Enbridge Pipelines (North Dakota) LLC

ORDER ON PETITION FOR DECLARATORY ORDER

142 FERC ¶ 61,212 (2013)

In this case, Enbridge Pipelines (North Dakota) LLC (Enbridge North Dakota) filed a petition for a declaratory order seeking a Commission decision approving the notion of an initial cost-of-service surcharge rate and an initial cost-based rate to recover costs of expanding and extending its crude oil pipeline system to take more product from the Bakken formation to downstream markets. A number of parties protested Enbridge North Dakota's petition. The Commission noted various methods for setting initial rates; it also noted various methods of changing existing oil pipeline rates, the primary one being by indexing. The Commission indicated as well that the declaratory order mechanism was appropriate for considering in general conceptual rate structure questions such as the ones Enbridge North Dakota had posed. The Commission denied the petition without prejudice for Enbridge North Dakota to try again because the company failed to submit in the record information sufficient to show that all pertinent prospective ratepayers had agreed in writing to certain rates and the company had not presented sufficient cost support for cost-based rates.

142 FERC ¶ 61,212
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enbridge Pipelines (North Dakota) LLC Docket No. OR13-6-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued March 22, 2013)

1. This order addresses a petition filed by Enbridge Pipelines (North Dakota) LLC (Enbridge North Dakota) requesting that the Commission issue a declaratory order and approve a related offer of settlement with respect to the rate structure of a major proposed expansion and extension of the Enbridge North Dakota pipeline system known as the Sandpiper Project. For the reasons discussed below, the Commission denies Enbridge North Dakota's petition without prejudice.

Background

2. Enbridge North Dakota's Sandpiper Project is a proposed $2.5 billion expansion and extension of its pipeline system to increase the ability of Enbridge North Dakota to transport growing North Dakota and Montana crude oil production, particularly from the Bakken formation, to downstream markets. The Sandpiper Project involves: (1) a 24 inch pipeline running 375 miles from Beaver Lodge, North Dakota to Clearbrook, Minnesota that will twin the existing Enbridge North Dakota pipeline, with two new pump stations that together will increase capacity to Clearbrook, Minnesota by 225,000 barrels per day (bpd) to a total of 435,000 bpd, and (2) a 24 inch pipeline running from Clearbrook, Minnesota to Superior, Wisconsin with four new pumping stations creating an initial capacity of 375,000 bpd. Enbridge North Dakota states these segments will form a unified system to transport crude oil from origin points on the Enbridge North Dakota system to the new connection with the Lakehead System[1] at Superior, Wisconsin

[1] The Lakehead System comprises the U.S. portion of the overall Enbridge Mainline system, which stretches from Western Canada through the U.S. Upper Midwest to Eastern Canada. The Lakehead System is owned and operated by Enbridge Energy, Limited Partnership and extends from a connection point with the Canadian portion of the Enbridge Mainline at the U.S.-Canada border near Neche, North Dakota, to reach various receipt and delivery points in the States of Minnesota, Wisconsin, Illinois,
(continued...)

for transportation via Lakehead to numerous downstream U.S. refinery markets and various connecting pipelines.[2]

3. In addition to the construction of new pipelines and pumping stations, the project scope includes expansions within Enbridge North Dakota's existing terminaling facilities including: (1) two new 150,000-barrel tanks at the Beaver Lodge, North Dakota terminal; (2) two new 80,000-barrel tanks at the Stanley, North Dakota terminal; and (3) three new 350,000-barrel tanks at Clearbrook, Minnesota.

4. The total capital cost of the Beaver Lodge, North Dakota to Clearbrook, Minnesota expansion is estimated at $1.452 billion, including allowance for funds used during construction (AFUDC), and is scheduled to be in service by January 2016. The Clearbrook, Minnesota to Superior, Wisconsin extension is estimated to cost $1.083 billion, including AFUDC, and is also scheduled to be in service by January 2016.

