

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff

Platte Pipe Line Company

Docket No. IS06-259-000

ORDER FOLLOWING TECHNICAL CONFERENCE

(Issued December 19, 2006)

1. On April 19, 2006, Platte Pipe Line Company (Platte) filed Supplement No. 7 to FERC Tariff No. 1456 to implement a new prorationing methodology. On May 19, 2006, the Commission issued its Accepting and Suspending Tariff Supplement and Establishing Technical Conference (May 19, 2006 Order).¹ At the July 14, 2006 technical conference, the parties addressed issues arising from Platte's prorationing proposal. Following the technical conference, the parties filed comments and reply comments.²

2. As discussed below, the Commission conditionally accepts Platte's Supplement No. 7 to FERC No. 1456 to be effective December 20, 2006. However, within 15 days of the date of issuance of this order, Platte must file a revised supplement consistent with the provisions of this order to be effective as of December 20, 2006.

¹ *Platte Pipe Line Co.*, 115 FERC ¶ 61,215 (2006). The order accepted and suspended Platte's filing to be effective December 20, 2006, subject to the outcome of the technical conference.

² Parties filing initial comments include Platte; Continental Resources, Inc. and Banner Pipeline Company, LLC (Continental); EAP Energy Services, L.P. (EAP); EnCana Crude Oil Marketing (EnCana); Flint Hills Resources, Canada, L.P. and Flint Hills Resources, L.P. (Flint Hills); National Cooperative Refinery Association (NCRA); Northern Alliance of Independent Producers (Northern Alliance); and Suncor Energy Marketing Inc. and Suncor Energy [U.S.A.] (Suncor). Parties filing reply comments include Platte, Continental, Encana, Flint Hills, Frontier, NCRA, and Suncor.

Motions to Intervene Out of Time

3. The following parties filed motions to intervene out of time: EnCana, EAP, NCRA, Flint Hills, and ConocoPhillips. No party opposed the motions, and the Commission will grant them. Allowing these parties to intervene at this stage of the proceedings will not delay or disrupt the proceedings or cause any prejudice to or burden on the other parties. These intervenors must accept the record as it exists as of the date of this order.

Background and Proposed Supplement No. 7

4. Platte's tariff contains a prorationing provision (Item No. 13 of its Rules and Regulations Tariff, FERC No. 1456) that allocates capacity each month based on each shipper's nomination as a percentage of available capacity. In 1997, Platte began requiring shippers either to ship or pay for 95 percent of their "binding nominations" once prorationing is declared for a given month. However, Platte asserts that changes in circumstances have rendered its existing nominations-based prorationing provisions susceptible to gamesmanship and artificially inflated nominations.

5. Platte lists the following characteristics of its system:

- A. Platte operates in tandem with Express Pipeline LLC and Express Pipeline (Express) in an integrated system extending from Hardisty, Alberta, on the Enbridge mainline, to Wood River, Illinois, a major refinery location and pipeline hub.
- B. Platte has interconnections with other pipelines at Casper and Guernsey, Wyoming; at Holdrege, Nebraska; and at Wood River, Illinois.
- C. Platte is not directly connected to any petroleum fields at its origins or to any refineries at its destinations. Platte receives a wide range of petroleum types from pipelines and trucks and delivers to several downstream pipelines.
- D. Platte's capacity from Casper to Guernsey is approximately 163,000 barrels per day (bpd). Platte's capacity from Guernsey to eastern destinations is approximately 143,000 bpd. Actual capacity may vary, usually lower, due to the shipment of heavier petroleum types or maintenance work.
- E. Between 1996 and November 2005, Platte was never subject to prorationing.
- F. The Platte segment most likely to become subject to prorationing is between Guernsey and Holdrege. Between Casper and Guernsey, Platte's capacity is at its highest, and substantial volumes flowing from Express and other sources at Casper are delivered at Guernsey for further transportation to refineries in the

Cheyenne and Denver areas. At Guernsey, Platte also receives substantial additional volumes for delivery downstream.

6. Platte states that, in 2004, it received an average of 60,000 bpd from Express for transportation east of Guernsey and less than 20,000 bpd of domestic production, for a total of approximately 80,000 bpd or a 56-percent load factor. Platte further explains that, in 2005, after a significant expansion by Express (from 172,000 bpd to 280,000 bpd), Platte received an average of 100,000 bpd from Express for delivery east of Guernsey and approximately 30,000 bpd of domestic production, for an average of 130,000 bpd or a 91-percent load factor.

7. However, continues Platte, at the end of 2005, delivery patterns to its markets changed significantly due to a variety of circumstances, including refinery turnarounds and other outages, increasing domestic production, and overnominations by many PADD IV³ and Canadian shippers. Platte also observes that certain industry projects have increased demand for its capacity, including the expansion of Canadian oil sands production and delivery into PADD IV and PADD II.⁴ Specifically, Platte states that nominations from domestic and Canadian origins climbed from a level approximately equal to its capacity through November 2005 to levels of up to 200 percent or more of pipeline capacity since that time.

8. Platte asserts that its data establish the following key facts:

A. Platte has been in prorationing since December 2005.

B. Following the onset of prorationing, shipper nominations surged upward to as much as 300 percent (domestic) or 210 percent (Canadian) of pre-prorationing levels.⁵

³ PADD: Petroleum Administration for Defense Districts. PADD IV (Rocky Mountain) includes Colorado, Idaho, Montana, Utah, and Wyoming.

⁴ PADD II (Midwest) includes Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, Ohio, Oklahoma, Tennessee, and Wisconsin.

