

128 FERC ¶ 61,089  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

July 27, 2009

In Reply Refer To:  
Enbridge Pipelines (Midla) L.L.C.  
Docket Nos. RP07-113-000  
RP07-113-001

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

Attention: Cynthia A. Corcoran  
FERC Chief Compliance Officer and Senior Counsel Specialist

Reference: Tariff Sheets Listing Non-conforming Agreements

Dear Ms. Corcoran:

1. On December 19, 2006, Enbridge Pipelines (Midla) L.L.C. (Midla) submitted for filing original and revised tariff sheets,<sup>1</sup> adding 40 currently effective potentially non-conforming service agreements to the list of non-conforming contracts in its FERC Gas tariff, Fifth Revised Volume No. 1. Midla also filed the non-conforming agreements listed in the tariff sheets for Commission review. Midla requests an effective date of January 18, 2007 for its tariff sheets. On January 18, 2007, the Commission issued an order<sup>2</sup> accepting Midla's December 19, 2006 filing subject to further review. The Commission also directed Midla to either file certain contracts which were referenced in its transmittal letter and were not made part of the filing or explain why these contracts were referenced but not included in the filing.

2. Upon further review of Midla's filing, the Commission accepts 39 of the 40 tendered contracts for filing, requires Midla to remove a material deviation from one contract or modify its tariff to offer such a provision subject to not unduly discriminatory conditions, and requires Midla to clarify its tariff in one other respect. The Commission

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<sup>1</sup> First Revised Sheet No. 190, Original Sheet Nos. 191 and 192, to FERC Gas Tariff, Fifth Revised Volume No. 1.

<sup>2</sup> Enbridge Pipelines (Midla) L.L.C., 118 FERC ¶ 61,022 (2007).

will also accept Midla's explanation filed on January 22, 2007 concerning why certain contracts referenced in its transmittal letter were not included in the December 19, 2006 filing. These determinations are discussed in detail below.

3. Midla states that it was acquired by Enbridge Energy Partners L.P. (Enbridge) on October 17, 2002. After the acquisition, Midla reviewed its existing service agreements to determine whether they deviated from its form of service agreement. Midla determined that most of its service agreements for firm and no-notice service<sup>3</sup> had Maximum Daily Quantities (MDQs) that differed, on a monthly or seasonal basis during the terms of the agreements. However, its tariff was silent with regard to whether a shipper's MDQ could vary either monthly or seasonally during each contract year. Therefore, on November 1, 2006, Midla filed to revise its tariff to clarify that a shipper's MDQ shall be a uniform quantity throughout the contract year, except that the pipeline may, on a not unduly discriminatory basis, agree to certain differing levels in a shipper's MDQ over specified periods. Midla also proposed to revise its form of service agreements to provide spaces to fill in either monthly or seasonal variations in MDQ. Midla also stated that it was reviewing its service agreements for other potentially non-conforming provisions and would file them with the Commission in the near future. On November 21, 2006, the Commission accepted the revised tariff sheets.<sup>4</sup>

4. The following month, Midla made the instant filing, submitting 40 agreements as potentially non-conforming. Midla states that all but one of these agreements was executed prior to the time Midla was purchased by Enbridge.

5. Midla filed 21 firm service agreements under Rate Schedule FTS (FTS Agreements) and 19 firm service agreements under Rate Schedule NNS (NNS Agreements). Midla also included a chart detailing the potential deviating provisions contained in each agreement, with a cross-reference that describes the potential deviating provision. Midla states that most of the FTS Agreements were entered into in 1993, when Midla was restructuring to comply with Order No. 636. Midla included in its filing redline versions of its FTS service agreements to compare them to the FTS *pro forma* agreement currently in effect. Midla notes that many of the changes appearing in redline are merely the result of the changes to the Rate Schedule FTS *pro forma* agreement over time.

