

137 FERC ¶ 61,256
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enbridge Pipelines (Southern Lights) LLC

Docket No. IS12-63-000

ORDER ACCEPTING AND SUSPENDING TARIFF SUBJECT TO REFUND
AND HOLDING PROCEEDING IN ABEYANCE

(Issued December 30, 2011)

1. This order addresses Enbridge Pipelines (Southern Lights) LLC's (Southern Lights) filing reflecting committed and uncommitted rates on its diluent pipeline for the 2012 calendar year. For the reasons discussed below, the Commission accepts and suspends Southern Lights' FERC Tariff 4.5.0, to be effective January 1, 2012, subject to refund. This order also holds any further proceedings in this docket in abeyance pending the outcome of the ongoing proceeding in Docket No. IS10-399-000, *et al.* and subject to a future Commission order.

Background

2. Southern Lights operates the U.S. segment of a diluent pipeline, which provides transportation service from Manhattan, Illinois to the International Boundary near Neche, North Dakota. Southern Lights states that the pipeline commenced service on July 1, 2010, and the tariff rate structure was approved by the Commission in a declaratory order in Docket No. OR07-15-000.¹ Southern Lights states the Commission approved the calculation of the rate for committed shipments in accordance with the agreed upon Transportation Services Agreement (TSA) entered into between Southern Lights and its committed shippers and further approved the setting of the initial uncommitted rate at two times the committed rate, subject to review of the uncommitted rate at the time it is filed. Pursuant to the TSA, Southern Lights is required to recalculate and file tariff rates

¹ *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310 (2007), *order on clarification and reh'g*, 122 FERC ¶ 61,170 (2008).

each year to be effective on January 1 of the following year. Southern Lights filed FERC Tariff No. 4.5.0, to be effective January 1, 2012, which contains committed and uncommitted rates for the 2012 calendar year as provided for in the TSA.

3. Southern Lights states that although the rate design of the pipeline's committed and uncommitted rates was approved in the Commission orders cited above, it is submitting cost-of-service schedules, in conformance with Part 346 of the Commission's regulations, in support of the uncommitted rate. Southern Lights states that the uncommitted rate of \$11.8434 per barrel is subject to a year-end true up mechanism previously approved by the Commission. Southern Lights asserts that the appropriate comparison is between the cost-of-service rates calculated in the schedules attached to its filing and the corresponding effective uncommitted rates at the applicable throughput level.

4. Southern Lights states that because of the true-up mechanism, the effective rate payable by an uncommitted shipper is initially \$11.8434 per barrel but may be substantially less than that amount depending upon the volume of uncommitted movements during the year. Southern Lights states that to date it has not received any nominations other than from committed shippers. Southern Lights states that since it is not feasible to calculate a cost-of-service based uncommitted rate on the assumption of zero uncommitted volumes, it submitted cost, revenue and throughput information under three different volumes scenarios that capture the full range of possibilities. Southern Lights asserts that all three cases show that the effective rate paid by an uncommitted shipper after the application of the true-up mechanism is lower than the cost-of-service rate for uncommitted shippers. Southern Lights contends that one of its exhibits illustrates that the same holds true at any volume level up to 180,000 barrels per day (bpd), the full capacity of the pipeline. Southern Lights asserts that in accordance with the rate structure (including the true-up mechanism) approved by the Commission in its declaratory order, the uncommitted rate in FERC Tariff No. 4.5.0 is just and reasonable across the full spectrum of throughput levels on the Southern Lights pipeline.

Interventions and Protests

5. BP Products North America Inc. filed a motion to intervene. Statoil North America Inc. filed a motion to intervene out-of-time. Imperial Oil and ExxonMobil Oil Corporation (Indicated Shippers) filed a motion to intervene, protest, and motion for consolidation. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2011), all timely unopposed motions to intervene and any motion to intervene out-of-time filed before the issuance date of this order are granted.