⁵ Platte contends that these nomination levels do not reflect the volumes the shippers intend to ship, but instead reflect their efforts to manage their capacity allocations by inflating nominations in anticipation of prorationing. Platte Pipe Line Company, August 4, 2006 Initial Post-Technical Conference Comments at Attachment D, ¶ 6 (Verified Statement of Reynold Hinger); Attachment E, ¶ 6 (Verified Statement of Rob Garner).

- C. Prorationing was not exacerbated by Canadian nominations.⁶
- D. Nominations since December 2005 ex-Guernsey have been at levels of up to twice Platte's capacity.

9. Platte states that it began prorationing in December 2005 at a level of nine percent and that prorationing steadily increased in the following months to 16.6 percent, 32 percent, 57 percent, and 53 percent, respectively. As a result, Platte states that its shippers began to request historically-based prorationing; therefore, it proposed two options to the shippers, one of which received considerable support.

10. Platte states that the provisions of Supplement No. 7 reflect the more popular option, which allocates capacity among New Shippers and Historic Shippers⁷ using a rolling six-month historical volume average. Platte defines New Shippers as those moving injection volumes in four or fewer months of the six months used in the historical calculation. Under Platte's proposal, a New Shipper would remain in that status until it had shipped volumes in at least five of the six consecutive months used in calculating the historical period for any particular month and if the pipeline segment has not required prorationing for a minimum of one month. Supplement No. 7 also allocates 10 percent of available capacity to New Shippers, with any individual New Shipper limited to a maximum of three percent of capacity. Additionally, Supplement No. 7 provides that unused capacity that is allocated to Historic Shippers but not used will be re-allocated among all shippers, both Historic and New.

11. As proposed, the prorationing calculation for June 2006 would have been based on the six-month period from November 2005 through April 2006. Platte intended the new methodology to be effective on an interim basis for three months (June through August 2006) to allow for further review and refinement with shippers. However, in the May 19, 2006 Order, the Commission accepted and suspended Supplement No. 7 to be effective December 20, 2006. The Commission expressed concern about the retroactive nature of the period during which shippers could establish Historic Shipper status; therefore, the Commission determined that the seven-month suspension period would give shippers notice and a sufficient opportunity to develop shipment histories.⁸

⁶ Platte Pipe Line Company, August 4, 2006 Initial Post-Technical Conference Comments at Attachment B, p. 11 (Chart, *Express Canada PADD IV Nominations (Pre-Proration)*).

⁷ Platte defines Historic Shippers as shippers other than New Shippers.

⁸ *Platte Pipe Line Co.*, 115 FERC ¶ 61,215, at P 30-31 (2006).

12. According to Platte, the current 95-percent “ship or pay” provision applicable during prorationing has not been effective because it imposes a relatively small penalty. Thus Platte contends that historically-based prorationing will help prevent further gamesmanship by shippers who now may be trying to build artificial throughput positions in anticipation of the new prorationing methodology.

Revised Proposal

13. After the technical conference, in an August 1, 2006 filing, Platte amended its proposed prorationing procedure to permit New Shippers to become Historic Shippers even during periods of prorationing. Specifically, Platte proposed changes to provide that shippers that do not qualify as Historic Shippers may transition to that status for allocation purposes once they have shipped a minimum of five of the six consecutive months used to calculate the six-month rolling period for determining historic volumes.⁹ Platte also modified its proposal to provide that, when a New Shipper injects volumes during five consecutive months of the six-month historical period, in the month when the New Shipper transitions to a Historic Shipper status, that shipper will receive a prorated share of space based on the average of its five months’ shipments, rather than on the basis of five-sixths of the six-month average.

14. On August 14, 2006, Platte filed additional comments in response to feedback from its shippers addressing the August 1, 2006 revision to the proposal. Platte stated that the shippers suggested revising the New Shipper definition to reduce the amount of capacity allocated to New Shippers. While Platte did not propose to reduce the capacity allocated to New Shippers, it stated that it would not oppose a Commission-imposed requirement to do so.

15. Platte suggested, however, that the Commission should modify its proposal by implementing additional provisions that would limit shippers’ ability to expand their capacity shares through the creation of New Shipper affiliates, the assignment of capacity, or similar steps, and Platte stated that it had circulated language among its shippers that would address this issue. Platte suggested that parties comment on the language and another option that would combine the historic volumes of affiliates for purposes of calculating allocations under the proposed tariffs. The suggested new paragraph 11, section viii is as follows:

⁹ Platte Pipe Line Company August 1, 2006 Filing, Attachment A, p. 4, section 11.ii.

viii. Shipper Affiliates

- a. Any Company (not currently shipping on the system) seeking Approved Shipper Status with the Carrier in order to become a New Shipper will be required to provide certification from responsible Company Officials that applicant is not an affiliate of any existing Shipper on the Express or Platte Pipeline systems.
- b. Pipeline capacity allocated to any Shipper may not be assigned to another Shipper. Carrier may require written assurances from responsible Company Officials of Shippers that this provision has not been violated. In the event that such provision is violated or written assurances cannot be provided, the allocated pipeline capacity for all Shippers involved in the violation shall be reduced by the amount of unauthorized capacity obtained (or the Carrier's estimate thereof) for the current month and the next five months of proration. Transfers on Batches-in-Transit will be accepted in the normal manner.
- c. Pipeline capacity allocated to any Shipper may be utilized by that Shipper only to transport petroleum from all receipt points in accordance with the tariff, upstream of the prorated pipeline segment. Nomination changes in receipt point will be accepted to the extent that capacity in the prorated pipeline segment is not affected.

