

140 FERC ¶ 61,119  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

PBF Holding Company LLC and  
Toledo Refining Company LLC

Docket No. OR12-14-000

v.

Enbridge Energy, Limited Partnership

ORDER ON COMPLAINT ESTABLISHING HEARING AND SETTLEMENT JUDGE  
PROCEDURES

(Issued August 9, 2012)

1. On May 11, 2012, PBF Holding Company LLC and Toledo Refining Company LLC (together, PBF) filed a complaint against Enbridge Energy, Limited Partnership (Enbridge Energy) contending that Enbridge Energy's procedures and practices in apportioning capacity on its crude oil pipeline system violate the Interstate Commerce Act (ICA). PBF maintains that Enbridge Energy's actions constitute an unjust and unreasonable classification and practice, thereby creating an undue and unjust preference for shippers and users of heavy crude oil, while causing undue and unjust discrimination against shippers and users of light crude oil.
2. On June 11, 2012, Enbridge Energy filed a motion to dismiss and answer to the complaint, maintaining that its prorationing policy and practices are just and reasonable and non-discriminatory. On June 26, 2012, PBF filed an answer to the motion to dismiss.
3. As discussed below, the Commission will set the complaint for hearing and settlement judge procedures.

## **Complaint**<sup>1</sup>

4. PBF states that Enbridge Energy and its Canadian affiliate, Enbridge Pipelines, Inc., operate a crude oil pipeline that begins at Edmonton, Alberta, and terminates in Sarnia, Ontario, with intermediate receipt and delivery points in Canada and the United States (Mainline). According to PBF, the Mainline includes an upstream portion from Edmonton to Superior, Wisconsin, and a downstream system from Superior to various delivery points.

5. PBF explains that the downstream portion of the Mainline system includes Lines 5 and 6, which supply crude oil to refineries in the midwestern United States and eastern Canada. PBF asserts that Line 5 generally transports light crude oil, while Line 6 generally transports heavy crude oil. Additionally, PBF states that three refineries receive only light crude oil from Line 5, and six refineries receive both light and heavy crude oil from both lines.

6. PBF states that it operates a 170,000 barrel per day (bpd) refinery near Toledo, Ohio. According to PBF, the refinery is designed to process light crude oil, and it relies on Enbridge Energy's Line 5 to obtain a substantial portion of its feedstock. PBF further states that the Toledo refinery does not process heavy crude oil and does not receive any of its supply from Enbridge Energy's Line 6. PBF maintains that the Toledo refinery competes in refined product markets with other refineries that are supplied by the Enbridge Energy system, including the six refineries that receive both light crude oil from Line 5 and heavy crude oil from Line 6.

7. Additionally, PBF explains that Mainline shippers nominate monthly by advising Enbridge Energy of the origin and delivery points, volumes, and grades of crude oil they plan to ship during the month. PBF contends that, for crude oil to be delivered on the downstream portion of the system, shippers do not specify their preferences for lines to be used to transport their volumes, and Enbridge Energy unilaterally assigns nominations to the lines.

8. PBF cites Rule 14 of Enbridge Energy's Rules and Regulations tariff (FERC Tariff No. 41.1.0), which contains the apportionment procedure for the downstream portion of the Mainline. According to PBF, if shippers tender more crude oil than can be transported, Rule 14 provides that Enbridge Energy will apportion such tenders on a *pro rata* basis among the shippers, based on the tenders and current operating conditions of the system.

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<sup>1</sup> In support of its complaint, PBF attaches the affidavits of Robert E. Foti, Robert C. Means, and Thomas O. Miesner.

9. PBF maintains that, in January 2011, Enbridge Energy began capping Mainline nominations and instituted a verification process that limited the nominations for each facility served by the system to the highest monthly volume delivered to that facility in any month during the 24-month period prior to July 2010. PBF explains that, when it acquired the Toledo refinery in March 2011, it became the successor to the previous owner's delivery history, making its nominations since that time to be subject to the cap.

10. Moreover, continues PBF, prior to April 19, 2012, Enbridge Energy's Rules and Regulations tariff did not contain the cap on nominations and the verification process adopted in January 2011. However, PBF states that Enbridge Energy filed a proposed new Rules and Regulations tariff on that date to become effective May 20, 2012, codifying the cap and verification process that Enbridge Energy implemented in January 2011, thus limiting nominations to the highest volume delivered to each facility during the 24-month period prior to July 2010.

11. PBF contends that Enbridge Energy applied apportionment to both Line 5 and Line 6 from January 2011 through November 2011. However, PBF claims that Enbridge Energy apportioned only Line 5 from December 2011 through May 2012. PBF asserts that the monthly apportionment of that line ranged from 27 percent in March 2012 to 16 percent in May 2012.

