

120 FERC ¶ 61,197
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enbridge Pipelines (North Dakota) LLC

Docket No. IS07-412-000

ORDER ACCEPTING TARIFF

(Issued August 30, 2007)

1. On August 1, 2007, Enbridge Pipelines (North Dakota) LLC (Enbridge North Dakota) filed FERC No. 52 canceling FERC No. 47¹ and implementing revisions to its prorationing procedures. Enbridge North Dakota states that the revisions are designed to aid in resolving disputes relating to its existing prorationing policy and the effects of that policy on current and new shippers before an expansion of the system (Phase 5 expansion) comes on line. Enbridge North Dakota requests that FERC No. 52 become effective September 1, 2007, so that it will govern shipper nominations in September 2007 for transportation during October 2007.

2. Certain shippers protest FERC No. 52, arguing that it would perpetuate distortions in the current prorationing policy caused by a limitation that Enbridge North Dakota imposed as of March 1, 2007, and that FERC No. 52 was inconsistent with Commission precedent. As discussed below, the Commission accepts FERC No. 52 to become effective September 1, 2007.

Background

3. Enbridge North Dakota states that it owns a 950-mile common carrier pipeline that currently transports approximately 90,000 barrels per day (bpd) of crude oil from the Williston Basin oil fields in eastern Montana and western North Dakota to Clearbrook, Minnesota, where the pipeline interconnects with the Lakehead and Minnesota Pipeline systems that transport the crude oil to the upper Midwest and eastern Canada. Enbridge North Dakota further states that the Phase 5 expansion will increase the mainline capacity of the line into Clearbrook, Minnesota, to approximately 110,000 bpd by late 2007.

¹ Enbridge North Dakota filed FERC No. 47 to comply with the conditions the Commission imposed when it accepted FERC No. 46. *Enbridge Pipelines (North Dakota) LLC*, 118 FERC ¶ 61,162 (2007).

4. Enbridge North Dakota explains that the Commission previously accepted certain changes to the pipeline's prorationing policy intended to address increasing capacity demands on the line. According to Enbridge North Dakota, the changes included limiting the nominations to the physical capacity of the pipeline and adding a penalty for shippers that, except in force majeure situations, ship less than 95 percent of the volume allocated to them through the nomination and prorationing process.² However, Enbridge North Dakota states that those changes have failed to eliminate the over-nominations on the system. Enbridge North Dakota also points out that it recently met with shippers and the Commission staff to address concerns with the current prorationing policy and to obtain suggestions for improving it. Enbridge North Dakota states that, following the meeting, it circulated a proposed revised prorationing policy, which most shippers found acceptable.

5. Enbridge North Dakota notes that some commenters suggested changes to the prorationing policy that appeared to be inconsistent with the Commission's order in *Platte Pipe Line Company (Platte)*,³ which barred that pipeline from looking back over a prior six-month period to establish Historic Shipper status. Enbridge North Dakota further states that other suggestions appeared to be tilted in favor of one class of shippers over another or gave insufficient weight to the existing historical prorationing policy that the pipeline has followed since 2005. Enbridge North Dakota maintains that FERC No. 52 represents a fair policy that balances the needs and interests of all shippers to the extent possible.

Enbridge North Dakota's Proposal

6. Enbridge North Dakota states that FERC No. 52 amends section 65 of its tariff that addresses the prorationing of pipeline capacity. Enbridge North Dakota proposes to revise its existing historically-based policy by amending the definition of a shipper's "Average Monthly Volume" (AMV) beginning with nominations made in September 2007 (*i.e.*, after the new tariff becomes effective). Enbridge North Dakota explains that the AMV for nominations made during September 2007 for shipments in October 2007 will, for that one month, be based on the allocations effective in the previous month under the existing prorationing policy established in FERC No. 47. However, continues Enbridge North Dakota, beginning with nominations made in October 2007 for November 2007 shipments (and for all subsequent months), the AMV will be calculated using actual shipments for a rolling period beginning in September 2007 and continuing up through and including actual shipments for the month occurring two months prior to

² Enbridge North Dakota cites *Enbridge Pipelines (North Dakota) LLC*, 118 FERC ¶ 61,162 (2007).

