

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Enbridge Offshore Facilities, LLC

Docket No. OR06-6-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued July 3, 2006)

1. On March 17, 2006, Enbridge Offshore Facilities, LLC (Enbridge) filed a petition for declaratory order. Enbridge plans to construct a crude oil pipeline from production facilities serving the Neptune oil field in the Atwater Valley area, approximately 170 miles south of New Orleans, Louisiana in the deepwater Gulf of Mexico to Caesar Oil Pipeline Company, LLC (Caesar) on the Outer Continental Shelf (OCS). Enbridge requests authorization to function as a contract carrier, hold an open season, and execute long-term transportation contracts reflecting contract carriage principles. Enbridge proposes to give those anchor shipper contracts precedence in allocating capacity, and then sign up shippers on a first-come, first-served basis for capacity that remains available after the open season closes. The issue presented is whether an oil pipeline subject to the anti-discrimination provisions of section 5 of the Outer Continental Shelf Lands Act (OCSLA)¹ may operate as a contract carrier when it connects to another oil pipeline that the Commission granted authority to operate as a contract carrier in a prior declaratory order.² For the reasons discussed below, the Commission grants Enbridge's petition since it will enable Enbridge to provide open and nondiscriminatory access to its transportation system that will both permit and encourage optimal development of oil production in the deepwater Gulf of Mexico.

Background

2. Anticipating commencing service in 2007, Enbridge currently plans to build a 20-inch, 26-mile crude oil pipeline from the Neptune Tension Leg Platform in Green Canyon Block 613,³ with a throughput of 60,000 barrels a day, which will terminate at a sub-sea connection with Caesar in Green Canyon Block 650. BHP Billiton Petroleum (Deepwater)

¹ 43 U.S.C. § 1334(e)-(f).

² *Caesar Oil Pipeline Co.*, 102 FERC ¶ 61,339 (2003).

³ Located adjacent one block to the west of the Neptune Field in the Atwater Valley area.

Inc. (35 percent), Marathon Oil Company (30 percent), Woodside Energy (USA) Inc. (20 percent), and Maxus (U.S.) Exploration Company (15 percent) (collectively, the Neptune Field Producers) own the deepwater facilities in the Neptune Field.

3. Enbridge will function as an extension of the Caesar pipeline, which also executed agreements with the Neptune Field producers to transport up to 60,000 barrels per day on contract carriage terms from Atwater Valley Blocks 573, 574, 575, 617 and 618. With estimated crude oil reserves of more than 120 million barrels, Neptune Field Producers expect production to peak in the first two years. Thereafter, area producers can use any available Enbridge capacity to provide transportation service from other developing portions of the Green Canyon and Atwater Valley areas already under lease. Enbridge, in connection with Caesar, will be the first oil pipeline to provide transportation service to the western Atwater Valley, a portion of the Gulf of Mexico that currently has little available transportation capacity on existing oil pipeline infrastructure.

4. Investments in the Neptune Field and its production facilities will total more than \$850 million and Enbridge estimates construction costs in excess of \$65 million. Enbridge states that an investment of this magnitude requires securing transportation commitments for Neptune Field's production, but in the event the Commission does not approve contract carriage or issue its requested declaratory order, the Neptune Field Producers have the right to renegotiate or terminate the transportation agreements up to September 2007. Enbridge stated that it also hopes to attract producers from fields in addition to the Neptune Field in order to fully utilize the capacity on Enbridge, and states its ability to obtain future commitments depend on its ability to offer such producers contract carriage terms that complement the terms they can obtain for further transportation on the connecting Caesar pipeline.