Enbridge North Dakota's Petition

5. Enbridge North Dakota seeks rulings from the Commission on three key points. First, Enbridge North Dakota seeks confirmation that it can recover the costs of the expanded pipeline between Beaver Lodge, North Dakota and Clearbrook, Minnesota through a cost-of-service surcharge to be added to the existing rates for all barrels moving to Clearbrook, Minnesota and beyond. Second, Enbridge North Dakota seeks confirmation that it can recover the costs of the extension of its system from Clearbrook, Minnesota to Superior, Wisconsin through a cost-based rate for movements over that segment. Third, Enbridge North Dakota seeks Commission acceptance of the terms contained in shipper support letters,[3] which establishes the cost parameters to be used in setting the surcharge and the cost-based extension rate.

Indiana, Michigan, and New York, as well as to a further connection point with the Canadian portion of the Enbridge Mainline system at the U.S.-Canada border near Marysville, Michigan.

[2] The Sandpiper Project will relocate the interconnection to the Lakehead System from Clearbrook, Minnesota to Superior, Wisconsin. Enbridge North Dakota submits the relocation will bypass forecasted capacity constraints for that segment on Lakehead, thus facilitating the transportation of crude to Midwestern, Eastern and Southern markets.

[3] Enbridge North Dakota attached to its petition fifteen letters from shippers on the Enbridge North Dakota system indicating their support for the petition and the offer of settlement contained within the letter.

6. The rate and cost methodology detailed in the offer of settlement between Enbridge North Dakota and its supporting potential shippers include the following: (1) the Commission's Opinion 154-B methodology, using a stipulated capital structure of 45 percent debt and 55 percent equity; (2) a stipulated cost of debt equal to the weighted long-term cost of debt of Enbridge North Dakota's publicly traded parent company, Enbridge Energy Partners, L.P., from year to year; (3) a stipulated real cost of equity equal to 10.60 percent; (4) a 15-year term from the in-service date of Sandpiper (currently anticipated to be about January 1, 2016); (5) a stipulated annual depreciation rate of 6.667 percent, so that the capital costs of the project are fully recovered during the 15-year term of the settlement; and (6) a tax allowance component determined each year in accordance with the Commission's tax allowance policy in effect for that year. Enbridge North Dakota states the expansion surcharge and the extension rate tariff will both be trued-up annually to actual costs and volumes to assure that the cost parameters agreed to between Enbridge North Dakota and its shippers are preserved for the term of the settlement letters.

7. Enbridge North Dakota asserts the relief requested in the petition will give Enbridge North Dakota and its shippers the certainty required to enable this much-needed infrastructure project to go forward. Enbridge North Dakota further states this project will result in advantages to Bakken producers, shippers, refiners, and the States of North Dakota and Montana and their citizens, who will benefit substantially from the increased production and marketing of crude from this region.

8. Enbridge North Dakota contends the Sandpiper Project results in a substantial increase in the capacity available to transport Bakken crude both to Clearbrook, Minnesota and through Clearbrook to Superior, Wisconsin. Enbridge North Dakota submits the success of this project is dependent on: (1) Enbridge North Dakota's willingness to invest the capital required to accomplish this major expansion, and to do so without requiring long term contractual commitments from existing or future shippers; (2) the support of a cross-section of Enbridge North Dakota system shippers, including refiners, midstream companies, and large and small producers for increased tariff rates necessary to recover the costs of the Sandpiper Project; and (3) approval by the Commission of the tariff rate structure (including the specific cost parameters agreed to with the supporting shippers) set forth in the petition for declaratory order.

9. Enbridge North Dakota contends the principal benefit of the Sandpiper Project will be increased capacity for all shippers on the Enbridge North Dakota System to reach downstream markets for their crude. Enbridge North Dakota asserts expanding capacity into Clearbrook, Minnesota and Superior, Wisconsin provides for a significant increase in access to refinery markets served by the Lakehead System and other connecting carriers in the Midwest, East, and South. Enbridge North Dakota argues the Sandpiper Project will benefit all shippers by offering sufficient capacity to address the bottleneck at Clearbrook, Minnesota and beyond for Enbridge North Dakota system crude and avoid

projected apportionment. Enbridge North Dakota submits this will result in a more efficient utilization of the pipeline assets, as well as other significant benefits including (1) increased transportation capacity from the Bakken region; (2) 100 percent common carriage - no contract or commitments required from shippers; (3) providing an economic outlet for Bakken production growth; (4) enhanced system reliability and ratable movement of Bakken supply to refiners; and (5) protection of crude quality. Enbridge North Dakota asserts these benefits maximize the value of light crude oil produced in Montana and North Dakota to the benefit of the producers, shippers, and the states themselves, while reducing the impact of pipeline capacity constraints on the market for these barrels.

