

122 FERC ¶ 61,196
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. IS07-412-001

ORDER ON REHEARING AND CLARIFICATION

(Issued March 4, 2008)

1. On September 18, 2007, ConocoPhillips Company, Continental Resources, Inc., Encore Acquisition Company, and Marathon Oil Company (collectively, Producer Shippers) filed a request for rehearing of the Order Accepting Tariff issued August 30, 2007 Order (August 30, 2008).¹ In that order, the Commission accepted a tariff (FERC No. 52) filed by Enbridge Pipelines (North Dakota) LLC (Enbridge North Dakota) to implement revisions to its prorationing policy.

2. On rehearing, the Producer Shippers contend that the Commission failed to recognize the extent to which the new prorationing methodology in Enbridge North Dakota's FERC No. 52 relies on volumes allocated under the prior prorationing methodology in the pipeline's FERC No. 47. Producer Shippers also assert that the Commission failed to recognize that the new prorationing system provides an undue preference for parties that were Regular Shippers under the provisions of FERC No. 47, resulting in undue discrimination against parties that were New Shippers under that tariff. As discussed below, the Commission denies rehearing and clarifies one aspect of the August 30, 2007 Order.

Background

A. The Enbridge North Dakota System

3. Enbridge North Dakota owns a 950-mile common carrier pipeline that transports crude oil from the Williston Basin oil fields in eastern Montana and western North

¹ *Enbridge Pipelines (North Dakota) LLC*, 120 FERC ¶ 61,197 (2007).

Dakota to Clearbrook, Minnesota, where the pipeline interconnects with the Lakehead and Minnesota Pipeline systems that further transport the crude oil to the upper Midwest and eastern Canada. Because of increasing demands for capacity on the system, Enbridge North Dakota has increased the capacity of the pipeline into Clearbrook from approximately 90,000 barrels per day (bpd) to approximately 110,000 bpd.

B. FERC No. 52

4. Enbridge North Dakota stated that previous Commission-approved changes to the pipeline's prorationing policy failed to eliminate the problem of over-nominations.² Therefore, Enbridge North Dakota proposed FERC No. 52 to revise the historically-based prorationing policy by amending the definition of a shipper's Average Monthly Volume (AMV). Specifically, FERC No. 52 provided that the AMV for nominations made during September 2007 for shipments in October 2007 would be based on the allocations in the previous month under the prorationing methodology established in FERC No. 47. Thereafter, beginning with nominations made in October 2007, for November 2007 shipments (and for all subsequent months), the AMV would be calculated based on actual shipments over a rolling period beginning in September 2007. Enbridge North Dakota explained that this calculation methodology would continue up through and including actual shipments for the month occurring two months prior to the month for which the AMV would be calculated until at least one year of actual historical shipments becomes available. Thereafter, continued Enbridge North Dakota, the AMV would be calculated on a cumulative rolling basis of one year's actual shipments.

5. Enbridge North Dakota also proposed to amend the definition of Regular Shipper so that, beginning in September 2007, any Regular Shipper under FERC No. 47 would continue to be a Regular Shipper under FERC No. 52. Additionally, Enbridge North Dakota proposed that any other shipper that had shipped on its system prior to September 2007 would be considered a Regular Shipper under the new tariff for purposes of nominations in September 2007 for October 2007 movements. Enbridge North Dakota stated that, beginning with the September 2007 nominations, all old and new Regular Shippers would 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 (those that began shipping after September 1, 2007) would be allocated up to 10 percent of the total Available Capacity for the line segment being prorated, with no more than 2.5 percent of the total Available Capacity awarded to an individual New Shipper. With respect to any remaining unallocated Available Capacity, Enbridge North Dakota proposed to allocate such capacity to Regular Shippers and New Shippers based on their proportionate shares of the nominations not accepted in the prior steps.

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

C. Producer Shippers' Protest

6. The Producer Shippers protested FERC No. 52, arguing that it perpetuated distortions in the prorationing process caused by the limitation on nominations established in FERC Nos. 46/47 as of March 1, 2007. They argued that the September 2007 “snapshot” of allocations on which Enbridge North Dakota proposed to base future allocations would not accurately reflect the relative needs of shipping parties. Instead, they contended, allocations for September 2007 would be distorted by the flawed system established in FERC No. 47.

7. Producer Shippers further claimed that the proposed prorationing system would not provide shippers with a fair prospective opportunity to establish a meaningful and representative history of shipment volumes as required by *Platte Pipe Line Co. (Platte)*.³ Producer Shippers maintained that the system implemented in *Platte* gave shippers the unrestricted ability to nominate their full transportation needs during a prospective base period, while in this case, Enbridge North Dakota proposed 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. Producer Shippers contended 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,⁴ so the Commission suspended the proposed policy for seven months, thereby creating an opportunity for shippers to establish their usage patterns.⁵

D. The August 30, 2007 Order

8. The Commission accepted FERC No. 52 to be effective September 1, 2007, rejecting the Producer Shippers' protest. The Commission found that FERC No. 52 represented a reasonable means of transitioning from the methodology established in FERC Nos. 46 and 47 because it preserved the status of current Regular Shippers for purposes of the September 2007 allocation process applicable to shipments in October 2007. The Commission also pointed out that the AMV of Regular Shippers would be determined thereafter using a rolling period beginning in September 2007. The Commission cited the 10 percent of total Available Capacity on the segment being prorated that would be allocated to New Shippers (those that began shipping after September 1, 2007) and the 2.5-percent limit of total Available Capacity for any single New Shipper. The Commission further recognized that the prorationing policy

³ 115 FERC ¶ 61,215 (2006).

