

139 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Enbridge Pipelines (North Texas) L.P. Docket No. PR09-26-000

ORDER ON REVISIONS TO STATEMENT OF OPERATING CONDITIONS

(Issued June 13, 2012)

1. On June 1, 2009 Enbridge Pipelines (North Texas) L.P. (EPNT) filed revisions to its rates and to other aspects of its Statement of Operating Conditions (SOC), pursuant to section 311 of the Natural Gas Policy Act (NGPA) and section 284.123 of the Commission's regulations. EPNT proposes a new demand charge, overrun rate, and fuel retention rate not on file with the Texas Railroad Commission (TRC). EPNT also proposes several changes to its SOC. EPNT requests an effective date of May 1, 2009. For the reasons discussed below, the Commission accepts EPNT's revised SOC and rates effective May 1, 2009, subject to conditions.

Background

2. Section 284.123(b) of the Commission's regulations permits NGPA section 311 pipelines to determine their rates in either of two ways. First, section 284.123(b)(1) provides that the pipeline may elect to base its NGPA section 311 rates upon rates approved by the appropriate state agency for its non-jurisdictional intrastate services. Second, section 284.123(b)(2) provides that a section 311 pipeline may propose rates to be approved by the Commission upon a showing that the proposed rates are fair and equitable. If the pipeline elects to base its rates on those approved by a state agency, sections 284.123(b)(1)(i) and (ii) provide several options for how the pipeline may do this. As relevant in this case, section 284.123(b)(i)(A) provides that a section 311 pipeline may "base its rates upon the methodology used in designing rates to recover the costs of . . . transportation . . . included in one of its then effective firm sales rate schedules for city-gate service on file with the appropriate state regulatory agency."

3. On August 31, 2006, EPNT filed an SOC with the Commission and a rate election. EPNT elected, under section 284.123 (b)(1)(i)(A), to base its maximum rates for firm (FT) and interruptible (IT) interstate transportation service on the transportation component of the currently effective city-gate sales rate that the TRC had established for

EPNT's predecessor in interest, Southwestern Gas Pipeline, Inc.¹ (2006 Rate Election).² That rate was \$0.49/MMBtu, inclusive of fuel.³ Because a rate filed pursuant to section 284.123 (b)(1) is presumed to be fair and equitable;⁴ the Commission did not act on this 2006 filing, and therefore the presumption remains.⁵

4. Previously on August 25, 2006, EPNT filed with the TRC an application for a rate review. On April 10, 2007, the TRC found \$0.49 per MMBtu to be fair and equitable as the transportation component of EPNT's city gate sales rate.⁶ The TRC did not approve any other rate components, nor did it specify whether the "city gate sales rate" is for interruptible or firm service.

5. On June 1, 2009, EPNT made the instant filing. EPNT states in its transmittal that it is filing pursuant to 18 C.F.R. § 284.123(e). That section provides that if a pipeline "changes its operations, rates, or rate election," it must amend its SOC and file such amendments not later than 30 days after commencement of the change in operations or the change in rate election. EPNT further states that its revisions "reflect the implementation of a demand charge for firm services, as well [as] numerous

¹ *Southwestern Gas Pipeline, Inc.*, Gas Utilities Docket No. 8040 (Texas Railroad Commission June 1, 1992).

² EPNT, Filing of Rate Election, Docket No. RM85-1-000, FERC Submittal No. 20060901-0151 (filed August 31, 2006).

³ Section 2.1 of EPNT's SOC, which is now labeled section 3.2 in the instant filing, also provides that it has elected to base its rates on the methodology provided in section 284.123(b)(1)(i)(A), and that its maximum rate for NGPA service will be the applicable maximum rate approved by the TRC as that rate may change from time to time.

⁴ *See* 18 CFR § 284.123 (d) (2011) ("If the intrastate pipeline is charging a rate computed pursuant to §284.123(b)(1), the rate charged is presumed to be: (1) Fair and equitable ...").