12. PBF maintains that the Line 5 apportionment results from Enbridge Energy's practice of transporting all Light Sour Blend (LSB) crude oil on Line 5 and transporting no LSB crude oil on Line 6, although both lines are physically capable of transporting LSB crude oil and have been used for that purpose in the past. Further, contends PBF, Enbridge Energy's website states that it can transport light sour crude oil on both Line 5 and Line 6.

13. Moreover, continues PBF, Enbridge Energy's website indicates that Lines 6A and 6B are capable of accommodating light sour, high sour, medium, and heavy crude oil for movement along the entire route. Thus, PBF emphasizes that Enbridge Energy's current practice is inconsistent with the operating pattern it describes on its website. PBF further observes that Enbridge Energy has operated Line 5 and Line 6 in a combined fashion even though they follow different routes.

14. PBF states that Enbridge Energy recently advised that it assigns all nominations of LSB crude oil to Line 5 because Line 6 is at capacity with heavy crude oil nominations and is designated as a heavy crude oil pipeline. PBF observes that Enbridge Energy claimed that it would assign nominations of LSB crude oil to Line 6 if nominations of heavy crude oil did not require all of the capacity on that line.

15. PBF states that the ICA prohibits any unjust or unreasonable classification, regulation, or practice and makes it unlawful for a common carrier to create an undue or unreasonable preference for any particular type of transportation. According to PBF,

Enbridge Energy's practice of assigning all nominations of LSB crude oil to Line 5 places a discriminatory burden on refineries that receive light crude oil from that line and constitutes a preferential reservation of capacity for heavy crude oil refineries.

16. PBF acknowledges that not all preferences are improper, but it argues that there appears to be no operational or financial reason why LSB could not be shipped on Line 6. PBF contends that Enbridge Energy's preferential and discriminatory apportionment practice has an adverse competitive effect on PBF because of the Toledo refinery's competition in refined petroleum product markets with refineries that process heavy crude oil delivered from Line 6. PBF asserts that the heavy crude oil refineries avoid the economic penalty associated with reduced crude oil supplies and gain a competitive advantage.

17. PBF explains that the substantial injury to its refinery operations at Toledo consists primarily of the economic penalty associated with the acquisition of higher-priced substitute crude oil supplies that do not have a refining value commensurate with their price. PBF adds that the injury also includes contract deficiency payments to the local pipeline that connects the Toledo refinery with Enbridge Energy's Line 5. According to PBF, the analysis attached to Mr. Foti's Affidavit provides an approximate quantification of the financial detriment to PBF for each month beginning December 2011.

18. PBF asks the Commission to find that the apportionment procedures of Enbridge Energy violate ICA sections 1(6)<sup>2</sup> and 3(1)<sup>3</sup> and to issue an order under ICA section 15(1)<sup>4</sup> requiring Enbridge Energy to cease and desist from its unlawful apportionment procedures and practices and to adopt apportionment procedures that distribute the burden of apportionment equitably between shippers and users of light crude oil and

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<sup>2</sup> ICA section 1(6) provides in part that it is "the duty of all common carriers . . . to establish, observe, and enforce . . . just and reasonable regulations and practices. . . ."

<sup>3</sup> ICA section 3(1) provides in part that it "shall be unlawful for any common carrier . . . to make, give, or cause any undue or unreasonable preference or advantage to . . . any particular description of traffic. . . ."

<sup>4</sup> ICA section 15(1) provides in part that, following an investigation and hearing that establishes a violation, the Commission is empowered to issue an order that the carrier cease and desist from the violation.

shippers and users of heavy crude oil. In addition, PBF seeks damages in accordance with ICA section 16(1).<sup>5</sup>

19. PBF also asks the Commission to establish a hearing to investigate its allegations.<sup>6</sup> PBF contends that its complaint presents *prima facie* evidence of Enbridge Energy's unlawful actions. However, PBF states that discovery procedures are necessary for it to obtain from Enbridge Energy additional relevant information, including any studies, analyses, or evaluations of the apportionment practices and any communications with other shippers regarding apportionment of Line 5 and Line 6.

20. PBF states that it has complied with applicable procedural rules established in Rule 206.<sup>7</sup> Additionally, PBF states that it has not sought assistance from the Commission's Enforcement Hotline or through the Alternative Dispute Resolution process.