⁴ *Id.* at P 29-31.

⁵ *Id.* at P 30.

established in FERC No. 52 would continue to apply after the expansion capacity came on line. Accordingly, the Commission concluded that FERC No. 52 established a reasonable policy that did not give undue preference to any class of shippers.⁶

9. The Commission also rejected the argument that its acceptance of FERC No. 52 would be inconsistent with its decision in *Platte* because it would not give shippers a sufficient prospective opportunity to establish a representative shipping history for the purpose of determining future allocations. According to the Commission, only a single month of experience under FERC No. 47 would be applied in calculating October 2007 allocations, and thereafter, the allocations would be based on a rolling basis that would not be based on experience under FERC No. 47. The Commission further emphasized that Producer Shippers' claims regarding FERC No. 47 represented an impermissible attack on that tariff. The Commission pointed out that Producer Shippers were disingenuous in claiming lack of notice because the pipeline had been in proration for approximately two years, and all parties acknowledged that the number of shippers on the system had increased considerably.⁷

Discussion

A. Request for Rehearing

10. Producer Shippers challenge the statement in the August 2007 Order that allocations after October 2007 would be "determined on a rolling basis that will not be based on volumes allocated under FERC No. 47." In fact, state Producer Shippers, allocations for September 2007 were determined under FERC No. 47, and those September allocations were to be used to determine AMVs for October 2007. After that point, continued Producer Shippers, the AMVs for November would be based on September shipments, and AMVs for December would be based on September-October shipments, etc. While they acknowledge that AMVs after October 2007 would be based on actual shipment history commencing as of September 2007, Producer Shippers contend that the rolling average of each shipper's monthly shipments would continue to be constrained by the allocation level established for September 2007 under Tariff No. 47.

11. Producer Shippers also challenge the statement in the August 2007 Order that the new prorationing system "does not give undue preference to any class of shippers." According to Producer Shippers, even if the new system treats producers, refiners, and

⁶ *Enbridge Pipelines (North Dakota) LLC*, 120 FERC ¶ 61,197, at P 29-30 (2007).

⁷ Although not relevant to the instant request for rehearing, the Commission also approved Enbridge North Dakota's proposal to revise the penalty provision so that it would apply when shippers shipped less than 90 percent of their apportionments.

marketers equally, it creates an undue preference for those parties that were Regular Shippers under FERC No. 47 and a corresponding undue discrimination against the parties that were New Shippers under that tariff. Producer Shippers reiterate that Regular Shippers received at least 90 percent of their respective AMVs under FERC No. 47, and New Shippers shared the remaining capacity. Producer Shippers assert that, under FERC No. 52, the undue preference in September 2007 for Regular Shippers under FERC No. 47 will be perpetuated in the allocations and shipments of those shippers in October 2007 and all subsequent months, thereby causing an ongoing discriminatory effect on the allocations to parties such as the Producer Shippers that were New Shippers under FERC No. 47.

B. Answers

12. Nexen Marketing U.S.A., Inc. (Nexen) filed a motion for leave to answer and an answer challenging the Producer Shippers' request for rehearing. Producer Shippers filed an answer to Nexen's answer, contending that Nexen has provided no basis for waiving the Commission's rules prohibiting answers to requests for rehearing.⁸ Pursuant to section 385.213(a)(2) of the Commission's regulations, the Commission declines to admit either answer. The answers have not provided any additional facts or arguments that the Commission did not consider in the August 2007 Order.

C. Commission Analysis

13. The Commission denies rehearing and clarifies the August 2007 Order. That order sufficiently addresses the two interrelated challenges that Producer Shippers raise on rehearing. Enbridge North Dakota's pipeline has been constrained for some time, and the pipeline's previous revision of its prorationing policy did not resolve the problem of over-nominations.

14. FERC No. 52 establishes a reasonable means of transitioning to a different prorationing methodology that will apply to the planned capacity expansion as well as the previously existing capacity. It is doubtful that any proposal would satisfy all of the competing interests that seek transportation on the pipeline. However, the Commission's role is merely to examine a proposal, consider the positions of affected parties, and determine whether the pipeline's proposal is a reasonable one that does not cause undue discrimination. As discussed in the August 2007 Order, the Commission is satisfied that FERC No. 52 represents a reasonable accommodation of the competing interests. While it does not treat all shippers in exactly the same fashion, the new prorationing methodology does not result in undue discrimination against any group of shippers.

⁸ Producer Shippers cite 18 C.F.R. §§ 385.213(a)(2) and 385.713(d)(1) (2007).

15. The fact that the September 2007 allocations for October 2007 gave effect to allocations under the previous allocation methodology does not render FERC No. 52 unreasonable. The Commission clarifies that, while subsequent allocations under FERC No. 52 will give some effect to the September 2007 allocations that were based in part on the prior allocation methodology, the effect of the September 2007 allocations will diminish as the shippers nominate and receive their allocations in subsequent months until one year of shipments under FERC No. 52 has occurred. The Commission affirms its conclusion that this is a reasonable transitional process.⁹

16. The Commission also affirms its conclusion that Enbridge North Dakota's proposal is not inconsistent with *Platte*. As the Commission pointed out, shippers were well aware that the system was constrained and had every reason to understand the importance of establishing shipping histories.¹⁰ No additional notice is required.

The Commission orders:

The Commission denies rehearing and clarifies the August 2007 Order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁹ *Enbridge Pipelines (North Dakota)*

LLC, 120 FERC ¶ 61,197, at P 30 (2007).

¹⁰ *Id.* P 31.