⁵ Rate elections under (b)(1) do not subject the Commission to the 150-day deadline imposed on (b)(2) filings by 18 CFR § 284.123 (b)(2)(ii), but the Commission now endeavors to issue orders on (b)(1) filings within 150 days as well, rather than allowing them to take effect by inaction.

⁶ *Enbridge Pipelines (North Texas) L.P.*, Gas Utilities Docket No. 9691 (Texas Railroad Commission April 10, 2007).

housekeeping amendments.”⁷ This filing is the first time that EPNT has informed the Commission that it is assessing a demand charge for firm service. EPNT’s Filing also introduces an overrun service charge, implements a separate in-kind fuel retention charge for the first time, and adjusts the firm and interruptible commodity rates to remove the cost of fuel previously reflected in those rates. EPNT proposes to modify several terms and conditions of service. EPNT seeks to change the minimum quantity for delivery, to alter the definition of Force Majeure, and to render its Transportation Agreements confidential, as discussed below. Other revisions include modifications to its cash out procedure; new sections on fuel retention, creditworthiness, taxes, and governmental fees; and numerous housekeeping adjustments. EPNT proposes to make all these changes effective May 1, 2009.

6. On August 5, 2009, Commission Staff issued a request for additional information regarding EPNT’s proposed changes to its rates and to its terms of service. EPNT filed its response on August 19, 2009.

7. EPNT filed in Docket No. PR10-29-000, *et seq.*, to put its SOC in the format required by Order No. 714⁸ and section 284.123 of the Commission’s regulations.⁹ The Commission accepted these changes subject to the outcome of this proceeding.¹⁰

Notice of Filing

8. Public notice of EPNT’s Filing was issued on June 9, 2009. Interventions and protests were due June 15, 2009, as provided in section 154.210 of the Commission’s regulations.¹¹ Pursuant to Rule 214,¹² all timely filed motions to intervene and any unopposed 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

⁷ EPNT June 1, 2009 transmittal letter.

⁸ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, 124 FERC ¶ 61,270 (2008).

⁹ 18 C.F.R. § 284.123 (2011).

¹⁰ *Enbridge Pipelines (North Texas) L.P.*, Docket Nos. PR10-29-000, PR10-29-001, PR10-29-002, and PR10-29-003 (April 27, 2011) (delegated letter order).

¹¹ 18 C.F.R. § 154.210 (2011).

¹² 18 C.F.R. § 385.214 (2011).

proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

Rate Changes

9. EPNT proposes to change not only the dollar amount of its transportation rates, but also the structure of those rates. In its 2006 Rate Election, EPNT proposed to set both FT and IT rates at a one-part, volumetric rate of \$0.49/MMBtu, “inclusive of fuel.” EPNT did not have any separate Fuel Reimbursement charge. EPNT has received TRC approval for this all-inclusive rate.¹³

10. In the instant filing, however, EPNT proposes to add several new charges that were neither previously approved by the TRC nor included in its 2006 SOC Filing. First, EPNT proposes to charge a separate in-kind Fuel Reimbursement rate of 3.05 percent of receipts to both IT and FT shippers for the first time. Second, EPNT proposes a new demand rate for firm shippers, set at \$0.2770 per MMBtu of contract demand per day. As partial compensation for these new rate categories, EPNT proposes to lower its commodity rate, previously set at \$0.49/MMBtu “inclusive of fuel,” to \$0.3140/MMBtu for IT and \$0.0370/MMBtu for FT, exclusive of fuel. Finally, EPNT proposes an overrun service charge for all shippers, set at \$0.3140/MMBtu. EPNT has not informed the Commission of any filing with the TRC that would authorize EPNT to charge separately for Fuel Reimbursement or convert its FT rate to a two-part rate, including a demand charge. To the contrary, EPNT’s response to the Commission’s request for information expressly shows that EPNT is separating out fuel costs and establishing an FT demand charge on its own initiative, not with TRC approval.¹⁴

