127 FERC ¶ 61,020
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 3, 2009

In Reply Refer To:
Enbridge Pipelines (Midla) L.L.C.
RP09-332-000

Enbridge Pipelines (Midla) L.L.C.
1100 Louisiana Street, Suite 3300
Houston, TX 77002

Attention: Cynthia A. Corcoran
Vice President, Regulatory Affairs

Reference: Order No. 712 Compliance Filing

Dear Ms. Corcoran:

1. On January 30, 2009, Enbridge Pipelines (Midla) L.L.C. (Enbridge) filed revised tariff sheets proposing modifications to its tariff to comply with the capacity release requirements promulgated by Order Nos. 712 and 712-A.[1] The tariff sheets listed in the Appendix are accepted effective March 1, 2009, subject to the conditions described below.

2. In Order Nos. 712 and 712-A, the Commission removed the maximum rate ceiling on capacity releases of one year or less, which take effect within one year after the pipeline is notified of the release. The Commission also modified its regulations in order to facilitate asset management arrangements (AMAs) by relaxing the Commission's prohibition on tying and on its bidding requirements for certain capacity releases. The Commission further clarified that its prohibition on tying does not apply to conditions associated with gas inventory held in storage for releases of firm storage capacity.

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[1] *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37,058 (June 30, 2008), FERC Stats. & Regs. ¶ 31,271 (2008) (Order No. 712), *order on reh'g,* Order No. 712-A, 73 Fed. Reg. 72,692 (December 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008) (Order No. 712-A).

Finally, the Commission waived its prohibition on tying and bidding requirements for capacity release made as part of state-approved retail access program. Enbridge proposes several changes to Section 4 of the General Terms and Conditions of its tariff to reflect the various changes in the capacity release regulations made by Order Nos. 712 and 712-A.

3. Public notice of Enbridge's filing was issued on February 4, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[2] Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[3] all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. Atmos Energy Corporation (Atmos) submitted comments. On February 27, 2009, the Interstate Natural Gas Association of America (INGAA) submitted comments out of time. On March 11, 2009, the American Gas Association (AGA) filed a response to INGAA's comments.

4. On February 26, 2009, Enbridge filed an answer to Atmos' Comments. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[4] prohibits an answer to a protest unless otherwise ordered by the decisional authority. However, the Commission finds good cause to accept Enbridge's answer because it will not delay the proceeding, may assist the Commission with the issues raised and will ensure a complete record. Therefore, Enbridge's answer is accepted.

5. The Commission finds that Enbridge's proposed revised tariff sheets are generally consistent with the Commission's capacity release policies and Order Nos. 712 and 712-A and are otherwise just and reasonable. Accordingly, the Commission accepts Enbridge's filing, effective March 1, 2009, subject to conditions as discussed below.

6. Atmos requests that the Commission require Enbridge to include provisions allowing the "flow-through" of discounts from releasing shippers to their asset managers. For example, Atmos states that it is unclear whether and to what extent Enbridge will permit a releasing shipper's asset manager to pay the same discounted usage and fuel rates that the pipeline provided to the releasing shipper. Atmos suggests that Enbridge should clarify (or propose) a policy allowing the asset manager/replacement shipper to receive the same discounted usage and fuel rates applicable to the releasing shipper,

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[2] 18 C.F.R. § 154.210 (2008).

[3] 18 C.F.R. § 385.214 (2008).

[4] 18 C.F.R. § 385.213(a)(2) (2008).

particularly since a general refusal to allow "pass-through" of such discounts would impede asset management transactions, contrary to Order Nos. 712 and 712-A.

7. In Enbridge's answer it argues that the Commission recently found that Order No. 712 did not modify the Commission's policy regarding the pass-through of usage charge discounts to replacement shippers.[5] Consequently, Enbridge asks the Commission to reject Atmos' comments as an impermissible attack on Order No. 712. It also requests that, if the Commission decides to take up the "flow-through" issue, it be addressed generically instead of on a pipeline by pipeline basis.

8. In its comments, INGAA argues that the Commission should not decide the issue of an asset manager's right to the same discounted or negotiated usage or fuel charge as the releasing shipper in the individual Order No. 712 compliance proceedings. Rather, INGAA asserts that the Commission should address these issues in a generic proceeding because they are of industry-wide scope and have been raised in numerous Order No. 712 compliance filings.

9. In its comments, AGA urges the Commission to act expeditiously to resolve these issues, regardless of whether it proceeds through a generic rulemaking or case-by-case adjudication, because continued regulatory uncertainty could discourage parties from entering into AMAs. AGA contends that releasing shippers should be permitted to pass through discounted or negotiated usage and fuel charges to asset managers or retail choice marketers, consistent with the goal of facilitating AMAs and retail choice programs.

10. The issue of whether a pipeline must provide an asset manager/replacement shipper the same discounted or negotiated usage and fuel rates as it has given the releasing shipper only arises to the extent that the pipeline has provided such discounts or negotiated rates to the releasing shipper. The Commission does not permit pipelines to offer discounts below their minimum rates, which are based on the variable costs allocated to the service to which the rate applies.[6] Therefore, a pipeline such as Enbridge using a Straight-Fixed Variable (SFV) rate design cannot discount its usage charges, because those usage charges only contain variable costs. The Commission has also held that pipelines may not discount their fuel retention rates, because fuel and lost and unaccounted for (LAUF) gas are variable costs.[7] Thus, the issue of the "flow-through" of

[5] Enbridge Answer at 2 (citing *Tennessee Gas Pipeline Co.*, 126 FERC ¶ 61,171, at P 17 (2009); *see also, Tres Palacios Gas Storage LLC*, 126 FERC ¶ 61,167, at P 13 (2009)).