³ 115 FERC ¶ 61,125, at P 30-31 (2006).

the month for which AMV is being calculated (*i.e.*, October 2008 AMV would include September 2007 to August 2008 actuals), until at least one year of actual historical shipments is available (which would occur when September 2008 nominations for October 2008 shipments are made). Thereafter, explains Enbridge North Dakota, the AMV will be calculated on a cumulative rolling basis of one year's actual shipments.

7. Additionally, Enbridge North Dakota states that FERC No. 52 amends the definition of "Regular Shipper" so that, beginning in September 2007, any shipper that was a "Regular Shipper" under FERC No. 47 will continue to be a "Regular Shipper" under FERC No. 52. However, Enbridge North Dakota explains that, beginning with the September 2007 nominations, all those old and new "Regular Shippers" will be prorated based on 100 percent of their AMV up to 90 percent of the pipeline's Available Capacity for the line segment being prorated. According to Enbridge North Dakota, "New Shippers" on the pipeline (meaning those that begin shipping after September 1, 2007) will be allocated up to 10 percent of the total Available Capacity for the line segment being prorated, but no more than 2.5 percent of the total Available Capacity. With respect to any remaining unallocated Available Capacity, Enbridge North Dakota states that it will allocate such capacity to "Regular Shippers" and "New Shippers" based on their proportionate shares of the nominations not accepted in the prior steps.

8. Enbridge North Dakota argues that the revised prorationing policy will be fair to all shippers because it effectively takes a snapshot of today's shipper allocations and preserves the status of existing shippers as "Regular Shippers," while it also reserves space for future "New Shippers" on the line. Although the proposed tariff does not specifically address the ongoing Phase 5 expansion, Enbridge North Dakota affirms that it will continue to operate in the same manner once the expansion space becomes available. In effect, continues Enbridge North Dakota, this provides a means for both "Regular Shippers" (old and new) and "New Shippers" to have a fair opportunity to nominate for the increased capacity that will be created by the Phase 5 expansion.

9. Finally, Enbridge North Dakota states that FERC No. 52 makes another change to respond to concerns identified at the shipper meeting. Specifically, Enbridge North Dakota states that it proposes to revise the penalty provision applicable when shippers fail to ship 95 percent of their apportionments. The revised penalty will apply when shippers ship less than 90 percent of their apportionments, which affords them a greater ability to accommodate temporary problems on the line without incurring the over-nomination penalty.

Interventions, Protest, and Answers

10. Texon L.P. (Texon), Nexen Marketing U.S.A. Inc. (Nexen) and Flint Hills Resources, LP (Flint Hills) intervened. Texon and Flint Hills filed comments in support of FERC No. 52. However, Flint Hills expresses continuing concern about the potential

for inflated nominations that may undermine the efficacy of the proposed new policy, and Flint Hills contends that FERC No. 52 does not address this problem. Flint Hills maintains that Enbridge North Dakota proposes to eliminate the provisions of current Item 65(c) that are designed to discourage fraudulent nominations by affiliates or subsidiaries of shippers. Flint Hills asks the Commission to make it clear that FERC No. 52 will not permit allocation devices, schemes, or arrangements to increase capacity allocations through the use of affiliates or subsidiaries.

11. ConocoPhillips Company (ConocoPhillips), Continental Resources, Inc. (Continental), Encore Acquisition Company (Encore), and Marathon Oil Company (Marathon) (collectively, Producer Shippers) protest FERC No. 52. They state that, in the aggregate, they have crude oil production of more than 100,000 bpd in the area served by the Enbridge North Dakota system.