10. Enbridge North Dakota asserts the terms of the offer of settlement benefit both the pipeline and shippers because of increased certainty in relation to how the costs of this new project will be recovered. Because of the true-up in the surcharge and cost-based rate terms, Enbridge North Dakota contends shippers avoid the risk of over-recoveries by the pipeline. At the same time, Enbridge North Dakota states it minimizes the risk that, having expended more than $2.5 billion in constructing this new project, its tariff rates will be subject to challenges that will disregard the economic basis on which the project was undertaken.

11. Enbridge North Dakota asserts the proposal to add a surcharge component to its existing rates from Beaver Lodge, North Dakota to Clearbrook, Minnesota is substantially similar to arrangements approved by the Commission in other cases.[4] Enbridge North Dakota asserts the Commission should approve its proposal to charge a new cost-of-service based tariff from Clearbrook, Minnesota to Superior, Wisconsin. Enbridge North Dakota contends the Commission has the authority to waive its rate regulations to approve the cost-based rate mechanism in place of the generic indexing methodology that would otherwise apply. Enbridge North Dakota submits the Commission should accept the terms of the offer of settlement because the Commission has approved substantially similar settlements regarding cost parameters for Enbridge North Dakota's Phase 5 and 6 expansions.[5]

12. Enbridge North Dakota states the total cost of the Sandpiper Project is estimated to be approximately $2.5 billion. Enbridge North Dakota states it has already incurred preliminary planning and engineering costs for this project and will continue such

---

[4] *Citing, Colonial Pipeline Co.*, 116 FERC ¶ 61,078 (2006), *order denying reh'g*, 119 FERC ¶ 61,183 (2007) (*Colonial*); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073 (2007) (*Calnev*).

[5] *Citing, Enbridge Pipelines (North Dakota) LLC*, 117 FERC ¶ 61,131 (2006); *Enbridge Pipelines (North Dakota) LLC*, 125 FERC ¶ 61,052 (2008).

activities pending the outcome of the petition. However, Enbridge North Dakota states it will need to significantly increase development spending to approximately $2 to $3 million per month beginning in February 2013 in order to maintain the scheduled in service date of January 2016. Enbridge North Dakota asserts it cannot undertake expenditures of this magnitude without the assurances requested in this petition. Enbridge North Dakota therefore requests expedited consideration of the petition and a Commission ruling, if possible, no later than January 31, 2013.

13. The North Dakota Pipeline Authority filed a letter in support of the Sandpiper Project asserting it will enhance North Dakota crude oil transportation. The North Dakota Pipeline Authority believes projects like Sandpiper will help relieve the current transportation bottleneck by affording access to diverse downstream markets, thus resulting in better crude oil prices and increased revenues to all parties.

Protests

14. A number of protests were filed in opposition to Enbridge North Dakota's petition for declaratory order. High Prairie Pipeline Company, LLC (High Prairie) supports the development of new infrastructure but asserts there is no justification for eliminating Clearbrook, Minnesota as a receipt point, especially since its elimination would remove less expensive capacity between Clearbrook, Minnesota and Superior, Wisconsin. High Prairie contends that the petition is a coordinated effort by the Enbridge companies to limit transportation options and control access to infrastructure. At a minimum, High Prairie submits any approval of the petition should be conditioned on Enbridge North Dakota retaining the Clearbrook, Minnesota point and granting non-discriminatory access to High Prairie. High Prairie also asserts the proposal is infirm under section 4(1) of the Interstate Commerce Act (ICA) because a shipper utilizing the line between Clearbrook, Minnesota and Superior, Wisconsin would be paying a higher rate than a longer haul on the same route on Enbridge Energy's mainline.[6]

15. EnWest Marketing LLC (EnWest) filed what it styled as a protest, complaint, opposition, request for rejection, and motion to intervene in response to Enbridge North Dakota's petition.[7] EnWest asserts Enbridge North Dakota's petition should be rejected.

