

the challenged provision concerning the transfer. Enbridge North Dakota filed a response to the protest.

4. As discussed below, the Commission rejects Supplement No. 2 to FERC No. 52 and accepts FERC No. 58 and Supplement No. 1 to FERC No. 58, subject to revision to remove the changes carried forward from the rejected Supplement No. 2, to be effective December 1, 2008.

Description of the Filings

5. In Docket No. IS09-13-000 (Supplement No. 2 to FERC No. 52), Enbridge North Dakota states that its tariff contains a prorating provision that allocates capacity to shippers when nominations exceed the available volume on the pipeline, but it does not include a means by which a shipper's capacity allocation can be transferred to another entity. Enbridge North Dakota states that it has received a request that the capacity of a shipper now in bankruptcy be transferred to the shipper's affiliate. Therefore, Enbridge North Dakota seeks a waiver to allow Supplement No. 2 to FERC No. 52 to be effective November 1, 2008.

6. In Docket No. IS09-12-000, Enbridge states that it seeks a revision to its prorating procedures in advance of an expansion of the line (Phase 6 expansion), which is the subject of an offer of settlement in Docket No. OR08-6-000.² Enbridge North Dakota states that, if the Commission approves FERC No. 58 to be effective December 1, 2008, it will govern nominations in December 2008 for transportation in January 2009. Enbridge North Dakota further states that FERC No. 58 cancels FERC No. 52 and brings forward the challenged provision concerning the transfer of historical allocation rights.

7. Enbridge North Dakota explains that it is a 950-mile common carrier oil pipeline that currently transports approximately 110,000 barrels per day (bpd) of crude oil from the Williston Basin oil fields in eastern Montana and western North Dakota to Clearbrook, Minnesota, where it interconnects with the Lakehead and Minnesota Pipeline systems transporting crude oil to the upper Midwest and eastern Canada. According to Enbridge North Dakota, the Phase 6 expansion will increase the pipeline's capacity by approximately 40,000 bpd into Minot, North Dakota, and approximately 51,000 bpd from Minot to Clearbrook.

² On October 20, 2008, the Commission issued a letter order accepting the Offer of Settlement, which authorizes Enbridge North Dakota to recover the costs of the Phase 6 expansion of capacity on its system.

8. Enbridge North Dakota cites previous Commission orders accepting changes to its prorationing policy to address increasing capacity demands on its system.³ However, Enbridge North Dakota states that shippers have raised concerns that the current prorationing policy unexpectedly favors New Shippers over Regular Shippers in the allocation process. Enbridge North Dakota further states that it formulated a proposal to make additional revisions to its prorationing policy and conducted a conference with its shippers to discuss its proposal. Enbridge North Dakota points out that no shippers opposed its proposal.

9. Enbridge North Dakota states that the primary change proposed here relates to the prorationing policy established in its Rule 65(b). According to Enbridge North Dakota, this change reduces the amount of the total Available Capacity available to each individual New Shipper during prorationing and revises the point in the process at which New Shippers share in residual capacity allocation. Enbridge North Dakota explains that, over the past year, as the number of Regular Shippers has increased, a Regular Shipper now may be allocated as little as 0.51 percent of the total system capacity in a given month, while the current prorationing rule allows a New Shipper to obtain as much as 2.5 percent of the Available Capacity starting from the first month the New Shipper nominates to the system and continuing for as long as the shipper remains in New Shipper status. To remedy this situation, Enbridge North Dakota states that the tariff revision limits each New Shipper to no more than one percent of total Available Capacity, but this cap can be exceeded if there is space available at the end of the allocation process that otherwise would go unused and if the New Shipper's original nomination has not been fully satisfied.

10. Enbridge North Dakota also states that the current prorationing policy has had the effect of allocating a disproportionate share of any expansion capacity to New Shippers rather than Regular Shippers. Accordingly, Enbridge North Dakota proposes to revise Rule 65(b)(iv) to provide that the residual capacity remaining after Regular Shippers have been allocated their Average Monthly Volumes and New Shippers have been allocated up to 10 percent of the Available Capacity will be apportioned on a pro rata basis among the Regular Shippers. However, continues Enbridge North Dakota, if Regular Shippers' nominations do not fill the residual capacity, any remaining Available Capacity will be allocated among all shippers, including New Shippers.