6. Midla states that, similar to the FTS Agreements, most of the NNS Agreements were entered into in 1993. At that time, Midla held rights in the Hester Storage Field

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<sup>3</sup> Midla provides firm transportation service under Rate Schedules FTS and FTS-OSF, and no-notice service under Rate Schedule NNS.

<sup>4</sup> Unpublished Director Letter Order issued November 21, 2006 in Docket No. RP07-53-000.

which it used to provide NNS service. However, the Commission approved the abandonment of those rights in 1996,<sup>5</sup> and Midla no longer uses storage to provide NNS service. Because of these changes in the NNS service, Midla has substantially changed its NNS *pro forma* agreement since 1993. For this reason, Midla states that a redline comparison of the non-conforming NNS service agreements to the current NNS *pro forma* service agreement would show so many changes as to be unhelpful, and instead it has provided a redline comparison of those agreements to the *pro forma* service agreement in effect in 1993. Midla has also provided a description of the changes in the *pro forma* NNS service agreement since 1993.

7. Midla has also provided a matrix which identifies each potential non-conforming provision and a corresponding explanation of each provision. Each contract submitted by Midla contains several deviations from the existing *pro forma* service agreement. Midla asserts that the Commission has approved various non-conforming contracts in the past on the basis of the significant reliance interest that the contracting parties had in their long-standing contractual arrangements,<sup>6</sup> and it asks that the Commission do the same in this case.

8. Public notice of Midla's January 27, 2007 compliance filing was issued on February 1, 2007, allowing for protests to be filed as provided in section 154.210 of the Commission's regulations. No protests or adverse comments were filed.

9. Section 154.1(d) of the Commission's regulations requires the pipeline to file a contract which materially deviates from the pipeline's form of service agreement.<sup>7</sup> In *Columbia Gas Transmission Corporation*, issued on November 21, 2001,<sup>8</sup> the Commission clarified that a material deviation is any provision in a service agreement that: (1) goes beyond filling in the blank spaces with the appropriate information allowed

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<sup>5</sup> *Mid Louisiana Gas Company*, 76 FERC ¶ 61,213 (1996).

<sup>6</sup> *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at p. 62,010 (2001); *ANR Pipeline Co.*, 98 FERC ¶ 61,247, at p. 62,002 (2002).

<sup>7</sup> 18 CFR §154.1(d) (2008).

<sup>8</sup> *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001) (Columbia).

by the tariff; and (2) affects the substantive rights of the parties.<sup>9</sup> However, not all material deviations are impermissible. If the Commission finds that such deviation does not constitute a substantial risk of undue discrimination the Commission may permit the deviation.<sup>10</sup> Therefore, there are two general categories of material deviations: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination.

10. Midla has presented the Commission with original and revised tariff sheets, and non-conforming service agreements. The Commission has completed its review of the tariff sheets and service agreements. The Commission finds that most of the contractual provisions at issue here are not material deviations, and only one material deviation presents a substantial risk of undue discrimination, as more fully discussed below.<sup>11</sup> The major provisions which deviate from the *pro forma* service agreements are discussed below.

11. Midla states that two FTS Service Agreements (contract numbers 71638 and 71639), omit section 7.5 of the *pro forma* service agreement regarding superseded agreements. Midla states that, because the service agreements did not supersede any other agreement, the omission of section 7.5 does not pose a risk of undue discrimination. The Commission finds that, where a *pro forma* service agreement contains a provision designed to address a situation that may or may not arise with respect to individual service agreements, the parties may omit that provision when it is inapplicable without the omission constituting a material deviation. Therefore, the omission of section 7.5 from service agreements that do not supersede earlier agreements does not constitute a material deviation.

12. In addition, Midla states that these two contracts along with 19 other contracts contain MDQs which vary on a monthly or seasonal basis. As explained by Midla, the Commission approved changes to Midla's tariff providing that it will offer shippers such variable MDQs on a not unduly discriminatory basis and revising its *pro forma* service

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<sup>9</sup> In *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 27 (2003), the Commission stated “[s]ince there would appear to be no reason for the parties to use language different from that in the form of service agreement other than to affect the substantive right of the parties, this effectively means that all language that is different from the form of service agreement should be filed with the Commission.” *Id.* P 32.