---

[6] High Prairie notes the issues raised here concerning access to the Clearbrook, Minnesota point were raised in Docket Nos. IS12-236-000 and OR12-17-000. Since the access issue is currently pending before the Commission in those proceedings, the Commission will not address it here.

[7] The Commission will treat EnWest's pleading only as a protest to the petition for declaratory order since a complaint is not an appropriate responsive pleading to a petition for declaratory order.

EnWest contends that proposals to substantially expand Enbridge North Dakota (akin to the expansion proposed here) were circulated to shippers and rejected by many, because the amount of capacity was not necessary in view of rail and pipeline alternatives. EnWest submits there is more take away capacity in the Bakken than the quantity of crude Enbridge North Dakota states will be produced at any time in the next ten years. EnWest contends take away capacity would be further increased if all projects proposed were built. EnWest contends that the price of capacity offered by Enbridge North Dakota to shippers was significantly in excess of a fair market price and shippers would not commit to the term Enbridge North Dakota was insisting upon. EnWest asserts that by filing the petition for declaratory order Enbridge North Dakota is attempting to force these shippers to pay for a project that they rejected. EnWest submits the new tariff would be a 133 percent increase compared to the existing tariff. EnWest argues since Enbridge North Dakota is asking to be guaranteed a specific return on equity, if the volume in any given year is less than the full capacity, rates will be increased prospectively. EnWest contends the rates proposed by Enbridge North Dakota and the potential for further increases harm captive customers who have made significant investments in facilities along the pipeline. EnWest asserts the cases cited by Enbridge North Dakota in support of its petition are not applicable because in those cases all shippers supported building the additional capacity and the only issue was how the costs were to be recovered.

16. St. Paul Park Refining Company LLC asserts the petition is an attempt to bypass the Commission's standard ratemaking procedures and to shield the significant over-recovery under Enbridge North Dakota's rates. WPX Energy Marketing, LLC agrees with the protest of EnWest and asserts that Enbridge North Dakota's proposal is an attempt to double the price of transportation while receiving a risk-free guaranteed rate of return.

17. Flint Hills Resources, LP (Flint Hills) asserts Enbridge North Dakota's proposal would shift to existing shippers 100 percent of the risk of a $2.6 billion expansion, should it become underutilized. Flint Hills contends there is nothing similar about the sheer size and scale of the proposed Sandpiper project and the related risk of underutilization to the various cases that Enbridge North Dakota asserts are analogous. Flint Hills argues the fact that Enbridge North Dakota failed to obtain shipper commitments to pay rates that would cover the cost of expansion is evidence that the proposed expansion is not a viable alternative at the prices proposed by Enbridge North Dakota.

18. The protesters also object to the specific cost elements in Enbridge North Dakota's declaratory order request. Among other things, the protesters contend: (1) the requested rate of return is not commensurate with the risks faced by Enbridge North Dakota, (2) the capital structure is not reflective of the typical oil pipeline or even Enbridge North Dakota's parent company, and (3) an accelerated depreciation schedule of 15 years is not reasonable since the Sandpiper Project would be a new pipeline that should have a

depreciation schedule of at least 30 years. A number of other parties also filed motions to intervene.

19. On January 24, 2013, Enbridge North Dakota filed a response to the motions of High Prairie, EnWest, and Flint Hills, requesting that the Commission deny the motions.

20. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2012)), all timely filed motions to intervene and any 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.

Discussion

21. In its petition, Enbridge North Dakota is seeking Commission approval to recover the costs of the Sandpiper Project, an extension and expansion of its system, through a surcharge and new cost of service tariff. Enbridge North Dakota also seeks approval of specific cost elements of the proposed surcharge and tariff, such as rate of return, capital structure and depreciation, as reflected in letters of support from shippers, which Enbridge North Dakota characterizes as an offer of settlement.