11. Enbridge North Dakota states that it also is proposing a technical change to Rule 65(e)(iv) to clarify who bears responsibility for resolving discrepancies between binding nominations made by shippers and information provided by a connecting facility.

³ *Enbridge Pipelines (North Dakota) LLC*, 118 FERC ¶ 61,162 (2007); *Enbridge Pipelines (North Dakota) LLC*, 120 FERC ¶ 61,197 (2007), *reh'g denied*, 122 FERC ¶ 61,196 (2008).

Enbridge North Dakota states that the proposed rule permits it to rely on the information provided by a connecting facility and requires the shipper to resolve any discrepancies in that information with the owner of the connecting facility within 30 days of the end of the month in which the transportation occurred.

12. In Docket No. IS09-13-000, Enbridge North Dakota proposes a new section 65B(f), which states as follows:

Prorated volumes allocated to a Shipper may not be assigned, conveyed, loaned, transferred to, or used in any manner by another Shipper. However, a Shipper's historical allocation rights may be transferred as an incident of the bona fide sale of the Shipper's business or to a successor to the Shipper's business by the operation of law, such as an executor or trustee in bankruptcy. In the event that the transferring Shipper chooses to become a Shipper on the system at some point in the future, they will be regarded as a New Shipper until such time as they meet the criteria to become a Regular Shipper.

This is the language brought forward in FERC No. 58 with the cancellation of FERC No. 52 by FERC No. 58.

Interventions, Protest, Comments, and Answer

13. Plains challenges the provision in Supplement 2 to FERC No. 52 and brought forward in FERC No. 58 that relates to the transfer of a shipper's historical allocation rights. Plains contends that it effectively permits a New Shipper access to capacity on Enbridge North Dakota's already capacity-constrained system, impermissibly creates a preference for a single affiliate of a shipper in bankruptcy, and in effect permits a shipper to dispose of capacity to another entity without being subject to any obligations imposed by the Interstate Commerce Act. Plains states that it has been a shipper on Enbridge North Dakota's pipeline since 2006 and that its shipments have been subject to prorationing.

14. Plains asserts that an existing provision of the pipeline's tariff that addresses the effect of a shipper's impaired financial condition by requiring the shipper to provide Financial Assurances for the payment of charges and costs, without which the pipeline may decline to accept shipments from the shipper. However, Plains maintains that the proposed provision is objectionable because it effectively vests in the shipper in bankruptcy the attributes of ownership of capacity with a right to transfer the capacity to a favored customer or an affiliate. Plains contends that the practical effect is that the shipper in bankruptcy holds the attributes of ownership of the capacity with a right to transfer the capacity to a favored customer or an affiliate, and the acquiring shipper could be permitted to offer transportation service without a tariff on file with the Commission. Finally, Plains argues that the provision is ambiguous in many respects, including how "business" is defined, why other shippers would not have an opportunity to acquire the

capacity, whether the Regular Shipper that “sells” the capacity will be able to re-acquire the capacity, and the effect on other current Regular Shippers.

15. SemCrude, L.P. (SemCrude) filed a motion to intervene and acknowledged that it is the shipper in bankruptcy. SemCrude states that it asked to transfer its accrued allocation capacity to an affiliate, SemCanada Crude Company (SemCanada). SemCrude further states that it continues to ship on Enbridge North Dakota’s system and that it has provided the financial assurances requested by the pipeline. SemCrude points out that SemCanada takes delivery of and title to SemCrude’s North Dakota shipped crude oil at Clearbrook, Minnesota, after which it ships the crude oil on Enbridge’s Lakehead Pipeline System to Chicago and eastern Canadian markets. According to SemCrude, with this combination, it and SemCanada provide the market for seven to eight small producers. In fact, continues SemCrude, since August 1, 2008, SemCanada has been the entity actually purchasing the approximately 7,000 bpd in the field because it could provide the security required by the producers, but then SemCrude had to acquire title to the volumes because it has the trucks necessary for gathering and terminals necessary for shipping.