<sup>10</sup> *Columbia*, 97 FERC ¶ 61,221 at p. 62,004.

<sup>11</sup> See *ANR Pipeline Co.*, 97 FERC ¶ 61,252, at 62,115-16 (2001).

agreements to provide blanks for filling in monthly or seasonal MDQs.<sup>12</sup> Accordingly, the Commission finds that these changes in Midla's tariff render the variable MDQ provisions conforming.

13. Midla also identified 18 FTS service agreements that exclude both Exhibit C and Exhibit D that are contained in the current *pro forma* service agreement. Midla explains that Exhibit C only applies to situations where Midla is providing service under section 311 of the Natural Gas Policy Act and Exhibit D specifies discount information. Midla states that since it is providing service for these contracts under its blanket certificate under Part 284, Subpart G, of the Commission's regulations Exhibit C is not applicable. It also points out that because it does not discount service under these agreements, Exhibit D is not applicable. Therefore, Midla states that by excluding these exhibits from the contracts it does not change the character of service and these contracts do not pose a risk of undue discrimination. The Commission finds that the omission of Exhibit C and/or D from the 18 contracts identified by Midla is not a material deviation, because those exhibits are inapplicable to the service agreements in question.

14. Midla identifies 17 FTS service agreements in which Article III, section 3.1 of the service agreement specifies that the maximum rates are governed by both the tariff and the "Small Customer Rate Option." Midla states that its current *pro forma* agreement applicable to Rate Schedule FTS provides that the maximum rates under the service agreement are specified by the tariff. Midla states that this small customer option is available to certain customers pursuant to section 4.4 of Rate Schedule FTS and is therefore not a deviation. Midla also points out that all of these contracts have been effective from the first day of September, 1993 and therefore the small customer rate option is a long standing provision set forth in Enbridge's tariff and applies to contracts with less than 2,000 MMBtu per day.<sup>13</sup> The Commission finds that the inclusion of the small customer rate option in service agreements for shippers who satisfy the conditions for that rate set forth in the tariff does not constitute a material deviation.

15. Midla identifies one FTS service agreement (contract #71645) that omits from both Exhibits A and B the maximum receipt and delivery pressure information which is provided for in the *pro forma* service agreement. Midla states that in the absence of an agreed maximum pressure, the maximum allowable operating pressure permitted by Part 192 of the U. S. Department of Transportation's regulations controls the pressures at which Midla can receive or deliver gas. Midla states that the absence of such a number in

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<sup>12</sup> See *Enbridge Pipelines (Midla) L.L.C.*, Docket No. RP07-53-000 (Letter Order dated November 21, 2006).

<sup>13</sup> The small customer rate option was approved in the pipelines restructuring proceeding in Docket No. RS92-20-000. See, *Mid Louisiana Gas Co.*, 63 FERC ¶ 61,048 (1993).

the exhibits does not present a risk of undue discrimination. The Commission finds that under these circumstances the absence of the maximum operating number does not present a risk of undue discrimination and that such a deviation is permissible. However, to make clear Midla's intent concerning the applicable maximum pressure when no maximum is included in a service agreement, we require that Midla revise its tariff to state that in the absence of an agreed maximum pressure, the maximum allowable operating pressure permitted by Part 192 of the U. S. Department of Transportation's regulations controls the pressures at which Midla can receive or deliver gas.

16. Midla identifies 18 FTS service agreements that contain amendments which alter the original service agreement. The amendments to the service agreements either: (1) change the primary receipt point, which is permitted by section 8.1(a) of Midla's GT&C; (2) extend the primary term of the service agreement; or (3) notify the customer of a change in its MDQ pursuant to a Commission order. Midla states that it recognizes that the use of an Amendment, rather than a superseding service agreement, may be prohibited by section 154.601 of the Commission regulations.<sup>14</sup> However, Midla states that these amendments were made before Enbridge acquired Midla, and Enbridge has now put into place procedures to ensure that any changes to executed service agreements are accomplished by superseding service agreements which fully comply with the Commission's regulations. The subject amendments do not give the shippers in question a different quality of service than that offered all shippers under Midla's tariff. Given these circumstances, the Commission finds that there is no substantial risk of undue discrimination from the subject amendments. Accordingly, the Commission will grant waiver of section 154.601 of its regulations for good cause shown.