12. Producer Shippers argue that the proposed prorationing policy is unjust, unreasonable, and discriminatory because it perpetuates distortions in the prorationing process caused by the limitation on nominations established in FERC Nos. 46/47 as of March 1, 2007. According to Producer Shippers, for this reason, the September 2007 “snapshot” of allocations on which Enbridge North Dakota proposes to base future allocations will not accurately reflect the relative needs of shipping parties. Instead, they contend that allocations for September 2007 will be distorted by the current flawed system that will artificially restrict nominations by crude oil producers, gatherers, and refiners with specific transportation needs and instead will facilitate nominations by speculators attempting to capture the market value of limited line space.

13. Producer Shippers further assert that the proposed prorationing system does not provide shippers with a fair prospective opportunity to establish a meaningful and representative history of shipment volumes as required by *Platte*. Producer Shippers state that Enbridge North Dakota proposes to use a historical 12-month period to determine the AMV of shippers for the new base month of September 2007. Producer Shippers contend that the system implemented in *Platte* gave shippers the unrestricted ability to nominate their full transportation needs during a prospective base period, while in contrast, Enbridge North Dakota proposes here to base future allocations on a past period during which shippers could not nominate their full volume requirements because of the segment capacity cap on nominations.

14. Producer Shippers explain that FERC No. 47 imposed a restriction that limited the volume of each nomination to the physical capacity of the pipeline segment through which the nominated volumes would be transported. Further, they continue, FERC

No. 47 provides that nominations exceeding segment capacity are automatically reduced to the applicable segment capacity limit before the prorationing process occurs. Producer Shippers argue that this policy has reduced dramatically the capacity allocated to them.⁴

15. Producer Shippers assert that the steep reduction in volumes allocated to them on the Enbridge North Dakota system cannot be explained by increased oil production. Rather, they claim that the only plausible explanation is that new parties have entered the nomination process and have obtained allocations for barrels previously controlled and shipped by other parties. Based on their knowledge of the local market, Producer Shippers state that some of these new shipper parties do not have any production, gathering, or refining assets. In effect then, maintain Producer Shippers, the volumes currently transported through the Enbridge North Dakota system are composed primarily of volumes generated by Producer Shippers but reallocated to third-party arbitragers that add no value to the production, processing, or availability of crude oil to new or existing markets.

16. Producer Shippers point out that the Commission required Platte to provide shippers prior notice that volumes shipped during a specific time period would be the basis for future allocations and to allow the shippers a fair opportunity to establish a shipment history.⁵ Producer Shippers explain that the Commission suspended the proposed policy for seven months, thereby creating an open opportunity for shippers to establish their usage patterns.⁶ Producer Shippers state that the Commission found that Platte was:

applying a retroactive historical period to establish Historical Shipper status, thus denying all shippers, both existing and prospective, an equal, nondiscriminatory opportunity to establish a pattern of historical shipments before the historical shipment based prorationing policy takes effect. This creates an undue preference, whether intended or not, on behalf of those who would be defined as Historical Shippers based on shipments during this retroactive six-month historic period. . . . The policy, however, has a retroactive application notice of which has not been provided, thus rendering the retroactive aspects unjust and unreasonable.⁷

⁴ Producer Shippers attach to their protest verified statements by an employee of each company in support of the protest.

⁵ Producer Shippers cite *Platte Pipe Line Co.*, 115 FERC ¶ 61,215, at P 29-31 (2006).

⁶ *Id.* at P 30.

⁷ *Id.*

17. Producer Shippers submit that Enbridge North Dakota proposes the same flawed retroactive use of a historical period to determine future allocations. They claim that nominations and allocations established during the critical base month of September 2007 will be based on the 12-month historical base period under the existing arbitrary prorationing system. They further contend that they have not had sufficient opportunity to establish a pattern of shipments during the historical period.

18. Producer Shippers also point out that the prorationing policy approved in *Platte* contained no segment capacity limit or any similar constraint on nominations.⁸ Here, by contrast, they assert that the nominations and allocations for the September 2007 base month proposed by Enbridge North Dakota will not reflect the true transportation needs or shipment history of the shipper parties because of the arbitrary segment capacity limit on nominations imposed by FERC No. 47. Moreover, Producer Shippers state that the prorationing policy approved in *Platte* also contained safeguards to “limit the ability of shippers to game the system,”⁹ while the distorted September 2007 base month proposed by Enbridge North Dakota will discriminate against the traditional shippers, which are producers, gatherers, and refiners with physical needs to transport crude oil versus parties with no production or refining assets that seek to game the system by capturing the market value of limited line space.