11. In its 2006 Rate Election, EPNT elected to offer service under section 284.123 (b)(1)(i)(A) of the Commission’s regulations, which states as follows:

(b) (1) Subject to the conditions in §§284.7 and 284.9 of this chapter, an intrastate pipeline may elect to: (1) Base its rates upon the methodology used: (A) In designing rates to recover the cost of gathering, treatment, processing, transportation, delivery or similar service (including storage service) included in one of its then effective firm sales rate schedules

¹³ *Enbridge Pipelines (North Texas) L.P.*, Gas Utilities Docket No. 9691 (Texas Railroad Commission April 10, 2007) (filed in this docket as EPNT August 19, 2009 Response at Attachment 1.1).

¹⁴ EPNT August 19, 2009 Response at Attachments 1.1 & 1.3.

for city-gate service on file with the appropriate state regulatory agency.¹⁵

12. EPNT claims not to have changed its rate election with its present filing. However, EPNT's present filing uses a different rate design methodology than the TRC approved for EPNT's state city-gate rate. EPNT has only received state regulatory review for a one-part, stated-rate methodology. It has not received state regulatory review for a two-part rate that splits reservation and commodity charges, nor for unbundling an in-kind fuel retention percentage from its commodity rate.¹⁶ Establishing the in-kind Fuel Reimbursement rate of 3.05 percent, in particular, results in rates whose cost to the shippers varies as the cost of natural gas varies, while the state-approved rate recovered a fixed dollar amount to compensate EPNT for its fuel costs even as natural gas spot prices fluctuate. In addition, EPNT's proposed demand charge for FT service requires firm shippers to pay a set amount for each MMBtu of contract demand without regard to how much firm service they use each day, whereas the previous one-part volumetric rate only required firm shippers to pay for firm service to the extent they used that service.

13. Accordingly, we find that the present filing proposes not merely a change in operations and rates, but also a change in rate design, and therefore in rate election. EPNT's current rates are not based upon the methodology that the TRC used, so its rates no longer constitute a section 284.123 (b)(1)(i)(A) or (b)(1)(i)(B) election.¹⁷ EPNT's current rates are also not "contained in one of its then effective transportation rate

¹⁵ 18 C.F.R. § 284.123 (b)(1)(i)(A) (2011). The distinction between (b)(1) and (b)(2) filings is among the original regulations imposed by the Commission after Congress passed the NGPA in 1978. Rather than being mandated by the statutory text itself, it is a regulatory solution that makes use of the expertise of state regulatory agencies without being an "unwise ... delegat[ion]" of Commission authority. *See Sales and Transportation of Natural Gas*, Order No. 46, FERC Stat. & Regs., Regulation Preambles 1977-1981, ¶ 30,104, 44 Fed. Reg. 52,179 at 52,182, *order on reh'g*, Order No. 46-A, 44 Fed. Reg. 66,789 (1979).

¹⁶ The pipeline is obligated to "satisf[y] the concerns of the Commission that the rate is cost-based and subject to state review." *See Odessa Natural Co.*, 21 FERC ¶ 62,254, at 63,424 (1982) (staff adjustment).

¹⁷ *Cf. Minnesota Energy Resources Corp.*, 117 FERC ¶ 61,254, at PP 9-11 (2006) (rejecting pipeline's request to use a bundled sales rate on file with the state, but allowing it to use a different, more comparable cost-of-service based transportation rate schedule already on file with the state).

schedules”¹⁸ on file with the TRC, so it is not currently eligible for a section 284.123 (b)(1)(ii) election.

14. EPNT therefore must, within 30 days of the date of this order, either: (1) modify section 3.2 of its SOC, in which it states that it elects to follow section 284.123 (b)(1)(i)(A), to state instead that its rates are on file pursuant to section 284.123 (b)(2)(i), or else (2) initiate an expedited filing with the TRC seeking approval of its new rate methodology.