6. Indicated Shippers assert that they have a substantial economic interest in the tariff filing submitted by Southern Lights as previously demonstrated and recognized by the Commission in Docket No. IS11-146-000. Indicated Shippers request that the rates Southern Light proposes to become effective January 1, 2012, retain the current status of

the rates they will supersede, i.e., subject to suspension, investigation, refund and the outcome of the hearing in Docket Nos. IS10-399-000 and IS11-146-000. Indicated Shippers contend that there are a number of unsubstantiated assumptions and conclusions in the cost-of-service filing which they raised in the previous filings and they are incorporating their objections by reference here.² Indicated Shippers submit that Southern Lights' proposed rates are an 18 percent increase to the rates filed in Docket No. IS10-399-000 and an 8 percent increase over the rates filed in Docket No. IS11-146-000. Indicated Shippers argue that Southern Lights is proposing to increase rates that are already unjust and unreasonable. Indicated Shippers assert that in the ongoing hearing in Docket No. IS10-399-000, *et al.*, the Commission Trial Staff contended that there was an inconsistency between the Commission's requirement to develop an uncommitted rate through a traditional cost-of-service methodology and the true-up mechanism under the TSA. Indicated Shippers assert that according to Commission Trial Staff, implementation of the TSA's true-up mechanism risks nullifying any rate result reached in Commission hearing procedures. Indicated Shippers state that such questions were addressed to the former presiding judge who held that none of them were before her and that the only issue set for hearing was the uncommitted rate unrelated to any of these TSA issues. Indicated Shippers argue that there are certain questions that the Commission must either resolve or set for hearing. Indicated Shippers state that in the ongoing hearing the Commission Trial Staff has contended that if certain inconsistencies are not resolved Southern Lights will continue to file rate cases every year creating the specter of endless litigation.

7. Indicated Shippers submit that certainty and clarity in the rules of engagement are needed in order for shippers to be able to exercise the right to challenge the uncommitted rates that the Commission has assured them they will have. Indicated Shippers argue that the rules of engagement should not be permitted to shift from case to case. Indicated Shippers contend that the rules of engagement should be established now based upon the Commission's directive that a cost-based uncommitted rate be first set and then a committed rate based upon the TSA rate structure be derived thereafter. Indicated Shippers argue that if that is not how the Commission intends for challenges to proceed, then shippers need to know now, not at the end of years of litigation of pancaked rate cases.

Southern Lights' Answer

8. As permitted by the regulations, Southern Lights filed an answer to the Indicated Shippers' protest on December 20, 2011. Southern Lights does not object to the suspension of the 2012 tariff subject to refund, which is consistent with the

² In the previous filings, Indicated Shippers raised concerns about, among other things, return on equity, capital structure, and depreciation.

Commission's general practice of suspending a newly filed rate when the prior rate is already subject to a pending investigation. Southern Lights opposes the consolidation of the subject 2012 tariff filing with the pending rate case. Southern Lights asserts that as the hearing before Presiding Administrative Law Judge (ALJ) McCartney is only three weeks away, it would be needlessly disruptive and administratively inefficient to consolidate the protested 2012 tariff into the pending rate case when all of the pre-filed testimony in that case has already been submitted and discovery has closed. Southern Lights submits that the appropriate course would be for the Commission to hold the new docket in abeyance subject to the outcome of the pending rate case, as is the usual practice in situations such as this one where new rates are filed in the midst of a pending case.

9. Southern Lights further opposes the Indicated Shippers' request for "guidance" on the method for establishing the committed and uncommitted rates going forward as untimely and unnecessary. Southern Lights argues that guidance concerning the issues to be addressed at the hearing has already been given by the Commission and the former and current Presiding ALJs. Southern Lights contends that, to the extent the Indicated Shippers are seeking guidance that Southern Lights' rates should be established without regard to prior rulings, their request is an improper and untimely challenge to the original declaratory orders and should be rejected.

Discussion

10. In the subject filing, Southern Lights filed to establish committed and uncommitted rates for the 2012 calendar year for service on its diluent pipeline, pursuant to the rate structure and TSA previously approved by the Commission in a declaratory order. As they did with Southern Lights' initial rates and 2011 calendar year rates, the Indicated Shippers have protested the uncommitted rate on the same grounds. Indicated Shippers have raised concerns that there may be some conflict and incompatibility between calculating uncommitted rates based on a traditional cost-of-service methodology and the TSA cost-of-service methodology, including the true-up mechanism. Indicated Shippers assert that such issues were raised by Commission Trial Staff in its Initial Brief in the Docket No. IS10-399-000, *et al.* hearing. Indicated Shippers request that the Commission clarify that a cost-based uncommitted rate be first set and then a committed rate based upon the TSA rate structure be derived thereafter.