19. Producer Shippers contend that there are reasonable alternatives to Enbridge North Dakota’s proposal. For example, they suggest that a prorationing policy consistent with *Platte* would provide prior notice of a reasonable prospective base period and immediate elimination of the segment capacity limit on nominations. Producer Shippers ask the Commission to reject the new prorationing system proposed in FERC No. 52 as unjust, unreasonable, and discriminatory. In the alternative, they ask the Commission to suspend FERC No. 52 for the maximum seven-month statutory period and establish a technical conference to develop a just, reasonable, and non-discriminatory alternative prorationing system.¹⁰

20. Enbridge North Dakota filed an answer. Enbridge North Dakota emphasizes its discussion with its shippers and contends that the changes proposed in FERC No. 52 were acceptable to most of its shippers and are reasonably fair and neutral. Citing its planned expansions of the system, Enbridge North Dakota points out that increased crude oil production and the physical capacity of the line are not the only factors that cause prorationing. Enbridge North Dakota states that shippers frequently nominate greater

⁸ See *Platte Pipe Line Co.*, Supplement 10 to FERC No. 1456, Item 13b.

⁹ *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 46 (2006).

¹⁰ Producer Shippers cite *Platte Pipe Line Co.*, 115 FERC ¶ 61,213, at P 29 (2006).

volumes than they expect to use, knowing that (1) the capacity they are allocated will be less than the volumes they nominate and (2) if they receive greater allocations than they need, they are likely to be able to obtain additional crude oil from parties that have more crude oil than their allocated capacity.

21. Enbridge North Dakota explains that FERC No. 46 represented its first effort to alleviate the over-nomination problem by making two changes to its tariff. First, Enbridge North Dakota states that the tariff limited nominations to the capacity of the particular pipeline segment in question and provided that all such nominations would be reduced accordingly. Second, Enbridge North Dakota states that FERC No. 46 imposed a penalty on shippers that failed to ship 95 percent of their allocated volumes. Enbridge North Dakota emphasizes that only one shipper protested FERC No. 46, but that it did not challenge the decision to reduce nominations to the capacity limit of the pipeline.

22. Enbridge North Dakota explains that FERC Nos. 46 and 47 have not alleviated the need for prorationing in part because there has been a dramatic increase in the number of shippers seeking transportation on Enbridge North Dakota's system. For example, Enbridge North Dakota states that, in September 2006, only 14 shippers nominated volumes, while by the end of September 2007, it expects to have 29 shippers nominating volumes. Enbridge North Dakota observes that nearly all shippers are receiving smaller allocations than last year. However, Enbridge North Dakota questions Producer Shippers' claim that this increase is a result of the limit on nominations implemented in FERC Nos. 46 and 47. Enbridge North Dakota points out that other pipelines impose nominations limitations based on the physical capacity of the lines to be used for the transportation so that nominations in excess of the limitations are not good faith nominations.¹¹ According to Enbridge North Dakota, the general understanding behind these provisions is that a nomination in excess of pipeline capacity cannot be a good-faith tender because it could not be accommodated even if there were no other shippers in that month. Moreover, continues Enbridge North Dakota, in the absence of reasonable limitations, shippers might begin a fruitless escalation of nominations in an attempt to gain a temporary advantage.

