

131 FERC ¶ 61,288
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Enbridge Pipeline (Southern Lights) LLC

Docket No. IS10-399-000

ORDER ACCEPTING AND SUSPENDING TARIFFS,
SUBJECT TO REFUND AND CONDITIONS, AND ESTABLISHING
A HEARING AND SETTLEMENT PROCEDURES

(Issued June 29, 2010)

1. On May 28, 2010, Enbridge Pipelines (Southern Lights) LLC (Southern Lights) filed FERC Tariff No. 1, setting forth Rules and Regulations, and FERC Tariff No. 2 establishing initial rates, on its diluent¹ pipeline from Manhattan, Illinois, to the International Border at Neche, North Dakota. Southern Lights requests a July 1, 2010 effective date for the tariffs. For the reasons discussed below, the Commission accepts and suspends the tariffs to be effective July 1, 2010, subject to refund and subject to Southern Lights filing cost, revenue and throughput data pursuant to Part 346 of the Commission's regulations to support its initial rates. This order sets the initial rates for hearing and settlement judge procedures. The hearing will be held in abeyance pending the outcome of the settlement process.

Background

2. FERC Tariff No. 1 sets forth the Rules and Regulations and FERC Tariff No. 2 establishes rates on the Southern Lights system. Southern Lights plans to commence service on its diluent pipeline from Manhattan, Illinois to the International Boundary near Neche, North Dakota, effective July 1, 2010. Southern Lights states the Commission approved the rate structure for this pipeline project in 2007.² Specifically, Southern Lights states the Commission approved Southern Lights' calculation of the committed

¹Diluent refers to a low density, low viscosity hydrocarbon used to dilute heavy oil and bitumen to make it transportable by pipeline.

²*Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310 (2007), *order granting clarification*, *Enbridge Pipelines (Southern Lights) LLC*, 122 FERC ¶ 61,170 (2008) (Southern Lights Orders).

rate in accordance with the agreed-upon Transportation Services Agreement (TSA) entered into between Southern Lights and its committed shippers. Pursuant to 18 C.F.R. § 342.2(b) (2010), attached to this filing is an affidavit attesting that the rates in FERC Tariff No. 2 have been agreed to by at least one non-affiliated shipper who intends to use the service.

3. Southern Lights states it calculated the committed and uncommitted rates as provided for within the TSA. Southern Lights states that it will refund proportionally to all shippers, all revenue from uncommitted volumes up to and including 162,000 barrels per day (bpd) plus 75 percent of revenue from uncommitted volumes over 162,000 bpd. Southern lights will remit the refunds at the end of each full calendar year net of committed shipper volume credits and the true-up between the forecast and actual revenue requirement. Southern Lights states this mechanism ensures the pipeline will not over-recover the agreed upon cost of service, and is proportional to shippers' actual volumes shipped during the calendar year for which it calculates the annual true-up. Southern Lights states this annual true-up will occur as soon as reasonably practicable after the end of each calendar year, except that the adjustments for both the period from July 1, 2010, through December 31, 2010, and for calendar year 2011 will occur after calendar year 2011.

4. To supplement the Rules and Regulations tariff, Southern lights attached the Diluent Acceptance Practice,³ the Equalization Practice⁴ and NAFTA Practice⁵ as appendices.

Interventions and Protests

5. BP Products North America Inc. (BP), a committed shipper on Southern Lights, filed a motion to intervene. Imperial Oil (Imperial) and ExxonMobil Oil Corporation (ExxonMobil) (together Indicated Shippers) move jointly and severally to intervene and protests the tariff filing.⁶ Indicated Shippers state that they plan to use Southern Light's

³ This practice concerns the quality specifications of the diluent and the data shippers will submit.

⁴ This practice compensates shippers via a monetary credit or debit for the quality, and hence value, of diluent.

⁵ This practice sets forth the categories of product pursuant to the North American Free Trade Agreement (NAFTA) which diluent shippers must meet to ship on the pipeline.

⁶ Imperial is an affiliate of ExxonMobil.

new service to ship diluent from the Chicago, Illinois area to Edmonton, Canada, for further transportation and used for blending with Imperial's bitumen before shipment to various markets. Indicated Shippers state that as an uncommitted shipper on the U.S. portion of the Southern Lights project, ExxonMobil will pay the significantly higher uncommitted rate for diluent proposed here by Southern Lights on the U.S. side of the border. Indicated Shippers state that at the U.S.-Canadian border, title would typically transfer to Imperial, where Imperial would become the shipper of record. Consequently, the Indicated Shippers assert that diluent purchasers will factor the significantly higher uncommitted rate into the market price on the Canadian side of the border as well. They state Exxon Mobil is a major purchaser of bitumen/diluent blends from Canada and thus has an interest not only in the cost of the transportation of diluent but also in the effect of that cost on diluent market prices and on bitumen/diluent blend prices in the marketplace. Accordingly, Indicated Shippers assert they have a substantial economic interest in the tariff filing that cannot be represented by any other party.