22. A number of shippers oppose Enbridge North Dakota's petition and urge that it be denied. The protesters argue the additional capacity provided by the Sandpiper Project is not necessary given the currently available, and soon to be available, pipeline and rail alternatives. The protesters assert since the Sandpiper Project capacity is not necessary, it is subject to the risk of underutilization and that such risk will fall solely on Enbridge North Dakota's shippers by the terms of its proposal. The protesters further contend the specific cost elements proposed by Enbridge North Dakota are not supported, not just and reasonable, and inconsistent with Commission policy and precedent.

23. Since 1996, the Commission has permitted oil pipelines to file petitions for declaratory orders to obtain approval of capacity allocation and prorationing methodologies for proposed projects. These petitions have been tailored by the pipelines to reflect their needs and their shippers' needs. In *Express Pipeline Partnership*,[8] the Commission for the first time ruled that an oil pipeline could use a petition for declaratory order to address issues relating to a proposal to construct a new oil pipeline. Relying on a prior court case, the Commission determined that Express' proposed rates and rate structure were permissible under the ICA.[9] Since that time, the Commission has recognized that advance rulings relating to the lawfulness of rate structures and terms of

---

[8] 76 FERC ¶ 61,245, at 62,259 (1996).

[9] *See Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984).

service for proposed oil pipeline projects can create regulatory certainty and allow the Commission to consider issues without being limited by tariff filing timetables.[10] However, the cases cited by Enbridge North Dakota in support of its petition are distinguishable from the facts presented here.[11]

24. In this case, Enbridge North Dakota seeks confirmation that it can recover the costs of the expanded pipeline between Beaver Lodge, North Dakota and Clearbrook, Minnesota through a cost-of-service surcharge to be added to the existing rate for all barrels moving to Clearbrook, Minnesota and beyond. Enbridge North Dakota also seeks confirmation that it can recover the costs of the extension of its system from Clearbrook, Minnesota to Superior, Wisconsin through a cost-based rate for movements over that segment. In general, these are the types of conceptual rate structure questions that are appropriate for consideration in a petition for declaratory order.

25. The Commission has provided a number of methods for an oil pipeline to establish initial rates[12] or change existing rates.[13] An oil pipeline may establish initial rates by using the cost-of-service method where it files cost, revenue and throughput data pursuant to Part 346 of the Commission's regulations.[14] Alternatively, an oil pipeline can file a sworn affidavit stating that the initial rate is agreed to by at least one non-affiliated person who intends to use the new service. However, if this initial rate is protested, the oil pipeline must support the proposed rate on a cost-of-service basis pursuant to Part 346 of the Commission's regulations.

---

[10] *Kinder Morgan Pony Express Pipeline LLC and Hiland Crude, LLC*, 141 FERC ¶ 61,249, at PP 14, 17-18 (2012).

[11] *Express Pipeline Partnership,* 76 FERC ¶ 61,245 (1996)(Shipper commitments for term rates, uncommitted rates subject to further review based on construction estimates when filed); *Enbridge Pipelines (North Dakota) LLC,* 117 FERC ¶ 61,131 (2006)*; Enbridge Pipelines (North Dakota) LLC,* 125 FERC ¶ 61,052 (2008) (uncontested filings based on surcharge framework established in a settlement); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078 (2006), *order denying reh'g,* 119 FERC ¶ 61,183 (2007) (*Colonial)* and *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073 (2007) (*Calnev)*(need for expansions supported by shippers, disagreements only over implementation of surcharge mechanism).

[12] 18 C.F.R. § 342.2 (2012).

[13] 18 C.F.R. §§ 342.3 and 342.4 (2012).

[14] 18 C.F.R. Part 346 (2012).

26. When viewed in the light most favorable to Enbridge North Dakota, the Commission concludes the proposed rates would not qualify for acceptance under the Commission's regulations for establishing initial rates. First, Enbridge North Dakota has not provided the data necessary pursuant to Part 346 of the Commission's regulations to support the proposed rates on a cost-of-service basis. Second, even if the letters of support can be construed as agreements of a non-affiliated person pursuant to section 342.2(b) of the Commission's regulations, the proposed rates are protested and thus require Enbridge North Dakota to support the proposed rates on a cost-of-service basis, which Enbridge North Dakota has not done.