Petition for Declaratory Order

Introduction

5. Enbridge asks the Commission to authorize it to function as a contract carrier, hold an open season, enter into long-term transportation contracts reflecting contract carriage principles, give those contracts precedence in allocating capacity, and contract on a first-come, first-served basis for capacity that remains available after the open season closes. Enbridge intends to hold a formal open season where it would offer firm life of lease contracts for transportation service on a non-discriminatory basis, based on projected production profiles. Enbridge intends to pattern its open season on the open season process used by jurisdictional natural gas pipelines and the open season process approved by the Commission and currently used by Caesar. Enbridge anticipates contractual terms will conform to the terms shippers negotiate for further transportation on Caesar.

6. The long-term transportation contracts proposed by Enbridge would provide that when a shipper under contract is faced with short-term upswings in production from dedicated acreage in excess of a shipper's maximum daily quantity, the shipper would be able to secure transportation for those additional volumes at the contractual tariff rate, provided there is capacity available on Enbridge for such overrun volumes.

Jurisdictional and Procedural Issues

7. Enbridge states it will transport oil from the Neptune Field production facilities to Caesar and, accordingly, both Enbridge's origin and destination points are in the OCS. Enbridge states that the Commission previously held that inasmuch as the OCS is not a State or Territory of the United States, the OCS does not come within the Interstate Commerce Act's (ICA) jurisdictional language and, thus, the ICA "does not expressly cover pipelines transporting oil solely on or across the OCS."⁴

8. Enbridge states that consideration of a petition for declaratory order is within the Commission's discretion,⁵ and that section 554(e) of the Administrative Procedure Act⁶ provides that an agency in its sound discretion may issue a declaratory order to terminate a controversy or remove uncertainty. Enbridge states that specifically with regard to the anti-discrimination provisions of the OCSLA, the federal courts characterized the Commission's granting of a petition for declaratory order in order to enforce sections 1334(e) and 1334(f)(1)(A) as a "remedy" within the scope of Commission's discretionary power.⁷

Interpretation of section 5 of the OCSLA

9. Enbridge states that it filed its petition in order to negate any potential claim that the Commission should direct Enbridge to allocate on a common-carrier, *pro rata* basis because

⁴ *Caesar Oil Pipeline Co.*, 102 FERC ¶ 61,339, at P 31 (2003); *Proteus Oil Pipeline Co. (Proteus)*, 102 FERC ¶ 61,333, at P 29 (2003); *Bonito Pipe Line Co. (Bonito)*, 61 FERC ¶ 61,050, at 61,221 (1992); *Oxy Pipeline, Inc.*, 61 FERC ¶ 61,051, at 61,227-28 (1992); see also *Ultramar, Inc. v. Gaviota Terminal Co.*, 80 FERC ¶ 61,201, at 61,810 (1997).

⁵ Citing, *Caesar Oil Pipeline Co.*, 102 FERC ¶ 61,339, at P 32 (2003); *Proteus Oil Pipeline Co.*, 102 FERC ¶ 61,333, at P 30 (2003); *Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,253 (1996); *Phillips Petroleum Co. and Marathon Oil Co.*, 58 FERC ¶ 61,290, at 61,932 (1992).

⁶ Citing, 5 U.S.C. 554(e).

⁷ Citing, *Chevron U.S.A., Inc. v. FERC*, 193 F.Supp.2d 54, 72 (D.D.C. 2002); *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1200 (D.C. Cir. 1995); *ICC v. American Trucking Assoc., Inc.*, 467 U.S. 354,367 (1984).

of the nondiscrimination language of section 5(e) of the OCSLA, 43 U.S.C. § 1334(e), which requires transportation in the OCS in such proportionate amounts as the Commission may determine to be reasonable. Enbridge states that slightly different language prohibiting discrimination also appears in section 5(f) of the OCSLA, 43 U.S.C. § 1334(f)(1)(A), although it does not specifically refer to "proportionate" takings.