11. The Commission accepts and suspends Southern Lights' proposed 2012 rates to be effective January 1, 2012, subject to refund. The Commission will hold any further proceedings on the subject filing in abeyance pending the outcome of the hearing in Docket No. IS10-399-000, *et al.* and subject to a future Commission order. The Commission will not consolidate this proceeding with the ongoing proceeding in Docket No. IS10-399-000, *et al.* Since discovery has closed and a hearing is scheduled to commence on January 10, 2012, adding the proposed rates here would be disruptive and prolong this proceeding, which was first set for hearing and settlement judge procedures

on June 29, 2010. Further, the Commission has already recognized that the ongoing proceeding in Docket No. IS10-399-000, *et al.*, may have an impact on future rate proceedings. As the Commission stated in its order on complaint in Docket No. OR11-9-000, “[t]o the extent any changes to Southern Lights Pipeline’s rate design principles or rate structure are made in the ongoing rate proceeding, the Commission will address the impact of such changes on future rate filings after the hearing before the ALJ is concluded, and the initial decision is before the Commission for review. Any decision now would be premature.”³ In addition, the possibility of endless litigation is overstated. The Indicated Shippers do not face any greater risk than any other customer of a regulated entity that makes annual rate filings or adjustments. Moreover, as Southern Lights observed in its answer, to the extent broad methods and principles will be resolved in the ongoing hearing in Docket No. IS10-399-000, *et al.*, any challenges to future filings should be limited to material issues concerning specific inputs to the rates, for example, operating costs.

12. The Commission also finds that no further guidance is needed in this proceeding. As the former Presiding ALJ stated in her order on the scope of issues set for hearing and denying motion for certification to the Commission:

I cannot see how the Commission could be clearer. The fact that Uncommitted Shippers protested and that EPSL was then obliged to determine Uncommitted Shippers rates by resort to Part 346 bears no impact on the scope of the issue(s). If that fact had changed the “paradigm,” as Indicated Shippers claim, the Commission would surely have found so and it would not have continued to find EPSL’s rate design to otherwise be as approved in the Declaratory Order. . . . From my perspective, the Commission has spoken. The Commission has thoroughly considered the matter and ruled as it has ruled. I find no ambiguity in the Commission’s orders and I have no jurisdiction to consider questions not put before me by the Commission.⁴

13. Finally, Indicated Shippers cited Commission Trial Staff’s brief as support for their argument that further guidance is needed in the proceeding because of the potential for inconsistencies between rates derived through a traditional cost-of-service methodology as opposed to the methodology under the TSA and true-up mechanism. While it is true that Commission Trial Staff indicated that there were three aspects of the TSA rate structure that could be affected by the level of the uncommitted rate, Trial Staff

³ *Imperial Oil and ExxonMobil Corporation v. Enbridge Pipelines (Southern Lights) LLC*, 136 FERC ¶ 61,115, at P 27 (2011) (April 5, 2011 Order).

⁴ April 5, 2011 Order, 136 FERC ¶ 61,115 at P 10.

observed that “[n]othing in the hearing orders issued in Docket Nos. IS10-399-000 and IS11-146-000 suggests that the Commission intended to set any matter for hearing other than the justness and reasonableness of the uncommitted rates.”⁵ Finally, as with any other hearing, to the extent that unanticipated issues arise during the course of the hearing, the Presiding ALJ has the discretion to handle them as she sees fit.

Suspension

14. 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 (ICA), the Commission will accept FERC Tariff 4.5.0 for filing and suspend it, to be effective January 1, 2012, 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 ICA, particularly section 15(7) thereof, Southern Lights’ FERC Tariff 4.5.0 is accepted for filing and suspended, to be effective January 1, 2012, subject to refund.

(B) Any further proceedings in this docket are held in abeyance pending the outcome of the ongoing hearing in Docket Nos. IS10-399-000, IS10-399-001, IS10-399-003 and IS11-146-000, and are subject to a future Commission order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵ February 24, 2011 Commission Trial Staff Brief at 6.