15. In the interim, we will deem EPNT to “not choose to make any election under paragraph (b)(1)” and therefore treat the instant filing as an application “for Commission approval, by order, of the proposed rates and charges,” that is, a (b)(2) filing.¹⁹ Reviewing the rates under this standard, we approve the rates on file,²⁰ which are unopposed. In light of its August 19, 2009 response to the Commission Staff’s data request, EPNT has provided sufficient information to show that its proposed rates and charges are fair and equitable.

Non-Rate Changes

16. EPNT proposes to modify several non-rate terms. EPNT seeks to change the minimum quantity for delivery, to alter the definition of Force Majeure, and to render its Transportation Agreements confidential, as discussed below. Other revisions include modifications to its cash out procedure; new sections on fuel retention, creditworthiness, taxes, and governmental fees; and numerous housekeeping adjustments. The Commission accepts EPNT’s proposed revisions to its SOC effective May 1, 2009 as requested,²¹ except as noted below.

¹⁸ 18 C.F.R. § 284.123 (b)(1)(ii) (2011).

¹⁹ 18 C.F.R. § 284.123 (b)(2)(i) (2011).

²⁰ *Cf. Gas Co. of New Mexico*, 30 FERC ¶ 62,061, at 63,071 & n.2 (1985) (finding pipeline’s rates do not qualify under section 284.123(b)(1)(i)(A), but construing the filing as a section 284.123(b)(1)(ii) filing and approving the rates).

²¹ EPNT filed its request on June 1, 2009, the first business day 30 days after commencement of its changes on May 1, 2009. An intrastate pipeline providing NGPA section 311 service must file its amended SOC and changes to rates “not later than 30 days after commencement of the change in operations or the change in rate election.” 18 C.F.R. § 284.123(e) (2011). We find the filing to be timely and the Commission’s approval is therefore effective May 1, 2009, as requested.

Minimum Quantity

17. EPNT originally proposed to revise section 9.6 of its SOC in order to change the Minimum Quantity required to maintain service at a given delivery point on an annual basis from 500 Mcf to 2 MMcf. However, in its response to the Commission's request for information, EPNT states that it "no longer supports the changed volume threshold implemented by its June 1, 2009 SOC Filing."²² Accordingly, we reject this revision to section 9.6 and direct EPNT to file a revised SOC within 30 days of the date of this order restoring the original Minimum Quantity.

Force Majeure

18. EPNT proposes to add the following to its language on Force Majeure in section 18.1 of its SOC, in relevant part:

Outages or shutdowns of power plant equipment or lines of pipe for inspection, maintenance or repairs to machinery, equipment, lines of pipe or other facilities...

19. In its response to the Commission's request for information, EPNT states that the above language "does not deem maintenance activity to be within the definition of 'Force Majeure.'"²³

20. We find that the proposed additions to the definition of Force Majeure may improperly refer to activities which could be termed scheduled maintenance. The Commission has described characteristics of a Force Majeure event as "an event beyond a party's control which it could not reasonably avoid."²⁴ As the Commission has noted for Natural Gas Act pipelines, "[b]ecause a pipeline is responsible for operating its system so that it can meet its contractual obligations, if the pipeline must curtail firm service due to an event within its control, or management, the Commission finds it inequitable for the pipeline's customers to bear the risk associated with such mismanagement."²⁵ We likewise find it inequitable in the section 311 context. Further,

²² EPNT August 19, 2009 Response at 2.

²³ *Id.* at 3.

²⁴ *Florida Gas Transmission Company*, 107 FERC ¶ 61,074 (2004).

²⁵ *Tennessee Gas Pipeline Company*, Opinion No. 406, 76 FERC ¶ 61,022, at 61,086 (1996).

EPNT's response to the Commission's request for information suggests that this language is not phrased to state what EPNT intends.

