<sup>12</sup> and the Commission has provided little guidance on what information is sufficient support for affiliate contracts. Therefore, the Commission proposed the policy statement in this proceeding to illustrate some potential ways that an oil pipeline carrier could demonstrate that an open season process was not unduly discriminatory.

5. Among the many potential benefits to adopting such a policy, the Commission explained that issuing guidance on this topic will help clarify our processes and aid pipelines in determining what information to consider including in their filings, not to limit how they might support their filings or prohibit affiliate contracts in any way. The proposed guidance was “neither prescriptive nor exhaustive” and the Commission emphasized that it will continue to evaluate contract proposals, including those involving affiliate contracts, on a case-by-case basis based on the record presented.<sup>13</sup>

6. With or without a policy statement, the Commission must apply a heightened level of scrutiny to an affiliate contract to ensure the transaction is free from affiliate abuse because “there is no assurance that there was an arms-length negotiation between the entities agreeing to the rate.”<sup>14</sup> As this Commission recognized, the ICA’s nondiscrimination requirements demand nothing less.<sup>15</sup> Had we pursued a policy statement to clarify our processes, rather than abandoning these efforts midstream, I believe we could have provided all interested parties with greater transparency that could

---

<sup>11</sup> *Id.* P 10.

<sup>12</sup> *E.g., Laurel Pipe Line Co.*, 167 FERC ¶ 61,210, at P 24 n.37 (2019) (“Oil pipelines have the burden to demonstrate that proposed rates are just and reasonable.”); *ONEOK Elk Creek Pipeline, L.L.C.*, 167 FERC ¶ 61,277, at P 4 (2019) (“An oil pipeline bears the burden of demonstrating that proposed rates and changes to its tariff are just and reasonable.”).

<sup>13</sup> Proposed Policy Statement, 173 FERC ¶ 61,063 at PP 4, 20.

<sup>14</sup> *Tapstone Midstream, LLC*, 150 FERC ¶ 61,016, at P 15 (2015).

<sup>15</sup> Proposed Policy Statement, 173 FERC ¶ 61,063 at PP 8-10.

have promoted regulatory certainty rather than undermining it.

For these reasons, I respectfully dissent.

---

Richard Glick  
Commissioner