Discussion

16. Platte maintains that it cannot resolve the existing prorationing problem by policing its shippers, and it emphasizes that no one single apportionment scheme can satisfy everyone. Platte asks the Commission to accept Platte's proposed Supplement No. 7 to FERC No. 1456, as modified by the August 1, 2006 and August 14, 2006 letters, to become effective at the end of the suspension period on December 20, 2006, although Platte states that it would not oppose Commission establishment of an earlier effective date. In determining whether the proposed prorationing methodology is reasonable and not unduly discriminatory, Platte contends that the Commission must consider the manner of shipper use, the role that Platte plays in the transportation system, and the mechanics of the nomination and verification procedures.

17. The Commission conditionally accepts Platte's proposed Supplement No. 7 to FERC Tariff No. 1456, contingent upon Platte's filing a new tariff supplement consistent with the discussion below within 15 days of the date of issuance of this order, to be effective as of December 20, 2006.

A. Platte's Proposed Historically-based Prorationing Methodology

1. Platte's Comments

18. Platte contends that it cannot correct the problems with the nominations-based methodology by expanded verification powers, weightier penalties, or more vigorous enforcement. For example, Platte states that, while the relevant tariff provisions grant it the right to verify that a nominating shipper has adequate supplies, a shipper with significant resources can inflate its nominations and still meet the verification test. However, as long as a shipper can tender or take away the amounts nominated, Platte maintains that there is no tariff violation. Platte also states that it has no real means of identifying which shippers are nominating air barrels, *i.e.*, are inflating their nominations, and that its role is not that of an investigative agency.

19. Platte acknowledges that pipelines connected to producing fields might be able to rely on state production records to verify volumes, but Platte emphasizes that it is not directly connected to producing fields or even to the originating pipelines. In any event, Platte points out that state production records are not available in a timely manner. Platte submits that, because it is a bridge pipeline, major shippers nominating out of Hardisty to Wood River can easily demonstrate the ability to move volumes equal to their inflated nominations both to Platte from their origins and from Platte at Wood River. Further, argues Platte, a production-based verification scheme generally would be based on past production, making it effectively similar to a historically-based prorationing methodology.

20. Platte emphasizes that the Commission has accepted prorationing policies based on historical volumes for other pipelines.¹⁰ Moreover, Platte contends that it is appropriate for a pipeline's tariff to provide capacity to shippers that have used the pipeline consistently and continue to rely on it.¹¹ While Platte admits that the historic volume method is less "dynamic" than the nominations approach, Platte argues that the historic volume method allows for changes in Historic Shippers' shares over time as New Shippers become Historic Shippers. In addition, Platte explains that its proposal allows it to redistribute capacity percentages gradually because, when the 10-percent of capacity set aside for New Shippers is underutilized, it will be reallocated, as will unused capacity that was allocated to Historic Shippers.

¹⁰ Platte cites *Explorer Pipeline Co.*, 87 FERC ¶ 61,374, at p. 62,387 n.14 (1999) (*Explorer*); *SFPP, L.P.*, 86 FERC ¶ 61,022, at p. 61,115 (1999) (*SFPP*); *Total Petroleum, Inc. v. Citgo Products Pipeline*, 76 FERC ¶ 61,164, at p. 61,947 (1996) (*Citgo*).

¹¹ Platte cites *ConocoPhillips Transportation Alaska, Inc.*, 112 FERC ¶ 61,213, at P 28 (2005) (*ConocoPhillips*) ("Although the prorationing policy rewards shipper loyalty, the Commission reiterates that it is not unduly discriminatory, as all have an equal opportunity to become loyal shippers." *Id.* P 19).

21. Platte denies that the historical approach would favor any of its affiliates. However, Platte argues that shippers could use their own affiliates to game the system. Platte states that the proposal it circulated on August 14, 2006, would prevent the use of affiliates or capacity assignments to circumvent the prorationing process.

22. Finally, while Platte recognizes that the Commission imposed the seven-month suspension period to provide all shippers with sufficient notice of the pending implementation of the historically-based prorationing policy, Platte states that it would not oppose lifting the suspension before December 20, 2006, if the Commission so orders.

2. Intervenors' Comments

23. EnCana states that the Commission has made it clear in *ConocoPhillips* and other cases that historically-based prorationing policies are not discriminatory or otherwise unlawful under the Interstate Commerce Act (ICA).¹² EAP, Suncor, Flint Hills, ConocoPhillips, and EnCana generally support Platte's proposal as the most workable solution to the capacity allocation problem, although they differ on various aspects of the revised proposal. NCRA asks the Commission to initiate an investigation of over-nominations and prevent such actions from occurring in the future. Continental opposes Platte's proposed historically-based prorationing methodology, instead offering its own alternative based on state conservation principles, which is discussed below. Frontier criticizes the proposal, but would support it reluctantly with certain modifications.