17. Midla has identified one FTS service agreement (contract # 70126) with Louisiana Gas Service that was amended in 1998 to add a provision that allows the customer to reduce its MDQ in the event there is a physical bypass of Customer or a bypass due to deregulation. The Commission has held that a shipper's right to reduce its contract demand is a valuable right which should be offered on a not unduly discriminatory basis as part of the pipeline's generally applicable tariff.<sup>15</sup> Midla submits that because the parties have acted in reliance upon this Service Agreement for over eight years, the Commission should accept this Service Agreement, as amended, including this provision. Midla states that the Commission has previously approved various material deviations in

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<sup>14</sup> 18 CFR §154.601 (2008) states that: Agreements intended to effect a change or revision of an executed service agreement on file with the Commission must be in the form of a superseding service agreement only.

<sup>15</sup> See, *Columbia Gas Transmission Corp.*, 99 FERC ¶ 61,053, at 61,230 (2002).

contracts on the basis of the significant reliance interest of contracting parties in their long-standing contractual arrangements.<sup>16</sup>

18. The reduction rights found in Article II of the subject contract were not part of the original agreement but were included as part of the contract after the primary term of the agreement had expired. Therefore the customer, Louisiana Gas, did not receive these preferential rights to a reduction of its MDQ as part of its original contract, executed in 1993 but did receive such rights after the primary term of the original contract by amendment in 1998. Currently the contract continues on a year to year basis and may be terminated by either party upon 90 day notice. In *Columbia*,<sup>17</sup> the Commission permitted the continuance of material deviations concerning maximum pressure levels, hourly flows, and shippers receipt and delivery point rights. The Commission states that it would not cancel the contracts, because they had all been ongoing for sometime and had been relied upon by the parties. However, the Commission placed Columbia on notice that before new contracts with such a material deviation may be placed into effect, it must either file all such contracts or revise its tariff and form of service agreement so that in the future it could enter into these types of provisions without then constituting material deviations.<sup>18</sup> Therefore, the Commission's action in grandfathering the contract with the reduction term was based both upon the fact that parties had placed significant reliance in the provision, and the fact that the provision in question would expire at the end of the primary term.<sup>19</sup>

19. As set forth above, in this case the contract containing the contract demand reduction term continues on a year to year basis. Therefore, the Commission will not grandfather the contract as requested by Midla. The Commission remains concerned that the provision in question will continue indefinitely, as it does not appear to expire at the end of a primary term as was the case in *Columbia*. Therefore, the Commission will

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<sup>16</sup> *Columbia*, 97 FERC ¶ 61,221 at p. 62,010; *ANR Pipeline Co.*, 98 FERC ¶ 61,247, at p. 62,002 (2002) (supporting approval of certain contracts with deviations determined to be material under the standard announced in *Columbia* because such contracts were long-standing agreements upon which parties had a greater reliance interest than the newly entered into contracts). *See also ANR Pipeline Company*, 98 FERC ¶ 61,175, at p. 61,655-61,656 (2002) (rejecting demand reduction provisions that ANR had defended on the basis of the parties reliance interest noting that the contracts at issue were new and thus any reliance interest was minimal).

<sup>17</sup> 97 FERC ¶ 61,222 at 62,010.

<sup>18</sup> *Tennessee Gas Pipeline*, 97 FERC ¶ 61,225, at 62,029-30 (2001).

<sup>19</sup> *Id.*

require Midla to either remove the provision granting the reduction rights or to offer this right in its tariff to all customers on a not unduly discriminatory basis.