21. Accordingly, as a condition of acceptance, EPNT must file a revised SOC within 30 days of the date of this order to either add the word "unplanned" in front of the word "outages" in the above quoted text, or else withdraw the proposed new text quoted above from section 18.1.

Confidentiality of Transportation Agreements

22. EPNT proposes a new section 22 of its SOC on confidentiality, which reads in relevant part:

Unless the parties have elected to waive this provision in a Transportation Agreement, such Transportation Agreement shall be confidential between the Parties and the terms contained therein ("Confidential Information") shall not be disclosed by a Party to any third party without the prior written consent of the other Party.

If either Party is requested or required to disclose any Confidential Information ... by any federal, state or local governmental or regulatory body, the disclosing Party will provide the other Party with prompt written notice of any such request or requirement so that the other Party or any of its representatives may seek an appropriate protective order....

23. In conjunction with section 6.1 of its SOC, which requires a Transportation Agreement for all services on EPNT's system, the proposed new SOC section 22 would purport to render confidential the precise contractual terms under which all of a given customer's section 311 services are offered.

24. We reject the proposed new section 22 on confidentiality and direct EPNT to file a revised SOC within 30 days of the date of this order removing it. As the Commission held in *Bay Gas Storage Company, Ltd.*,²⁶ such a tariff provision is contrary to Commission policy favoring public disclosure of the provisions of service contracts for jurisdictional service performed pursuant to NGPA section 311. This includes the name of the shipper under each contract, the length of each contract, and, for transportation

²⁶ 109 FERC ¶ 61,348, at P 9 (2004); 110 FERC ¶ 61,154, at P 17 (2005) (ordering removal of similar confidentiality provision).

service, the contract rate. All this information is necessary to evaluate EPNT's rate filings and ensure that it is complying with its SOC.

25. Aside from the need for public disclosure for purposes of Commission review, Commission policy generally favors disclosure of individual jurisdictional contract information in order to ensure that the pipeline's contracting practices are not unduly discriminatory, and no undue preferences are granted to any customer.²⁷ For the same reason, the Commission's regulations require pipelines performing transportation and storage service pursuant to NGPA section 311 to make quarterly public reports of much of the information that the proposed section 22 would potentially deem confidential.²⁸

26. We recognize that the language of the proposed section 22 would allow disclosure to a regulatory body such as the Commission, after any filings for continued confidential treatment are addressed. Such language, however, might require an individual Commission determination whether to release the contractual information pursuant to the procedures set forth in section 388.112 of the Commission rules each time contractual information is to be made public. That would be inefficient and contrary to Commission policy favoring public disclosure of the provisions of service contracts under NGPA section 311 to all interested parties.²⁹

Periodic Review

27. Section 311 of the NGPA provides that the rates of intrastate pipelines performing limited interstate services shall be fair and equitable. As a general matter, the Commission's review of the rates of section 311 pipelines under this standard is more light-handed than its review of the rates of interstate pipelines under the Natural Gas Act. For example, the Commission permits section 311 pipelines to use rates established by state agencies even though such agencies may not follow the methodology the Commission employs in its NGA ratemaking cases. The Commission also does not require section 311 pipelines to comply with the detailed filing requirements for rate changes applicable to interstate pipelines under Part 154 of the Commission's

²⁷ See, e.g., *Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs*, Order No. 582, FERC Stats. & Regs. ¶ 31,025 (1995), *order on reh'g*, Order No. 582-A, FERC Stats. & Regs. ¶ 31,034 (1996) (concluding that rate information is not generically confidential, privileged, or proprietary, and that such information must be made publicly available).

²⁸ 18 C.F.R. §§ 284.126(b) (2011).