24. Specifically, Frontier disagrees that the current prorationing system is broken, contending that the current nominations-based policy is the most dynamic methodology and allows non-discriminatory, non-preferential access to all shippers, consistent with the ICA. Frontier maintains that Platte could make minor changes to the existing policy, including changes to the verification process, enforcement of good-faith nominations, adoption of volume penalties, or requiring an officer of the company to submit a nomination at the time of prorationing. Frontier submits that it is Platte's responsibility to make commercially reasonable efforts to enforce all of the rules and regulations in its tariff. Frontier also contends that Platte's prediction that the current policy will spiral out of control has not proven to be true. In fact, continues Frontier, the Guernsey, Wyoming crude oil pricing differentials have improved substantially. Further, states Frontier, to the extent that over-nominations have occurred, Platte's own actions in changing the prorationing policy likely have been a significant cause. However, to the extent that the Commission permits Platte to implement historic prorationing, Frontier supports Platte's proposed change to paragraph 11. iv of its prorationing policy, which provides that Platte will base the allocation for a shipper in transition to Historic Shipper status on its average

¹² EnCana cites *ConocoPhillips Transportation Alaska, Inc.*, 112 FERC ¶ 61,213 (2005); *Total Petroleum, Inc. v. Citgo Products Pipeline*, 76 FERC ¶ 61,164 (1996).

monthly injection volumes received during the five consecutive months preceding the month in which nominations are due, rather than five-sixths of the six-month average.

25. Continental contends that the unduly discriminatory nature of Platte's proposal has not been cured by changing the definition of a New Shipper. Continental states that it would be considered a Historic Shipper if it makes shipments, no matter how small, in five of six months. In fact, states Continental, it is now shipping small volumes so that it can be considered a Historic Shipper, but this will fix its future access to capacity at a low level that does not reflect its past, present, or future needs.

26. Continental also suggests that the existing prorationing situation is a result of Kinder Morgan Canada, Inc.'s (Kinder Morgan) expansion of the Express system without providing for adequate takeaway capacity on Platte. Continental argues that Platte's proposal will create greater problems because it will benefit only the existing shippers that currently account for 80 percent of Platte's capacity. Moreover, Continental asserts that the proposal would serve Platte's broader affiliate interests. Specifically, Continental contends that, by fixing favored access for shipments from Express, Platte will facilitate Kinder Morgan's corporate marketing strategy to transport crude oil and synthetic production from Alberta for sale in U.S. markets. Further, Continental states that, while Platte's most recent proposal would prohibit outright assignment of capacity, it will not restrain the use of a myriad of other arrangements that can be devised by motivated shippers.

27. In contrast, EnCana submits that failure to adopt Platte's proposal will undermine the future of the Platte system because the predictions of decreased production in the Rocky Mountain area mean that the future feedstock source will be Canadian crude oil. EnCana reasons that restricting access to Canadian production now will result in the construction of new alternative infrastructure to transport Canadian crude oil to other markets.

28. NCRA, ConocoPhillips, Frontier, and EnCana emphasize their past and intended future reliance on Platte's system and contend that any new prorationing policy should recognize such reliance. EnCana asserts that shippers without refining capacity in PADD IV do not have the flexibility to handle prorationing. In addition, NCRA contends that, during periods of constrained capacity, Platte should only accept crude oil for shipment and no other products.

29. Continental opposes the use of an allocation methodology to reward steady shippers, arguing that all shippers will provide the same per-barrel revenue to the pipeline. Continental further contends that rewarding steady shippers is irrational because it bases allocations solely on the identity of the party that happens to be the shipper during the initial base period and disregards the reliance interests and contributions of the producers whose production has been shipped steadily on Platte, even though they may not have been the nominal shippers.

30. Continental states that Commission enforcement of Platte's common carrier obligations is vital to the functioning of the crude oil marketplace and to providing continuing incentives for independent producers to invest in crude oil production.¹³ However, Continental acknowledges that a long-term solution to the infrastructure problem will be the construction of additional pipeline capacity. ConocoPhillips also argues that consistent access to transportation capacity is necessary to foster new crude oil production, to avoid the shut-in of existing production, and to provide a more reliable foundation for planning and investment.

31. Despite its opposition to Platte's proposal, Continental argues that if the Commission does accept the proposal, it should modify it in two respects. First, states Continental, the Commission should require the inclusion of emergency relief procedures to allow continued access to Platte for producers with enhanced recovery projects that otherwise would be curtailed or shut in, resulting in irreparable loss of resources. Second, Continental asserts that any priority based on actual historic use of the system should recognize and protect not only the refiner-shippers, but also the producers whose crude oil production was used to establish the priority access to capacity. EnCana also asserts that parties should be credited for historical shipments made under another shipper's name because such transactions are not assignments of capacity, but rather consist of a shipper using its Platte capacity to ship its own crude oil and then selling that production at a downstream point to an entity such as NCRA.

32. EnCana, Frontier, and Suncor contend that terms such as "affiliate" or "assign" are not defined, and the significance of Section 11 viii.c is not clear. EnCana claims that Platte's proposed language is too expansive because it would preclude an affiliate of an existing shipper from achieving Approved Shipper status, disallow any assignments of an existing shipper's capacity to both affiliates and non-affiliates, and permit capacity to be used only by the shipper to which capacity is allocated. EnCana and Flint Hills maintain that such restrictions would unduly burden the marketplace because many affiliates now allocate space to one another, which provides benefits to the affiliates, including avoiding administrative hassles (such as import/export burdens), permitting them to source their crude from various places, and serving as the basis for future planning. Flint Hills asserts that the current practice of allowing shipper affiliates to allocate space to each other causes no harm. Additionally, Flint Hills suggests that the proposed language may unduly obstruct potential New Shippers from gaining Historic Shipper status and interfere with industry consolidations and asset transactions.

¹³ Continental states that, in natural gas curtailment cases, the Commission, acting under parallel provisions of the Natural Gas Act (NGA), suspended and reviewed curtailment plans filed by the pipelines, and following such review and hearing, modified the filed plans or imposed a different plan devised by the Commission.