27. Similarly, the Commission has four methods for changing existing rates. The primary method of changing existing rates is pursuant to the Commission's simplified and generally applicable indexing system pursuant to section 342.3 of the Commission's regulations.[15] The cost-of-service method outlined in Part 346 of the Commission's regulations may also be used to change existing rates. The settlement method described in section 342.4(c) of the Commission's regulations permit changes to existing rates if the proposed change is agreed to in writing by each person who is using the service on the day of the filing. Last, an oil pipeline may change existing rates through market-based rates if that pipeline is able to demonstrate that it lacks market power consistent with section 342.4(b) of the Commission's regulations.

28. Enbridge North Dakota's filing does not qualify for acceptance under any of the Commission's rate changing regulations. Enbridge North Dakota is proposing a cost-of-service surcharge for its proposed expansion and a cost-of-service tariff for its extension; therefore the indexing regulations do not apply. Moreover, Enbridge North Dakota's proposed rates do not qualify for acceptance as a cost-of-service rate change because Enbridge North Dakota has not shown that there is a substantial divergence between its actual costs and the rate resulting from application of the index that would result in Enbridge North Dakota not being able to charge a just and reasonable rate. Further, as already discussed with respect to the initial rate regulations, Enbridge North Dakota's filing does not contain the cost support required by Part 346 of the Commission's regulations to establish cost-of-service rates. Likewise, Enbridge North Dakota's does not qualify for market-based rates because the pipeline has not submitted an application to show that it lacks significant market power in the subject markets. Finally, Enbridge North Dakota's proposed rates do not qualify as settlement rates pursuant to section 342.4(c) of the Commission's regulations because the proposed rates have not been agreed to in writing by each person who is using the service on the day of the filing. While Enbridge North Dakota filed fifteen letters of support, a number of parties

[15] 18 C.F.R. § 342.3 (2012).

protested the filing and therefore the pipeline did not prove that all the shippers that would be using the service on the day of the filing were in support of the rate.[16]

29. Enbridge North Dakota attempts to overcome these obstacles by attaching to its petition letters from a number of shippers that it styles as a settlement. Simply put, Enbridge North Dakota's proposed rates do not qualify as settlement rates pursuant to section 342.4(c) of the Commission's regulations because the proposed rates have not been agreed to in writing by each person who is using the service on the day of the filing.[17] While Enbridge North Dakota filed fifteen letters in support, a number of parties protested the filing and in those protests stated that Enbridge North Dakota itself has indicated there may be over two hundred shippers on the system.

30. In short, Enbridge North Dakota has not filed a proposal seeking approval of the lawfulness of rate structures or terms of service that is appropriate for consideration in a petition for declaratory order. Enbridge North Dakota's proposed rates have not been supported pursuant to the Commission's regulations. Nor has Enbridge North Dakota filed anything that would qualify as an uncontested settlement that could be approved as fair and reasonable and in the public interest. Accordingly, Enbridge North Dakota's petition for declaratory order is denied without prejudice to it filing rates fully supported pursuant to the Commission's regulations or an uncontested settlement.

---

[16] *See* Protest of Flint Hills at 9.

[17] 18 C.F.R. § 342.4(c) reads, in relevant part:

A carrier may change a rate without regard to the ceiling level under [18 C.F.R. § 342.] if the proposed change has been agreed to, in writing, by each person who, on the day of the filing of the proposed rate change, is using the service covered by the rate. A filing pursuant to this section must contain a verified statement by the carrier that the proposed rate change has been agreed to by all current shippers.

The Commission orders:

Enbridge North Dakota's request for approval of its petition for declaratory order and related offer of settlement is denied without prejudice.

By the Commission. Commissioners Norris and Clark are dissenting in part with a joint separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Enbridge Pipelines (North Dakota) LLC Docket No. OR13-6-000

(Issued March 22, 2013)

CLARK, Commissioner, and NORRIS, Commissioner, *dissenting*:

Regulatory certainty can play a critical role in unlocking the benefits of new infrastructure development for consumers and our nation. Here, Enbridge North Dakota petitions the Commission for upfront regulatory certainty on several cost recovery mechanisms to enable $2.5 billion in new pipeline investment that will transport growing Bakken crude oil production to downstream markets. In declining to address Enbridge North Dakota's request, today's order results in a complete dismissal of the pipeline's proposal that will unduly delay much needed investment in infrastructure.