²⁹ *Bay Gas Storage Company, Ltd.*, 110 FERC ¶ 61,154, at P 17 (2005) (directing release of information).

regulations. Neither must section 311 pipelines file the comprehensive financial reports concerning their costs and revenues required by Part 260 of the Commission's regulations. In order to balance this comparatively light-handed rate review under section 311 with the Commission's duty to protect customers and oversee the market, the Commission requires petitioners to re-file their rates every five³⁰ years to ensure that the Commission has current information and rates have not become stale.³¹ The review is "a review of their rates," triggered "five years from the date the approved rates took effect," so pipelines are subject to rate review even when their rate election does not change.³²

28. The quinquennial rate review requirement has been consistently imposed, whether the pipeline has chosen to elect a state-based rate pursuant to section 284.123 (b)(1)³³ or has proposed a rate for a Commission approval pursuant to section 284.123 (b)(2).³⁴ The requirement that these pipelines file quinquennial petitions for rate approval is necessary for the Commission to fulfill its duty to ensure that the rates charged by intrastate pipelines for interstate transportation service under section 311(a)(2) of the NGPA continue to be fair and equitable.³⁵

³⁰ *Contract Reporting Requirements of Intrastate Natural Gas Companies*, Order No. 735, 75 Fed. Reg. 29,404, 131 FERC ¶ 61,150, at P 96 (2010) (decreasing the frequency of review from three to five years), *order on reh'g*, Order No. 735-A, 75 Fed. Reg. 80,685, 133 FERC ¶ 61,216 (2010).

³¹ *Arkansas Western Gas Co.*, 56 FERC ¶ 61,407, at 62,477 (1991), *reh'g denied*, 58 FERC ¶ 61,099 (1992).

³² *See* Order No. 735, 131 FERC ¶ 61,150 at P 96.

³³ *See Centana Intrastate Pipeline Co.*, 69 FERC ¶ 62,159 (1994), *order on reh'g*, 75 FERC ¶ 61,253 (1996) (imposing triennial rate review on a §284.123(b)(1) filing); *Transok, Inc.*, 83 FERC ¶ 61,055 at 61,311 (1998) (on a §284.123(b)(1) filing, clarifying that the Commission would not "depart[] from its practice of requiring triennial reviews of all rates established pursuant to section 284.123 to assure that they remain fair and equitable.")

³⁴ *Green Canyon Pipe Line Company, L.P.*, 97 FERC ¶ 61,021 (2001), *order on reh'g*, 98 FERC ¶ 61,041 (2002) (imposing triennial rate review on a §284.123(b)(2) filing); *GulfTerra Texas Pipeline, L.P.*, 106 FERC ¶ 61,184 (2004), *order on reh'g*, 109 FERC ¶ 61,350 (2004) (imposing triennial rate review on a §284.123(b)(2) filing).

³⁵ *Green Canyon Pipe Line Company, L.P.*, 98 FERC ¶ 61,041 at 61,123.

29. Accordingly, EPNT is required to file on or before May 1, 2014, either: (1) an application for rate election pursuant to section 284.123(b)(1) of the Commission's regulations showing that EPNT has requested the TRC to review the appropriateness of the state rate upon which EPNT proposes to base its rate election; or (2) an application for rate approval pursuant to section 284.123(b)(2) to justify the current maximum rate or to establish a new maximum rate before the Commission. If EPNT chooses option (1), it shall file a cost-based rate petition with the TRC at least 120 days in advance of EPNT's Filing with the Commission. While the Commission may adjust EPNT's rates prospectively at these quinquennial filings, EPNT's rates "would only be subject to refund to the extent the pipeline proposed to increase its rates."³⁶

The Commission orders:

(A) The Commission accepts the statement of rates and revisions to the SOC to be effective on May 1, 2009, subject to the conditions discussed in this order.

(B) EPNT shall file an amended SOC within 30 days of the date of this order to make the revisions directed above.

(C) EPNT shall file a renewed petition for rate election or rate approval, pursuant to section 284.123(b) of the Commission's regulations, on or before May 1, 2014, in accordance with the directives above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁶ *GulfTerra Texas Pipeline, L.P.*, 109 FERC ¶ 61,350 at P 13.