33. Flint Hills proposes certain changes to Platte's proposed shipper affiliate language. Flint Hills asserts that its revisions would prevent an affiliate that is not already a shipper from becoming a shipper unless the allocated space it intends to use, plus the combined allocated space of all its other shipper affiliates, is no greater than the total, amalgamated allocation of all shipper affiliates based on their historical nominations. Further, to avoid the possibility of repeated filings to address the proposed language, Flint Hills suggests that the Commission order Platte to incorporate certain principles that Flint Hills believes will resolve the affiliate issue.

34. EnCana supports Flint Hills' proposed revisions with one additional revision that would except from the assignment restriction those situations in which a shipper is exiting the business. Specifically, if a shipper on Platte sells substantially all of its crude oil assets, EnCana contends that the purchaser should be entitled to that shipper's capacity allocation and status on Platte. EnCana proposes to add a new paragraph 4 to read as follows:

In the event a Shipper exits the crude oil business by selling substantially all of its crude oil assets, then the Shipper may assign its pipeline capacity to the purchaser(s) of such assets, and the purchaser(s) of such assets shall be entitled to the capacity and historical status associated with the purchased assets.

35. Suncor does not object to Platte's proposal to combine historic volumes of affiliates in calculating capacity allocations. However, Suncor asserts that a mandatory aggregation of existing affiliate capacity allocations is largely unnecessary. Additionally, Suncor opposes any averaging of capacity allocations to existing shipper affiliates. Suncor states that it has been working in reliance on the May 19, 2006 Order to establish a pattern of nominations and deliveries that reflects Suncor's typical need for pipeline capacity, and in doing so, has submitted all nominations under one company name so as to avoid a duplication of nominations. According to Suncor, if Platte were to sum the six months of shipments for each affiliate and allocate the sum to one of them, the result would be as Suncor intends. However, if Platte averages the six months of historical shipments for each affiliate and allocates it to one of the affiliates, Suncor asserts that the process would reduce the total capacity of the affiliates by one-half.

36. Continental contends that only Platte and its large shippers know how much capacity is likely to be controlled by each shipper or how the shippers will use their capacity, and even the public does not know the identities of all the shippers. Continental states that Platte is withholding the necessary information on grounds of confidentiality, but without the information, the Commission has no basis for approving the proposal.¹⁴

¹⁴ Continental cites *State of North Carolina v. FERC*, 584 F.2d 1003, 1014-15 (D.C. Cir. 1982) (holding that a filed curtailment plan could not be found lawful under the NGA without information about the impact of the plan).

37. Continental claims that the Commission previously stated that a prorationing plan must be evaluated in light of the circumstances specific to the pipeline's operations.¹⁵ Continental argues that the facts in *ConocoPhillips*¹⁶ distinguish it from the instant case. Continental states that ConocoPhillips is the owner of an undivided, separately-tariffed interest in the Trans Alaska Pipeline System (TAPS) along with several other owners with capacity that is also separately tariffed and marketed. Thus, states Continental, there is competition for sales of transportation service and capacity among multiple owners in the giant TAPS pipeline. Continental acknowledges that the ConocoPhillips' tariff provided for prorationing on the basis of recent historical use, which the Commission found appropriate for creating incentives for steady and loyal use of the TAPS capacity. However, Continental states that TAPS itself apparently was not capacity-constrained, and shippers had the ability to deal directly with ConocoPhillips or other TAPS owners.

38. Continental further asserts that, in the cases of *ConocoPhillips* and *Explorer*, the pipelines' capacity was underutilized, so the pipelines were trying to create incentives to encourage shippers to use capacity and there were no captive producers. Continental also claims that the Commission determined that *Explorer* lacked market power. Moreover, Continental contends that *SFPP* is not relevant here because *SFPP*'s tariff expressly allowed new shippers and existing shippers to base their nominations on their new or increased needs for capacity. Finally, Continental argues that, in *Citgo*, the Commission did not discuss the merits of the challenged plan, the circumstances under which it was being implemented, or the effects of the plan on *Citgo*'s shippers, instead setting the plan for hearing. Similarly, asserts Continental, the Commission should conduct a hearing to determine whether *Platte*'s proposal or some alternative, such as Continental's conservation-based plan, would be appropriate.

39. EAP fears that the historic base period established by the May 19, 2006 Order will encourage parties to game the system prior to the December 20, 2006 effective date. Therefore, EAP urges the Commission to choose a more representative period, such as the six-month period prior to May 20, 2006, as *Platte* originally proposed. Continental and *NCRA* offer similar suggestions. EAP, *EnCana*, and *Flint Hills* also ask the Commission to lift the seven-month suspension prior to its expiration. In contrast, however, *Suncor* states that it has confirmed that *Platte* does not intend the August 1, 2006 revision to modify the December 20, 2006 effective date, and on that basis, *Suncor* supports the proposal.

40. *Frontier* opposes shortening the suspension period, arguing that the Commission instead should order an additional six-month suspension once *Platte* submits its final prorationing policy to accommodate shippers that now see a need to establish a historical

¹⁵ Continental cites *Mid-America Pipeline Company, LLC*, 106 FERC ¶ 61,094, at p. 61,336 (2004).

¹⁶ 112 FERC ¶ 61,213 (1995).

pattern of shipments because of the recent changes in Platte's proposal. However, EnCana opposes an additional six-month suspension period, arguing that Frontier has not demonstrated that shippers have been unaware of the need to become consistent, historic shippers on the Platte system.