6. Indicated Shippers protest Southern Light's proposed rates for diluent on the basis that they are not just and reasonable and have not been shown to be just and reasonable. They assert Southern Lights proposed an uncommitted rate of \$10.0526 per barrel, twice the rate it will charge the committed shippers. While Southern Lights claims the Commission approved its calculation of the committed rate in accordance with the agreed-upon Transportation Services Agreement, Indicated Shippers argue that Southern Lights failed to provide any cost justification for the new rates. Indicated Shippers submits that Southern Lights merely asserts that in accordance with section 342.2(b) of the Commission's regulations, one unaffiliated shipper who intends to use the service has agreed to the rates in FERC Tariff No. 2.

7. Indicated Shippers contend Southern Light allegedly based its calculation and development of the cost of service on the committed rate. They maintain this calculation is not in accordance with the Commission's Opinion No. 154-B, (31 FERC ¶ 61,377) methodology. Indicated Shippers further contend that Southern Light must demonstrate that the uncommitted shipper rate is just and reasonable. Indicated Shippers argue that the calculation of the equity return is based upon a formula that has not been shown to be just and reasonable, as the Commission previously required. Indicated Shippers assert the claimed income tax allowance is not based upon any calculation or even estimation of "actual or potential" income tax liability and therefore does not meet the Commission's Policy Statement on Income Tax Allowances. Indicated Shippers submit that the proposed "Carrier Incentive" is simply additional return beyond that embedded in the calculated cost of service and revenue requirement and therefore the Commission should reject this additional return because it is unjust and unreasonable. Indicated Shippers argue the committed volume credits are excessive and unwarranted and therefore unjust and unreasonable. Indicated Shippers contend the annual true-up and refund procedure is inadequate to ensure the revenues Enbridge receives are no more than the just and reasonable level. Indicated Shippers assert the proposed depreciation methodology has

not been shown to be appropriate, as the Commission previously required. Indicated Shippers argue the proposed capital structure has not been justified, as the Commission previously required. Finally, Indicated Shippers assert that Southern Lights' proposal under the TSA to design the rates on only 90 percent of the design capacity of the pipeline, such that the revenue requirement would be divided by fewer barrels than it should be to determine the rate. Indicated Shippers posit this aspect of the rate design is both unwarranted and not in accordance with the Opinion No. 154-B methodology, which Enbridge itself recognizes it must apply if the filing is challenged.

8. Accordingly, Indicated Shippers request the Commission (a) grant their joint and several motion to intervene as parties; (b) set the proceeding for a full evidentiary hearing; (c) accept and suspend the tariff for one day, subject to refund and investigation; (d) require Southern Lights to file cost, revenue, and throughput data supporting its proposed committed and uncommitted rates for diluent as required by Part 346 of the Commission's regulations; and (e) appoint a settlement judge to allow the parties to explore a resolution.

Responses and Replies

9. Southern Lights asserts the protest is an impermissible collateral attack on the Commission's Southern Lights Orders. Southern Lights argues that if the protesting shippers had concerns regarding the difference between the uncommitted rate and the committed rate, they had an ample opportunity to raise those concerns during the declaratory order proceedings. Southern Lights contends that it defeats the very purpose of the declaratory order process if potential shippers can fail to bring their concerns forward until the pipeline is in service, line fill is complete and it is now accepting nominations. Southern Lights submit such a collateral attack destroys the regulatory certainty that makes it possible to build new infrastructure and undermines the Commission's role in facilitating that process.

10. Southern Lights asserts that the protesting shippers mischaracterize many aspects of the rate mechanism and therefore have not shown that the uncommitted rate is unjust and unreasonable. Southern Lights contends that regarding the justness and reasonableness of the uncommitted rate, the protesting shippers appear to have misunderstood the nature of the true-up mechanism in the tariff and the rate an uncommitted shipper will ultimately pay. Southern Lights asserts it will refund all of the revenue from barrels transported by uncommitted shippers (and virtually all of the revenue from barrels transported by committed shippers in excess of their minimum volume commitment) to both committed and uncommitted shippers at the end of the year in accordance with the terms of the TSA. Thus, Southern Lights submits that while uncommitted shippers initially pay the stated rate in the tariff, the effective rate after the true-up occurs is likely to be substantially lower. Moreover, Southern Lights contends

the true up mechanism – which was specifically approved in the Southern Lights Orders – assures that Southern cannot over earn its allowed revenue requirement because excess revenues are flowed back to the shippers.

11. Southern Lights acknowledges the Commission provided that, upon a protest of the uncommitted rate, the Commission would require it to justify its rate under Opinion 154-B. To the extent the Commission were to determine that such an investigation is warranted here, Southern Lights is prepared to do just that, since it believes the uncommitted rate is fully justified under applicable Commission policies and standards.