Recent advances in drilling and hydraulic fracturing have resulted in significant increases in Bakken oil production. Pipeline capacity out of North Dakota is currently maximized and additional infrastructure is needed to ensure efficient and safe transportation. At the time of Enbridge North Dakota's submittal, Bakken crude oil production in Montana and North Dakota had risen from approximately 100,000 bpd in 2006 to approximately 770,000 bpd annualized in 2012.[1] Between 2006 and 2011, Enbridge North Dakota has more than doubled the capacity of its North Dakota System; nonetheless, it states that the system has remained in constant apportionment.[2]

Enbridge North Dakota now proposes to invest $2.5 billion to create the Sandpiper project and increase its ability to transport this growing production to downstream markets. In its petition, Enbridge North Dakota is not requesting a novel declaration from this Commission; prior Commission actions demonstrate the Commission's ability to address many aspects of Enbridge North Dakota's proposal at this stage. For instance, the Commission has previously approved contested cost-of-service surcharges in petitions for declaratory order.[3] We've

[1] Enbridge Pipelines (North Dakota) LLC November 2, 2012 Filing, Docket No. OR13-6-000, at 4 (citations omitted).

[2] *Id* at 5.

[3] *Colonial Pipeline Co.*, 116 FERC ¶ 61,078 (2006), *order denying reh'g*, 119 FERC ¶ 61,183 (2007); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073 (2007).

also addressed the merits of contested cost-of-service components.[4] Given the information Enbridge North Dakota has already provided in its filing, we could have addressed its petition at this time.

Regrettably, today's order relies on a procedural sidestep to avoid making any calls on the merits. The order responds to Enbridge North Dakota's request by directing the company to comply with the Commission's procedures for setting or changing a pipeline rate, such as by submitting a full cost-of-service filing. The order comes to this conclusion despite the fact that Enbridge North Dakota is not seeking to charge a rate at this time. While certain aspects of the cost recovery mechanisms are protested and may lack adequate support, a full cost-of-service filing is not necessary to address Enbridge North Dakota's proposal.

Nevertheless, to the extent the record can be supplemented with additional cost-of-service information, we encourage Enbridge North Dakota to do so in a future petition. Further discussions with existing shippers and potential settlement on contested rate issues would also be advantageous for relations with current shippers and for review of any future filing.

In addition, a key aspect of Enbridge North Dakota's proposal involves the allocation of risk of the project between the pipeline and its shippers, some of whom argue that the project is not needed. Certain shippers, for example, claim that Enbridge North Dakota seeks a guaranteed return on equity through its proposed annual true-up mechanism. The Commission has no role in the siting of oil pipelines, and our statutory obligation under the Interstate Commerce Act to ensure just, reasonable and not unduly discriminatory rates does not extend to an examination of project need. However, the Commission must ensure that, in addressing Enbridge North Dakota's cost recovery mechanisms, shippers are protected from risks that should appropriately be assigned to the pipeline.[5]

By denying Enbridge North Dakota's petition outright, and not addressing any of its proposed cost recovery mechanisms, we are concerned that a significant investment in this nation's infrastructure could be unnecessarily delayed.

---

[4] *Express Pipeline Partnership*, 76 FERC ¶ 61,245 (1996).

[5] In addition, if Enbridge North Dakota is concerned about potential over-exposure to risk, we encourage the company to consider further negotiations with High Prairie, LLC, who already has secured committed potential shippers for a significant portion of capacity on its proposed pipeline from the Bakken region. *See High Prairie Pipeline, LLC v. Enbridge Energy, Limited Partnership*, 142 FERC ¶ 61,199 (2013) (Clark, Commissioner, *concurring*).

For these reasons, we respectfully dissent from this order.

Tony Clark, Commissioner

John R. Norris, Commissioner

Document Content(s)