23. Enbridge North Dakota also states that FERC No. 52 is consistent with *Platte*, in which the Commission rejected the pipeline's proposal to determine retroactively based historical levels. Enbridge North Dakota states that FERC No. 52 does not attempt to establish historical levels on the basis of a retroactive period. It emphasizes that it already has been using a historical prorationing policy and that all shippers have known

¹¹ Enbridge North Dakota cites ExxonMobil Pipeline Co., FERC No. 249 (Docket No. IS06-17-000) and FERC No. 254 (Docket No. IS06-194-000); MarkWest Michigan Pipeline Co., LLC, FERC No. 3 (Docket No. IS06-41-000); Chevron Pipe Line Co., Supplement 1 to FERC No. 1008 (Docket No. IS07-403-000).

since 2005 that their future allocations would be based on their AMVs. Enbridge North Dakota contends that FERC No. 52 carries over the existing definition of AMV by basing the October 2007 allocation (under the new system) on the September 2007 allocation (under the pre-existing system). Enbridge North Dakota asserts that there is no element of retroactivity to the transitional mechanism because it has not sought to create a new historical base period. Further, continues Enbridge North Dakota, unlike the *Platte* proposed policy, where the transition from a pro rata to a historical policy meant that existing shippers might not be considered Historical Shippers, all previous shippers on the Enbridge North Dakota system, including the Producer Shippers, who shipped prior to September 1, 2007, will have Regular Shipper status under FERC No. 52.

24. According to Enbridge North Dakota, the Producer Shippers' proposal would disrupt the continuation of the historical prorationing policy by basing the October 2007 apportionment on a pro rata allocation of nominations. Enbridge North Dakota argues that this would cause the Regular Shippers to see their historic AMVs eliminated and, because of the increase in new shippers on the system, many shippers could see a further erosion of their allocated volumes.

25. Enbridge North Dakota also responds to Flint Hills' claim that the new policy should contain a ban that would prevent affiliates of Regular Shippers from becoming New Shippers. Enbridge North Dakota points out that Item 65(b)(iii) of FERC No. 52 provides that no more than 2.5 percent of the total Available Capacity will be allocated to a New Shipper, including capacity allocated to any affiliate or subsidiary of the New Shipper.

26. Nexen and Texon filed supplemental comments in response to Producer Shippers' protest. Nexen emphasizes that FERC No. 52 resulted from discussions between Enbridge North Dakota and its shippers and represented an effort to accommodate the variety of interests. Nexen agrees that it is reasonable to limit the nominations for a particular segment to the capacity of that segment. However, even if Enbridge North Dakota improperly imposed such a limitation, both Nexen and Texon contend that Producer Shippers should have raised their objections at the time FERC No. 47 was implemented.

27. Nexen also criticizes the Producer Shippers' claim that FERC No. 52 favors speculators at the expense of certain producers. Nexen states that it is unaware of any such speculators on the Enbridge North Dakota system, although it suspects that Producer Shippers use that term to refer to crude oil marketers, which Nexen maintains facilitate the transportation of crude oil from a wide variety of sources and the delivery of the most

efficient slates of crude oil to refineries.¹² At any rate, continues Nexen, crude oil producers cannot be a preferred class of shipper because that would contravene the Interstate Commerce Act.¹³

28. Nexen agrees that Enbridge North Dakota's proposal is consistent with *Platte*. Nexen also points out that the pipeline's capacity will be expanded from 90,000 bpd to 110,000 bpd, and that a majority of the existing Regular Shippers on the pipeline supported that extension by agreeing to pay higher rates. Nexen further states that, at the time the expansion comes on line, New Shippers will be able to compete with Regular Shippers for a substantial portion of the expansion capacity, and Regular Shippers will be allocated 90 percent of their average shipments prior to the expansion, while New Shippers will be allocated 10 percent of the total post-expansion capacity of the line. At that point, continues Nexen, there will be capacity that has not yet been allocated, and this capacity will be allocated pro rata to all shippers, regardless of whether they are Regular or New Shippers. Finally, Nexen asserts that FERC No. 52 complies with *Platte* and other cases by reserving a percentage of total pipeline capacity (10 percent in this case) at all times for New Shippers.¹⁴

Commission Analysis

29. The Commission accepts FERC No. 52 to be effective September 1, 2007. It represents a reasonable accommodation of the competing interests of shippers seeking transportation on Enbridge North Dakota's pipeline system, which currently is prorated because it does not have the capacity to accept the total volume of crude oil that the shippers wish to tender. Producer Shippers have failed to persuade the Commission otherwise.