16. SemCrude explains that, as a result of the bankruptcy, it needs to sell assets and generate money to flow to creditors, and the accrued allocation rights would form part of such assets. SemCrude points out that the Creditors’ Committee and the Bankruptcy Court have to approve the transfer of its capacity allocation rights and the sum to be paid for these rights. SemCrude further states that the transfer of its capacity allocation rights would result in the least disruption to current shipments of crude oil on the Enbridge North Dakota system because it would avoid the need for reallocating the 7,000 bpd into 200-bpd lots spread among a number of other Regular Shippers. In the alternative, continues SemCrude, the producers would all have to become New Shippers, which would increase already high crude oil prices to consumers.

17. Enbridge North Dakota filed a response to Plains’ protest, emphasizing that it is a neutral party and that it simply wants a provision to ensure that, if a shipper enters bankruptcy, it will be clear what will happen with that shipper’s allocation and transportation history on the pipeline. Enbridge North Dakota emphasizes that a shipper’s history does not guarantee any particular capacity allocation rights because no shipper can sell, assign, convey, loan, or transfer its history to another entity, but its proposal allows a transfer through a valid sale or by operation of law, such as in a bankruptcy proceeding. Enbridge North Dakota further states that, once the transfer of a shipper’s history has been made to another entity in accordance with the tariff rules, the original shipper would no longer have access to that history and would be returned to New Shipper status if it later sought to transport on the pipeline. Finally, Enbridge North Dakota maintains that the proposed change will not affect the history of any other shipper on the system, so there is no net effect on other shippers on its system.

Commission Analysis

18. The Commission will accept the unopposed provisions of FERC No. 58. The provisions revising the prorating policy to eliminate the unintended effect of favoring New Shippers over Regular Shippers represent a reasonable means of resolving the problems described by Enbridge North Dakota. Likewise, the proposed revision to clarify who bears responsibility for resolving discrepancies between binding nominations made by shippers and information provided by a connecting facility represents a reasonable means of establishing which party bears responsibility for resolving any discrepancies.

19. SemCrude has described the financial advantage it will gain by being able to transfer its shipping history on Enbridge North Dakota to its affiliate. However, neither it nor Enbridge North Dakota has addressed any of the allegations raised by Plains that the proposed provision creates an undue preference by entitling SemCrude's successor in interest to step into the shoes of SemCrude in terms of maintaining its history of shipments on Enbridge North Dakota, to the detriment of existing Regular Shippers on Enbridge North Dakota. Enbridge North Dakota, in fact, in its response to Plains, states that it is a neutral party in this proceeding and that, to the extent any matter specific to this particular bankruptcy is in question, it defers to the comments of SemCrude. It may be that there are advantages to and justifications for allowing the provision that Enbridge North Dakota proposes here, but in the presence of strong objections to it by Plains and the absence of any evidence in support, the Commission is unable to make that judgment. The Commission thus concludes that the existing record is insufficient to support proposed Supplement No. 2 to FERC No. 52 and section 65C(f) in FERC No. 58. Accordingly, the Commission rejects Supplement No. 2 to FERC No. 52 and proposed section 65C(f) in FERC No. 58, but without prejudice to Enbridge North Dakota filing a fully-supported proposal to add this provision to its tariff, and respond to the undue preference objections that have been raised.

The Commission orders:

(A) Supplement No. 2 to FERC No. 52 is rejected, as discussed in the body of this order.

(B) FERC No. 58 and Supplement No. 1 to FERC No. 58 are accepted for filing to be effective December 1, 2008, subject to revision as described in the body of this order.

(C) Within 10 days of the date of this order, Enbridge North Dakota must file a revised tariff sheet, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.