10. Enbridge states that in Order No. 509,⁸ the Commission determined that it was not required to and would not require interstate gas pipelines to prorate capacity. Instead it would allow shippers with firm contracts to have precedence over shippers without firm contracts. Enbridge states that the Commission held that "it can and should implement the nondiscriminatory access mandate in section 5 of the OCSLA without generically imposing, by rule, a *pro rata* allocation scheme on all OCS pipelines."⁹ Enbridge states that in Order No. 509 the Commission also held that it had legal authority under the OCSLA either (1) to require prorationing on the OCS or (2) to allow any allocation scheme that is acceptable for open-access transportation onshore to be used on the OCS.¹⁰

11. Enbridge states that in 2003, the Commission held in *Caesar* and *Proteus* that Order No. 509's interpretation of section 5 of the OCSLA as not requiring *pro rata* transportation "applies to oil pipelines in the OCS." Enbridge continues that the Commission accordingly exercised jurisdiction over the oil pipelines' petitions for declaratory order regarding the OCSLA's anti-discrimination provisions and held that the pipelines in *Caesar* and *Proteus* could function as contract carriers. In these rulings, Enbridge states the Commission noted that "there is nothing in the legislative history of the OCSLA that persuades us that the nondiscrimination provisions of that act were intended to apply to oil pipelines in a different fashion than they apply to natural gas pipelines."¹¹

Public Policy Arguments

12. Enbridge states it will be the first third-party pipeline to connect to Caesar, which was granted contract carriage by the Commission in recognition that "Caesar Company's contract carriage proposal along with its intention to build its pipeline up to the capacity technologically feasible in order to accommodate future production will send the appropriate economic signals to encourage development in the deepwater Gulf of Mexico."

⁸ Interpretation of, and Regulations Under, section 5 of the Outer Continental Shelf Lands Act (OCSLA) Governing Transportation of Natural Gas by Interstate Gas Pipelines on the Outer Continental Shelf, FERC Stats. & Regs. ¶ 30,842 (Dec.19, 1988).

⁹ *Id.* at 31,272-3, 31,279 and 31,283.

¹⁰ *Id.* at 31,272, 31,279 and 31,281-83.

¹¹ *Caesar*, 102 FERC ¶ 61,339 P36, *Proteus*, 102 FERC ¶ 61,333 P34, citing *Bonito, Pipe Line Co.*, 61 FERC ¶ 61,050 at 61,221 (1992).

(*Caesar*, P 37). Further, Enbridge continues, the Commission stated that approval of contract carriage on Caesar would “encourage optimal development of oil production in the deepwater Gulf of Mexico.” (*Caesar*, P 1).

13. Enbridge states the Commission recognized that Caesar was designed with the intention to serve future fields (*Caesar*, P 7) and would need to attract production from future fields in order to be successful (*Caesar*, P 6 and 10). Further, Enbridge states that the Commission’s order granting Caesar contract carrier status contemplated that contract carriage would encourage pipelines such as Enbridge to connect to Caesar and utilize its economies of scale, and relied on this factor as an important reason for approving contract carriage. Finally, Enbridge states that in *Caesar* (P 8), the Commission commended Caesar for constructing sub-sea connections so that future fields and pipelines (such as Enbridge) could easily connect to Caesar.

Therefore, Enbridge submits that its proposal is a necessary corollary to the Commission’s order in *Caesar*, as Caesar has already executed agreements with Neptune Field Producers requiring Enbridge’s third-party service. As in *Caesar*, Enbridge submits the Commission must grant authorization to function as a contract carrier to assure producers they can transport sufficient volumes on Enbridge to Caesar without any concern regarding the possibility of *pro rata* allocation of capacity. Enbridge states that such uncertainty would discourage prospective shippers from subscribing to capacity on Enbridge as prorationing would make development riskier and potentially more expensive, discouraging development of the areas Enbridge intends to serve.

14. Enbridge asserts that in granting Caesar contract carrier status, the Commission sought to encourage deepwater oil development by providing producers with “the security of knowing that they have an outlet for their production.” Enbridge states its producers must have the same assurances, and that it was not the Commission’s intent that only the producers and producing fields of Caesar (Holstein, Mad Dog, and Atlantis) would benefit from its contract carriage ruling. Accordingly, Enbridge asks the Commission to apply its holding in *Caesar* to Enbridge to function as a contract carrier.