3. Commission Analysis

41. The Commission conditionally accepts Platte's Supplement No. 7 to FERC No. 1456 to be effective December 20, 2006. However, within 15 days of the date of issuance of this order, Platte must file a new supplement consistent with the discussion in this order to be effective as of December 20, 2006. The Commission did not lift the suspension early because, as it determined in the May 19, 2006 Order, the full suspension period was necessary to allow all prospective shippers an adequate period in which to establish their shipping histories. With the full seven-month suspension, it is unnecessary to impose an additional six-month period after the effective date to allow shippers additional time to establish their volume histories. Additionally, the Commission will not establish an investigation and hearing. The numerous filings in this proceeding have afforded the Commission ample evidence on which to base its decision.

42. The Commission acknowledges that there is no single prorationing policy that will satisfy all of the competing interests in this case, though there could be a number of different methods that might be appropriate for the Platte system. The Commission also recognizes that additional capacity on Platte's system is likely the most effective means of alleviating the prorationing difficulties Platte has experienced, but the Commission does not have statutory authority to require an expansion of Platte's capacity. Accordingly, the Commission must determine only if Platte's proposed historically-based prorationing policy is just and reasonable and not unduly discriminatory.

43. The Commission previously permitted pipelines to adopt historically-based prorationing methodologies. For example, the *Explorer*, *SFPP*, and *Citgo* cases recognize the existence of such prorationing methodologies for those pipelines.

44. In *Explorer*, the Commission stated that "Explorer uses an historical-based proration methodology, under which access to the pipeline falls to shippers with movements made over the entire year period versus shippers that choose to ship only during peak periods."¹⁷ In *SFPP*, the pipeline described its prorationing policy as "allocate[ing] capacity among shippers in times of constraint in proportion to their prior twelve-month average, and that the 'demonstrated need' standard is intended to assure that new shippers do not displace existing shippers without adequately justifying their need for capacity."¹⁸ In the *Citgo* case, the Commission did not set for hearing the merits

¹⁷ *Explorer Pipeline Co.*, 87 FERC ¶ 61,374, at p. 62,387 n.14 (1999).

¹⁸ *SFPP, L.P.*, 86 FERC ¶ 61,022, at p. 61,115 (1999).

of Citgo's plan, as claimed by Continental, but rather only the question of whether Citgo properly applied its prorationing policy.¹⁹

45. In *ConocoPhillips*, the Commission dismissed a complaint against the carrier's implementation of a prorationing policy based on historical shipments over a rolling 12-14 month period. ConocoPhillips' policy established Regular Shippers and New Shippers, and the carrier allocated to New Shippers no less than five percent of the available capacity in any month to permit the New Shippers to obtain service and establish historical usage patterns. ConocoPhillips explained that the historical methodology rewarded shippers for their loyalty by protecting their historic usage patterns when the line was in proration due to increased demand, while at the same time protecting the carrier by encouraging consistent nominations and giving shippers incentives to continue to ship during periods of reduced demand. In addition, the Commission also cited the other decisions discussed above in approving of the use of historical volume-based allocations.²⁰

46. In the instant case, Platte has demonstrated that the rolling historically-based prorationing methodology will permit changes in the shipper mix and their entitlements over time after the methodology becomes effective on December 20, 2006. New Shippers have access to the 10-percent set-aside capacity each month. As they continue to ship on Platte's system, they have the opportunity to become Historic Shippers. It is not practical, nor is Platte required, to look beyond its shippers for the identities of the owners of the underlying production. The fact that shippers may not be able to move the volumes they wish to move on Platte's capacity-constrained system does not violate the common carrier obligation to provide service, which requires that carriers provide transportation service upon reasonable request therefor.²¹ However, the Commission finds merit to the modifications proposed by Platte that would allow New Shippers to become Historic Shippers even during periods of prorationing and would limit the ability of shippers to game the system through the use of affiliates.

47. The Commission rejects the allegations that Platte is concealing the identities of its shippers and that, absent such information, the Commission cannot assess the impact of the methodology. As Platte points out, its major shippers have identified themselves with

¹⁹ *Total Petroleum, Inc. v. Citgo Products Pipeline*, 76 FERC ¶ 61,164 (1996).

²⁰ *ConocoPhillips Transportation Alaska, Inc.*, 112 FERC ¶ 61,213 (2005).

²¹ See ICA section 1(4), 49 App. U.S.C. § 1(4) (1988).

their support of Platte's proposal. However, their specific volume history is highly-sensitive market information and need not be disclosed.²²

48. Certain parties have asked the Commission to require consideration by Platte of the shippers' past and expected future reliance on Platte to move their volumes. In some cases, the shippers have cited expenditures for facilities based on their expectations or their desire for some preference based on emergencies related to types of production. The policy proposed by Platte does give consideration to past volumes shipped on its system, but the Commission will not require Platte to accommodate these shippers' speculations concerning future levels of production volumes. The Commission is satisfied that the historically-based prorationing methodology proposed by Platte and modified by this order is reasonable in that it will afford all existing and potential shippers the ability to increase their volumes. As the Commission stated above, the fact that all shippers cannot access the full amount of capacity they wish during periods of prorationing does not render the prorationing methodology unjust and unreasonable. While it is true that shippers, whether New or Historic, provide the same per-barrel revenue to the pipeline and that the owner of the production may not be the nominal shipper, that does not warrant unduly preferential treatment of one potential shipper over another, including the establishment of an "emergency" provision that bases capacity entitlement on production types or violates the common carrier obligations.