[6] 18 C.F.R. § 284.10(c)(4)(ii) and (5)(ii)(A) (2008).

[7] *Mississippi River Transmission Corp.*, 98 FERC ¶ 61,119 (2002).

discounted usage and fuel charges to an asset manager/replacement shipper does not arise on Enbridge's system. However, pipelines with negotiated rate authority may enter into negotiated rate agreements which are not bounded by their tariff maximum and minimum rates. Enbridge has negotiated rate authority, and thus does have authority to enter into negotiated rate agreements providing for fuel retention rates (and usage charges) that vary from those in its tariff.

11. The Commission has held that the usage charge to be paid by the replacement shipper is a matter between the replacement shipper and the pipeline, and the releasing shipper cannot bind the pipeline to accept any particular usage charge from the replacement shipper. Therefore, the pipeline "generally should not be required to give the replacement shipper the same discount" of the usage charge that it gave the releasing shipper.[8] In *El Paso*, the Commission explained that:

> the discount in the usage charge negotiated between the releasing shipper and El Paso is related only to the contract between the releasing shipper and the pipeline and to the transportation services actually performed by El Paso for the releasing shipper under that contract and is not relevant to other contracts and services to other shippers, including replacement shippers. [9]

While pipelines are not subject to a blanket requirement that they must give replacement shippers the same usage charge discounts (or negotiated usage and fuel rates) given to the releasing shipper, pipelines are subject to the Commission's general policy that selective discounts must be given on a not unduly discriminatory basis to similarly situated shippers.[10] These same policies apply to negotiated usage and fuel charges.

12. Order No. 712 did not modify the Commission's existing policy concerning the pipeline's offering usage charge discounts to replacement shippers.[11] Nor did Order No. 712 address any issue concerning the offering of negotiated usage and fuel charges to replacement shippers. However, Order No. 712's modification of the Commission's regulations to facilitate AMAs does raise the following issues in this proceeding:

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[8] *El Paso Natural Gas Co*., 61 FERC ¶ 61,333, at p. 62,309 (1992) (*El Paso*).

[9] *Id.*

[10] *See Williston Basin Interstate Pipeline Co*., 85 FERC ¶ 61, 247, at p. 62,028-30 (1998), and cases cited, for a discussion of this policy.

[11] *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396, at P 21 (2008).

(1) whether it would be unduly discriminatory for Enbridge to deny an asset manager replacement shipper the same negotiated usage and fuel and LAUF charge that was provided to the releasing shipper, at least during periods when the asset manager is using the released capacity to satisfy the delivery or purchase obligation contained in the release to the asset manager; [12]

(2) if a negotiated rate agreement between Enbridge and the releasing shipper provides that the discount or negotiated rate is only applicable at certain specified receipt or delivery points as permitted by Commission policy,[13] should the asset manager/ replacement shipper's use of those points be considered to be within the usage contemplated by Enbridge when it granted the negotiated rate to the releasing shipper? For this reason, should Enbridge be required to offer the same negotiated rate to the asset manager/replacement shipper at those points, but not at any other point?

(3) whether Enbridge should be required to include in its tariff a provision concerning the circumstances under which it would provide similar negotiated usage and fuel charges to an asset manager/replacement shipper; or

(4) whether the circumstances of individual releases to asset managers are sufficiently case-specific that pipelines should be allowed to decide whether to grant negotiated usage and fuel and LAUF charges to the asset manager/replacement shipper on a case-by-case basis, subject to a general requirement of no undue discrimination.

13. Before deciding these issues, the Commission requires additional information from Enbridge, and will give the parties an opportunity to provide supplemental comments. In this regard, the Commission directs Enbridge to file the following information, within 30 days of the date of this order: (1) how many of Enbridge's existing firm shipper contracts include negotiated usage and fuel rates, (2) how many of any such contracts limit the negotiated rate to specific points, (3) a general description of how Enbridge intends to determine whether to grant negotiated usage and fuel charges to asset manager/replacement shippers, and (4) what factors it will consider in determining whether to grant such negotiated rates. Other parties may file comments within 20 days of the date of Enbridge's filing.

14. With respect to the request by INGAA and Enbridge that the Commission pursue these issues in a generic proceeding, the Commission will consider the need for such a

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[12] *See* § 284.8(h)(3) of the Commission's regulations, as revised by Order No. 712-A (defining a release to an asset manager).

[13] *Williston Basin Interstate Pipeline Co.*, 110 FERC ¶ 61,210, at P 5 and 22, *reh'g denied*, 112 FERC ¶ 61,038, at P 19 (2005).

proceeding after analyzing the parties' responses to the above request for information and comments concerning the specific circumstances on Enbridge's system.

By the direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

cc: Public File
All Parties

Appendix

Enbridge Pipelines (Midla) L.L.C.

FERC Gas Tariff, Fifth Revised Volume No. 1
Tariff Sheets to be Effective March 1, 2009, Subject to Conditions

Third Revised Sheet No. 111
Second Revised Sheet No. 112
Original Sheet No. 112A
First Revised Sheet No. 117
First Revised Sheet No. 118
First Revised Sheet No. 120