Public Notice and Interventions

15. Public notice of the filing was issued on March 24, 2006. Interventions in support of the petition were filed by BHP Billiton Petroleum (Deepwater) Inc., Marathon Oil Company, Maxus (U.S.) Exploratory Company, and Woodside Energy (USA) Inc. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2005)), 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. No protests or adverse comments were filed.

Discussion

16. As the Commission found in *Caesar*, we find that Enbridge's petition is appropriately analyzed under the OCSLA rather than the ICA since the Commission previously found that "[i]t is clear that the ICA does not expressly cover pipelines transporting oil solely on or across the OCS."¹²

17. Section 554(c) of the Administrative Procedure Act provides that an agency in its sound discretion may issue a declaratory order to terminate a controversy or remove uncertainty.¹³ Rule 207 of the Commission's Rules of Practice and Procedure provides that a person must file a petition when seeking a declaratory order.¹⁴ The rule does not include any requirement that a person have "standing" before filing a petition for a declaratory order. Thus, whether to consider providing declaratory relief under this provision is discretionary with the Commission.¹⁵

18. The Commission finds, in the exercise of its discretion, that, as a general matter, in order to provide definitive guidance for all interested parties, it would be appropriate to address the issues raised by Enbridge in the context of a declaratory order proceeding. It is better to address these issues in advance of financial commitments by Enbridge. Because of the importance of developing oil production in the deepwater Gulf of Mexico to the nation's economy, and the magnitude of the financial commitments previously made by Caesar and those that Enbridge will make, the Commission finds that it is appropriate to exercise its discretion to provide declaratory findings to provide certainty to Enbridge and all other interested parties.

19. The issue whether an oil pipeline subject to the anti-discrimination provisions of section 5 of the OCSLA may operate as a contract carrier was decided in *Caesar*, and therefore the Commission finds that Enbridge's contract carriage proposal is supported by applicable precedent. In addition, the Commission finds that granting Enbridge's petition is appropriate for a number of public policy reasons. As Enbridge points out, the deepwater Gulf of Mexico is potentially a significant source of oil production. However, because of the technology required to develop production and pipelines in this location, significant investments are required. Producers and pipelines are unlikely to make financial commitments without adequate assurance that they can recoup their investments. In the Commission's view, contract carriage will provide this assurance. Enbridge will be

¹² *Bonito Pipe Line Company*, 61 FERC ¶ 61,050 at 61,221 (1992).

¹³ 5 U.S.C. § 554(c).

¹⁴ 18 C.F.R. § 385.207 (2006).

¹⁵ See, e.g., *Phillips Petroleum Company and Marathon Oil Company*, 58 FERC ¶ 61,290 (1992); and *Longhorn Partners Pipeline*, 73 FERC ¶ 61,355 (1995).

guaranteed that certain supplies of oil will move on its pipeline and producers will have the security of knowing that they have an outlet for their production. The Commission further concludes that Enbridge's contract carriage proposal along with its intention to build its pipeline up to the capacity technologically feasible to accommodate future production will send the appropriate economic signals to encourage development in the deepwater Gulf of Mexico.

20. The Commission bases this declaratory order on the facts and circumstances presented by the petition. If any of the facts supporting this petition were to change significantly, Enbridge should make a filing with the Commission to determine whether the ruling here would still apply. Moreover, our issuing a declaratory order here does not relieve the Commission of its responsibility under section 5 of the OCSLA to investigate claims of discriminatory behavior made in a future complaint. In the event the Commission found that Enbridge was engaging in discriminatory conduct in the future, the Commission would have the authority under section 5 of the OCSLA and Order No. 509 to impose the appropriate remedies.

The Commission orders:

Enbridge's petition for declaratory order is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.