49. The Commission finds that the clarifications and additional provisions sought by certain intervenors have merit. Platte should define the terms "affiliate" and "assign." However, the Commission rejects as unnecessary the additional modifications proposed by Flint Hills concerning the shipper affiliate language. On the other hand, the Commission agrees that it is appropriate to allow shippers exiting the business to assign their capacity on Platte's system to the purchaser of the business. EnCana's proposed additional language appropriately provides for that situation.

50. Suncor has asked that Platte confirm that its intention is to transition any Historic Shipper that fails to ship any volumes in two or more of six consecutive months back to New Shipper status. The Commission rejects this request, finding that Platte's proposed revision to its proposal adequately addresses this concern.

²² See 49 App. U.S.C. § 15(13) (1988). Section 15(13) makes it unlawful for any common carrier knowingly to disclose without a shipper's or consignee's consent any shipper information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered to the carrier for transportation, which information may be used to the detriment or prejudice of the shipper or consignee, or which may improperly disclose the shipper's or consignee's business transactions to a competitor.

B. The Set-Aside Percentage for New Shippers

1. Platte's Proposal

51. Platte states that its analysis of shipment patterns for shippers fitting the New Shipper profile supports the reasonableness of the proposed 10-percent set-aside. Platte also points out that other pipeline systems have “new shipper” set-asides of 10 percent or less.²³ Further, Platte asserts that the three-percent maximum percentage for individual shippers is reasonable because it is within the 10-percent set-aside for New Shippers. According to Platte, it intends this limitation to control the potential for gaming by New Shippers, although Platte observes that its records show only two instances of shippers that would have qualified as New Shippers exceeding this limit. Platte does not propose to reduce the set-aside percentage as some intervenors request, although it states that it would not oppose such a reduction if the Commission were to require it.

2. Intervenors' Comments

52. NCRA supports the 10-percent set-aside of available capacity for New Shippers. Flint Hills, EnCana, and EAP support reducing the allocation to New Shippers to five percent. EAP states that, given the August 1, 2006 revisions, which would allow New Shippers to become Historic Shippers during periods of proration, reducing the New Shipper percentage to five percent more accurately reflects the percentage of New Shippers historically using the line.

53. Suncor also supports reducing the set-aside to five percent. Suncor states that, whether a shipper remains a New Shipper or becomes a Historic Shipper, that shipper will be limited to a maximum allocated capacity of three percent of available capacity on the pipeline system, or approximately 4,200 bpd, unless some Historic Shipper makes the unlikely decision to relinquish its previously-established historical capacity. Suncor states that, by reducing the aggregate New Shipper capacity allocation to five percent, when New Shippers do transition into Historic Shipper status, their aggregate transition volumes will be lower and the erosion of existing Historic Shippers will be limited to a maximum level of erosion of five percent every six months.

54. In contrast, Frontier argues that the proposed 10-percent New Shipper set-aside should be maintained or even increased to at least 15 percent. Frontier states that Platte's recent amendment allowing New Shippers to become Historic Shippers even during periods of prorationing is positive and removes one of the discriminatory effects on New Shippers. Nevertheless, reiterates Frontier, if Historic Shippers continue to use their full allocations, the system will not even allow Historic Shippers to increase their capacity beyond their existing levels. In response, EnCana asserts that Frontier fails to support this proposal.

²³ Platte cites, *e.g.*, Rocky Mountain Pipeline System LLC, Supplement No. 4 to FERC Tariff No. 15, filed February 28, 2003.

55. Frontier also suggests that Platte could enhance fair competition by removing the three-percent cap for any one New Shipper so New Shippers could build more economically viable space. Frontier maintains that confining a New Shipper to three percent will mean that, even if a New Shipper can become a Historic Shipper, the shipper's history will reflect only this artificially-depressed volume.

3. Commission Analysis

56. The Commission will not reduce the proposed 10-percent allocation reserved for New Shippers under Platte's proposal. The Commission finds that, in the current circumstances, the 10-percent set-aside is just and reasonable because it provides an opportunity for a greater number of shippers to attain Historic Shipper status, but at the same time, it provides sufficient protection for Historic Shippers. They will retain access to 90 percent of Platte's capacity, with the possibility of access to more capacity if New Shippers do not utilize the entire 10-percent set-aside. A larger set-aside would not provide an appropriate balance between these competing interests.

57. The Commission also finds that the three-percent cap applicable to an individual New Shipper is acceptable. Frontier fails to demonstrate that another limit would be just and reasonable. Platte can, of course, propose a change to either percentage after gaining experience under this prorationing program.

C. Continental's Proposed Alternative Prorationing Methodology

1. Continental's Comments

58. Continental argues the conservation authorities of producing states have developed priorities for production based on the need to control or prioritize production to prevent reservoir damage, to avoid waste, and to protect the correlative rights of producers. According to Continental, when a Commission-approved pipeline prorationing methodology creates production patterns at variance with the state-imposed conservation patterns, conservation objectives are undermined, and waste occurs. In Continental's view, neither Platte's existing nominations-based system nor the proposed historical use-based prorationing methodology is in the public interest.²⁴ Continental asserts that the Commission should declare Platte's proposal unlawful and order Platte to implement a new plan that would not undermine the public interest in maximizing resource recovery or cause the waste of resources or damage to correlative rights.