12. Southern Lights asserts Imperial lacks standing to protest the filing or become an intervener here. Southern Lights submits Imperial does not suggest that it will ever become a shipper on the U.S. portion of Southern Lights. Rather, by its own admission, title to any diluent shipped by ExxonMobil on Southern Lights would only transfer to Imperial at the Canadian border before being sent to bitumen producing locations in Alberta for blending. Thus, Southern Lights asserts Imperial will not become the shipper of record until the diluent enters Canada. Southern Lights argues that Imperial has the ability and resources to fully engage in a regulatory process in Canada, and as such would not be harmed by a decision of the Commission to deny it intervener status. Southern Lights submits that, as Imperial acknowledged, it is an affiliate of ExxonMobil, and therefore its interest – to the extent that it has any in the United States – would be fully protected by ExxonMobil's participation in any investigation that occurs here.

13. BP filed a reply to the Indicated Shippers' protest in which it supports Southern Lights' filing and asserts that the tariffs should take effect without suspension or investigation.

Discussion

14. In this filing, Southern Lights filed initial committed and uncommitted rates for transportation of diluent from Manhattan, Illinois to the International Border near Neche, North Dakota. Southern Lights asserts that the rates have been agreed to by at least one non-affiliated shipper who intends to use the service. Indicated Shippers protested the rates arguing that Southern Lights have not provided cost justification for the rates and point out a number of rate elements such as return on equity, capital structure and depreciation methodology which the Commission indicated it would examine when the actual rates for the new service were filed.

15. Pursuant to section 342.2(b) of the Commission's regulations, a pipeline may support its initial rates by attesting that the rates have been agreed to by at least one non-affiliated shipper who intends to use the service. However, if the rate is protested, the pipeline is required to support the rate with cost, revenue and throughput data in accordance with Part 346 of the Commission's regulations. Accordingly, since the rates have been protested, Southern Lights is required to provide cost justification in

accordance with Part 346. The Commission also finds that the protest has raised material issues of fact concerning the justness and reasonableness of the rates that require a hearing. The hearing, however, will be held in abeyance, pending the outcome of settlement judge procedures.

16. The fact that the Commission is setting the initial rates for hearing does not undermine the approval of the rate structure in the declaratory order or the fact that the Commission approved committed rates that would be 50 percent of the uncommitted rates. Since all potential shippers had the opportunity to sign up for the committed rates, there is no issue of discrimination. However, as the Commission stated in its order on clarification of the declaratory order, “if the uncommitted rate is protested, Enbridge Southern Lights must comply with section 342.2(b) to support its uncommitted rate by filing cost, revenue, and throughput data supporting such rate as required by part 346 of the Commission’s regulations. When a just and reasonable uncommitted rate is determined in this manner, Enbridge Southern Lights may derive its committed rate by applying the agreed-upon terms of the TSA.”⁷ The Commission’s decision here to set the matter for hearing is in keeping with the finding in the clarification order. Southern Lights and its committed shippers will receive the certainty sought through the declaratory order and the uncommitted shippers will be assured that the rate they pay will be just and reasonable.

17. Finally, on a procedural matter, the Commission will deny Imperial’s intervention. As Southern Lights has shown, Imperial does not have a substantial economic interest in the rates at issue because it is not a shipper on the U.S. portion of the pipeline.⁸ The Commission also finds that its interest will be adequately protected by its affiliate, ExxonMobil.

⁷ *Enbridge Pipelines (Southern Lights) LLC*, 122 FERC ¶ 61,170, at P 13 (2008).

⁸As the Commission has recognized, “[t]he ‘substantial economic interest’ standard is intended to assure that parties protesting a filing have sufficient interest in the matter to warrant the commitment of agency and pipeline resources to a review of the merits.” The Commission has found that whether a party was a current or future shipper is relevant in determining if a party has a substantial economic interest in the tariff filing. *See, Western Refining Pipeline Company*, 123 FERC ¶ 61,271, at P 10 (2008) (footnotes omitted).

Suspension

18. Based upon a review of the filing, the Commission finds that Southern Lights' tariff filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, pursuant to section 15(7) of the Interstate Commerce Act, the Commission will accept FERC Tariff Nos. 1 and 2 for filing and suspend them, to be effective July 1, 2010, subject to refund and subject to the conditions set forth in the body of this order and in the ordering paragraphs below.

The Commission orders:

(A) Pursuant to the authority contained in the Interstate Commerce Act, particularly section 15(7) thereof, Southern Lights' FERC Tariff Nos. 1 and 2 are accepted for filing and suspended, to become effective July 1, 2010, subject to refund and subject to filing cost, revenue and throughput data pursuant to Part 346 within 30 days of the date this order issues.

(B) Pursuant to the authority contained in the Interstate Commerce Act, particularly sections 15(1) and 15(7) thereof, and the Commission's regulations, a hearing is established to address the issues raised by Southern Lights' filing.

(C) The hearing established in Ordering Paragraph (B) is hereby held in abeyance pending the outcome of the settlement proceedings described in the body of this order.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is directed to appoint a settlement judge in this proceeding within 10 days of the date this order issues. To the extent consistent with this order, the designated settlement judge shall have all the powers and duties enumerated in Rule 603 and shall convene an initial settlement conference as soon as practicable.

(E) Within 60 days of the date this order issues, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement

discussions continue, the settlement judge shall file a report at least every 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.