20. Midla identifies 18 NNS Service Agreements in which Article III, section 3.1 of the Service Agreement specifies that the maximum rates are governed by both the tariff and the “Small Customer Rate Option.” The current *pro forma* agreement applicable to Rate Schedules NNS states that the maximum rates applicable to Midla under the service agreement are specified by the tariff. Midla states that this is an option available to certain customers pursuant to section 4.4 of Rate Schedule NNS and is therefore not a deviation.

21. As discussed above, the Small Customer Rate Option is a long standing provision dating back to Midla’s restructuring proceedings. The Commission as set forth above with regard to the Small Customer Rate Option for Rate Schedule FTS service finds that these provisions do not constitute material deviations.

22. Midla also identified 18 NNS contracts that exclude both Exhibit C and Exhibit D from the current *pro forma* service agreement. Midla explains that Exhibit C applies only for service under section 311 of the Natural Gas Policy Act and Exhibit D specifies discount information. Midla states that because it is providing service for these contracts only under part 284, Subpart G of the Commission’s regulations, Exhibit C is not applicable. It also points out that because it does not discount these agreements Exhibit D is also not applicable. Therefore it asserts that excluding these exhibits from the contracts does not change the character of service and does not pose a risk of undue discrimination. The Commission finds that the omission of Exhibit C and/or D from the 18 Rate Schedule NNS contracts identified by Midla does not constitute a material deviation from Midla’s tariff or *pro forma* service agreement, because those exhibits are inapplicable to the 18 NNS service agreements.

23. Midla identifies 18 service agreements that contain amendments which alter the original service agreement. Midla states that these amendments either: (1) change the primary receipt point, which is permitted by section 8.1(a) of Midla’s GT&C; (2) extend the primary term of the service agreement; or (3) notify the customer of a change in its MDQ pursuant to a Commission order. Midla states that the use of an Amendment, rather than a superseding service agreement or revised exhibit, does not comply with section 154.601 of the Commission’s regulations. However, Midla states that these amendments were made prior to it being purchased by Enbridge, and that it has now put in place procedures to ensure that any changes to executed service agreements comply with the Commission’s regulations. Midla, therefore, requests the Commission waive section 154.601 of its regulations to permit these amendments to be effective as of the date of the amendment and to allow the amended service agreements to continue in effect for the remainder of their respective terms.

24. The subject amendments do not give the shippers in question a different quality of service than that offered all shippers under Midla's tariff. Given these circumstances, the Commission finds that there is no substantial risk of undue discrimination from the subject amendments. Accordingly, as it did above in regard to certain Rates Schedule FTS contracts the Commission finds good cause to grant waiver of section 154.601 of its regulations.

25. In addition, Midla states that all of the contracts contain minor wording and formatting changes that do not affect the character of service. For example Midla states that the errors include changes in the heading of the documents, changes in the Company name, and or incomplete punctuation. The Commission finds that these are not material deviations and do not constitute a risk of undue discrimination.

26. Lastly, in response to the Commission's inquiry in its January 18, 2007 order<sup>20</sup> concerning certain contracts described in the transmittal letter and the non-appearance of the contracts in the filing, Midla states this was a clerical error and the two contracts (contract numbers 70136 and 70235) mentioned in the transmittal letter were terminated prior to the instant filing. The Commission accepts Midla's explanation as reasonable.

27. Based on the review of the contracts, the Commission requires Midla either to remove the contract demand reduction provision from contract number 70126 or file revised tariff sheets offering contract demand reduction rights pursuant to not unduly discriminatory conditions. In addition, Midla is required to file new tariff sheets within 30 days of this order to: (1) remove from its list of non-conforming contracts those contracts that do not contain material deviations based on the rulings found in this order; (2) clarify the maximum allowable operating pressure in the absence of an agreed maximum operating pressure.

By direction of the Commission.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>20</sup> *Enbridge Pipelines (Midla) L.L.C.*, 118 FERC ¶ 61,022 (2007).