59. Continental offers an alternative plan based on state conservation priorities. Continental also requests an expedited hearing under ICA section 15(7) to determine the lawful prorationing plan that will be followed thereafter. Finally, Continental states that,

²⁴ Continental states that a not-unduly-discriminatory prorationing plan must include reasonable distinctions among shippers to take account of differing circumstances as did the natural gas curtailment cases of the 1970s.

if the Commission believes it should also open a complaint docket to consider Continental's plan, then Continental asks the Commission to consider its protest, as supplemented by its post-technical conference comments, as a formal complaint.

2. Other Parties' Comments

60. Platte, EnCana, EAP, NCRA, and Suncor emphasize that the only proposal lawfully before the Commission in this proceeding is Platte's revised proposal to implement historically-based prorationing, and the Commission's responsibility is to determine whether that proposal is just and reasonable and not unduly discriminatory. Platte explains that the Commission reviews a carrier's proposed tariff change under ICA section 15(7) and accepts the proposal if the carrier justifies it. Platte points out that the fundamental purpose of the ICA is to prohibit unlawful discrimination among shippers, and there is no legal basis for distinguishing among shippers on the basis of relative need or processes of production.

61. Platte offers a number of specific reasons why the Commission should dismiss Continental's proposal, including the following: (1) this proceeding clearly was commenced as a section 15(7) investigation in which the sole question is whether Platte has justified a change to its tariff, not consideration of a completely unrelated shipper proposal; (2) Continental's alternative request for treatment as a complaint fails, particularly because its filings fall far short of the requirements for compliance with Rule 206;²⁵ (3) Continental provides no legal or factual support for its proposal under the ICA, citing instead precedents under the very different NGA; (4) the proposal would discriminate unduly among shippers of the same commodity based on the method of production; (5) the proposal would require the Commission to use state law as a basis for a fundamentally federal regulatory plan; (6) the proposal would place the Commission in an untenable role as an industrial policy maker, favoring different regions and types of production, as well as inappropriately involving Platte as arbiter of production; and (7) the proposal raises broad and unanswered practical and policy questions, including the impact on other pipelines' prorationing policies.

3. Commission Analysis

62. The Commission denies Continental's request that it reject Platte's proposed historically-based prorationing methodology and adopt instead Continental's proposed conservation-based prorationing methodology. Further, the Commission denies Continental's alternative request that its proposal and related comments be treated as a complaint. Continental's pleadings in this proceeding fall far short of meeting the Commission's regulations establishing the requirements for a complaint.²⁶

²⁵ 18 C.F.R. § 385.206 (2006).

²⁶ 18 C.F.R. §§ 343.2(c)(3), 385.206 (2006).

63. Continental has failed to cite any ICA precedents that support its proposal to implement a prorationing methodology based on state conservation priorities. In fact, no such precedents exist, and NGA precedents are neither controlling nor persuasive in the instant case. The purpose of oil pipeline regulation under the ICA is to prevent undue discrimination among those seeking transportation; it is not to promote or give any preference to certain types of oil production. The ICA does not regulate the production of crude oil or other commodities that are transported via oil pipelines. Further, as the other parties have pointed out, Continental's proposed conservation-based prorationing policy would lead the Commission into areas far beyond its ICA jurisdiction, such as making distinctions between certain domestic crude oil production methods and crude oil produced in Canada by other types of methods.

64. In *Amoco Pipeline Co. (Amoco)*,²⁷ the Commission made it clear that, in applying the provisions of the ICA, it is not bound by the provisions of the NGA or similar regulatory acts:

Although the cases cited by Amoco were decided under the Federal Power Act (FPA), the Natural Gas Act (NGA), and the Communications Act of 1934 (FCA), Amoco asserts that the Commission must be guided by these decisions because the jurisdictional provisions of those three acts are virtually identical to the jurisdictional provisions of the ICA. . . .

[W]hile the ICA and the NGA both apply to the movement of hydrocarbons through underground pipeline systems, the two acts differ considerably in purpose and scope. . . .²⁸

65. In *Amoco*, the Commission also reviewed judicial decisions recognizing the similarities of the NGA, FPA, and FCA, but the Commission emphasized that the courts uniformly have recognized the more limited nature of the ICA. The Commission summarized its discussion as follows:

Accordingly, the Commission is not required to interpret the ICA in light of these other regulatory acts. While the basic jurisdictional provisions of the NGA, FPA, and FCA are quite similar to that of the ICA, this alone will not cause us to give deference to cases decided under those acts. Amoco fails to acknowledge that the courts have found that the FPA, NGA, and FCA differ notably from the ICA in the extent of regulatory control they establish.²⁹

²⁷ 67 FERC ¶ 61,378 (1994).

²⁸ *Id.* at 62,295-96 (footnotes omitted).

²⁹ *Id.* at 62,296.

66. In the instant case, Continental likewise fails to acknowledge the more limited nature of the Commission's ICA jurisdiction over oil pipelines as compared to its jurisdiction over natural gas pipelines under the NGA. Simply put, Continental's proposal would require the Commission to assume the role of assessing the relative merits of various types of oil production methods, a role never intended by Congress. It would also impose on Platte a number of unreasonably cumbersome administrative duties and expenses to monitor Continental's proposed shipping priorities. The ICA requires a pipeline to avoid discrimination in allowing shippers access to its facilities, but it does not require the pipeline to make the types of distinctions among prospective shippers that Continental proposes.

The Commission orders:

(A) Platte's Supplement No. 7 to its FERC No. 1456 is conditionally accepted to be effective December 20, 2006.

(B) Within 15 days of the date of issuance of this order, Platte must file a new tariff supplement consistent with the provisions of this order to be effective as of December 20, 2006.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.