30. Producer Shippers' claim that FERC No. 52 perpetuates a flawed prorating policy lacks merit. They contend that the methodology bases future allocations on the past allocations of the shippers and does not reflect the true needs of producers, gatherers, and refiners. Producer Shippers argue that the restriction in FERC No. 47 that limits nominations to the physical capacity of the pipeline has created this distortion. On the contrary, the Commission finds it reasonable for Enbridge North Dakota to transition

¹² Nexen cites the Affidavit of Peter K. Ashton attached to its filing as Ex. A at ¶¶ 14-15.

¹³ Nexen cites 49 U.S.C. app. § 3(1) (1988). ("It shall be unlawful for any common carrier . . . to make . . . any undue or unreasonable preference . . . to any person . . . or any particular description of traffic, in any respect whatsoever. . .").

¹⁴ Nexen cites *Platte Pipe Line Co.*, 115 FERC ¶ 61,215, at P 32 (2006); *order following technical conference*, 117 FERC ¶ 61,296, at P 56-57 (2006).

from the current methodology established in FERC Nos. 46 and 47 by preserving the status of current Regular Shippers for purposes of the September 2007 allocation process for October shipments. Thereafter, the AMV of the Regular Shippers will be determined using a rolling period beginning in September 2007. New Shippers (those that begin shipping after September 1, 2007) will be allocated up to 10 percent of the total Available Capacity of the segment being prorated, but in no event will they be allocated more than 2.5 percent of the total Available Capacity of the pipeline. Capacity remaining available at the end of the monthly allocation process, if any, will be available to both Regular and New Shippers. It is significant as well that this prorationing policy will continue to apply when the Phase 5 expansion comes on-line. This is a reasonable policy that does not give an undue preference to any class of shippers -- whether such shippers are producers, refiners, marketers, or other types. Moreover, the Commission agrees that nominations that intentionally exceed the capacity of the pipeline are not good-faith nominations.

31. Producer Shippers attempt to distinguish the prorationing policy established in FERC No. 52 from the policy the Commission accepted in *Platte*. They assert that it does not provide shippers a fair prospective opportunity to establish a representative shipping history for purposes of determining future allocations. However, the Commission rejects this claim. First, only a single month of experience under FERC No. 47 will apply in calculating the allocations for October 2007. Thereafter, allocations will be determined on a rolling basis that will not be based on volumes allocated under FERC No. 47. Moreover, as the parties have pointed out, it is inappropriate and impermissible to attack the provisions of FERC Nos. 46/47 as Producer Shippers have done here -- upon the filing of a proposed successor tariff.

32. Producer Shippers are disingenuous in claiming lack of notice. The pipeline has been in proration for approximately two years, all parties agree that the number of shippers on the system has increased considerably, Enbridge North Dakota attempted to address the problem of over-nominations by means of FERC Nos. 46/47, there was a great deal of communication from the pipeline to its shippers (including the shipper meeting cited by Enbridge North Dakota), and FERC No. 52 was filed August 1, 2007 -- prior to the submission of nominations for September 2007 transportation. The Commission finds that these factors have given all shippers sufficient notice of the importance of establishing a shipping history. The fact that Producer Shippers have not been able to ship the total volumes they nominated does not alter this conclusion. For these reasons, the Commission will not suspend FERC No. 52 and schedule a technical conference, as requested by Producer Shippers.

33. The Commission further finds that it is reasonable for Enbridge North Dakota to reduce the threshold for assessing penalties. As Enbridge North Dakota stated, the reduced threshold will afford shippers the flexibility to accommodate temporary

problems without incurring penalties. Additionally, the Commission finds that FERC No. 52 adequately addresses the potential for abuse of the prorationing policy through the use of affiliates or subsidiaries.

The Commission orders:

FERC No. 52 is accepted to become effective September 1, 2007.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.