### **Notice**

21. Public notice of the complaint was issued May 15, 2012. Interventions and protests were due as provided in Rules 211 and 214 of the Commission's Rules of Practice and Procedure.<sup>8</sup> Pursuant to Rule 214, all timely-filed motions to intervene and any unopposed motion 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.

### **Motion to Dismiss and Response to Complaint**<sup>9</sup>

22. Enbridge Energy argues that PBF has failed to meet its burden to present reasonable grounds to investigate the allegations in the complaint, and further, that it also

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<sup>5</sup> ICA section 16(1) provides that, following a hearing on a complaint establishing a violation, the Commission is empowered to order payment of damages to a complainant.

<sup>6</sup> PBF cites *Valero Marketing and Supply Co. v. Longhorn Partners Pipeline, L.P.*, 123 FERC ¶ 61,106, at P 23 (2008); *ARCO v. Calnev Pipe Line, L.L.C.*, 97 FERC ¶ 61,057, at 61,211 (2001).

<sup>7</sup> 18 C.F.R. § 385.206 (2012).

<sup>8</sup> 18 C.F.R. §§ 385.211 and 385.214 (2012).

<sup>9</sup> Enbridge Energy attaches the affidavit of Elwyn Jackson in support of its motion to dismiss and response.

has failed to propose any reasonable and not unduly discriminatory alternative prorating practice.

23. Enbridge Energy describes its system as extremely complex, transporting more than 50 distinct types of crude oil and other commodities for more than 100 separate shippers on multiple lines. Enbridge Energy explains that it has a long-standing and previously unchallenged practice of transporting light crude on Line 5 and heavy crude on Lines 6A and 6B and that many shippers have relied on the configuration of its system in structuring their business operations.

24. Enbridge Energy emphasizes that the Commission affords pipelines broad discretion over the operation of their facilities, including determining the kinds of commodities they will transport and the manner in which they will do so.<sup>10</sup> In particular, continues Enbridge Energy, the Commission gives pipelines broad discretion over prorating of their capacity, repeatedly stating that there is no single solution to the issue of allocating scarce pipeline capacity.<sup>11</sup> Enbridge Energy explains that it limits the products that it normally ships on each pipeline to those products that are compatible for quality sequencing and integrity maintenance. Then, continues Enbridge Energy, it allocates constrained pipeline capacity on the individual pipelines on a *pro rata* basis in accordance with its tariff provisions.

25. Enbridge Energy asserts that multiple considerations affect the operation and scheduling of the system, and it cites a document describing the system's operational service levels for all shippers.<sup>12</sup> Enbridge Energy states that it provides transportation service for supplies from both Canada and the U.S. using a batched system to retain commodity integrity and shipper ownership for a wide variety of grades and types of crude petroleum, as well as a mixed stream of natural gas liquids (NGL). Enbridge Energy further explains that individual segments of the Mainline system transport specific commodities, and the allocation of commodities to these pipelines depends on several factors, including but not limited to petroleum quality, supply, tankage

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<sup>10</sup> Enbridge Energy cites *e.g.*, *Mid-America Pipeline Co., LLC*, 131 FERC ¶ 61,012, at PP 24-26 (2010) (pipeline has discretion over which products it offers to transport).

<sup>11</sup> Enbridge Energy cites, *e.g.*, *Suncor Energy Marketing Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 24 (2010) (*Suncor*).

<sup>12</sup> Enbridge Energy cites Motion to Dismiss and Answer of Enbridge Energy, Limited Partnership in Response to Complaint of PBF Holding Company LLC and Toledo Refining Company LLC, Affidavit of Elwyn Jackson, Att. A, June 11, 2012.

constraints, connectivity, receipt and delivery patterns, ratability, prorationing, and power costs.

26. Enbridge Energy contends that PBF relies on a diagram that illustrates only the general configuration of the Mainline pipelines, which should not be interpreted to determine practices, operations, restrictions, or even geographic location of the pipelines. Enbridge Energy states that Mr. Jackson's affidavit includes an attachment depicting the various pipeline segments in greater detail. While Enbridge Energy acknowledges that each of the pipelines generally is physically capable of transporting all of the commodities, in actual practice, however, there are four major pipeline routes forming an integrated system, with each pipeline primarily transporting a specific set of commodity types as follows:

- Line 5 transports condensate, light synthetic, light sweet crude oil, and NGL volumes destined for the Sarnia area and east of Sarnia delivery points. When possible, compatible batches are scheduled to pump adjacent to one another.
- Lines 14/64 transport volumes ranging between condensate and medium crudes for delivery at Mokena, Illinois, and Griffith, Indiana, respectively. It is also possible for volumes transported on Line 64 to access breakout tankage at Griffith/Hartsdale, Indiana, for subsequent movement on Line 6B. In normal operations, Line 14/64 is considered a light crude line.
- Line 61 can transport all approved mainline commodities except NGL, refined products, and cracked material. Line 62 transports heavy crude products to Griffith, and at times, through to the Sarnia area.
- Lines 6A/6B transport volumes of heavy, heavy high tan, and heavy low residual crude for delivery in the Chicago area and those destined for delivery at Sarnia/Toronto/Buffalo area refineries. Quality sequencing of light synthetic and medium crude destined to Mustang Pipeline are also scheduled on Line 6A because it is the only line connected to the Lockport terminal.<sup>13</sup>

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<sup>13</sup> Enbridge Energy cites Motion to Dismiss and Answer of Enbridge Energy, Limited Partnership in Response to Complaint of PBF Holding Company LLC and Toledo Refining Company LLC, Affidavit of Elwyn Jackson, Att. A, pp. 3-8, June 11, 2012.

27. Enbridge Energy contends that it has provided shippers a table specifying the applicable pipeline segment routing for any given destination, quality category, and transport commodity type.<sup>14</sup> Further, states Enbridge Energy, the chart indicates certain routings that constitute the “expected normal crude routing for each commodity by pipeline” and permissible routings that reflect “a nominal crude routing for each commodity by pipeline that is not typical and at the discretion of Enbridge.”<sup>15</sup> Enbridge Energy emphasizes that it only transports LSB on Lines 6A and 6B as a permissible routing.

28. Enbridge Energy explains that Line 5 is a 645 mile, 30-inch pipeline with a 491,200 bpd capacity that runs from Superior, Michigan, to Sarnia, Ontario, with different connection points than Lines 6A and 6B (other than in the Sarnia area with respect to Line 6B). Enbridge Energy points out that Line 5 does not carry medium or heavy crude products, which means that, when Line 5 is less than full and Line 6B (the heavy crude line) is over-subscribed, the excess heavy volumes do not move onto Line 5, and Line 5 shippers are not prorated as a result of additional heavy barrels.<sup>16</sup>

29. Further, states Enbridge Energy, Lines 6A and 6B, which appear to be two successive segments, are operated independently, with separate capacity determinations. Enbridge Energy points out that neither the volume nor the commodity mix is typically the same for the two lines. Further, states Enbridge Energy, these pipelines do not run directly parallel to Line 5, and although Line 6B and Line 5 both terminate at Sarnia, each serves both commodity types and different receipt and delivery points.

30. Additionally, Enbridge Energy explains that Line 6A is a 467-mile, 34-inch, 670,000 bpd line that runs from Superior, Wisconsin, to Griffith, Indiana. According to Enbridge Energy, Line 6 transports medium and heavy crude to delivery points on Line 6A or provides volumes to be transported on Line 6B towards Sarnia. Enbridge Energy

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<sup>14</sup> Enbridge Energy cites Motion to Dismiss and Answer of Enbridge Energy, Limited Partnership in Response to Complaint of PBF Holding Company LLC and Toledo Refining Company LLC, Affidavit of Elwyn Jackson, Att. A, at Table 2, June 11, 2012.

<sup>15</sup> Enbridge Energy cites Motion to Dismiss and Answer of Enbridge Energy, Limited Partnership in Response to Complaint of PBF Holding Company LLC and Toledo Refining Company LLC, Affidavit of Elwyn Jackson, Att. A, at Table 2, June 11, 2012.

<sup>16</sup> Enbridge Energy cites Motion to Dismiss and Answer of Enbridge Energy, Limited Partnership in Response to Complaint of PBF Holding Company LLC and Toledo Refining Company LLC, Affidavit of Elwyn Jackson, at ¶ 12, June 11, 2012.

explains that the only light crude transported on Line 6A is for delivery upstream of Griffith, and that requires segregation and buffering or larger batch trains to preserve quality.

31. Enbridge Energy next states that Line 6B is a 293-mile, 30-inch, 283,000 bpd line that runs from Griffith, Indiana, to Sarnia. Enbridge Energy explains that all volumes transported on Line 6B are supplied from Lines 6A, 64, and 62. Further, states Enbridge Energy, Line 6B is designated to transport medium and heavy crude, although on an infrequent emergency basis, that line transports LSB so that Enbridge Energy can perform maintenance and testing of its line. Enbridge Energy explains that this is because the equipment requires a commodity that is less dense and has greater viscosity than medium or heavy crude. In those instances, continues Enbridge Energy, the LSB is delivered to downstream customers that can take delivery of that commodity. Enbridge Energy adds that, just as Line 5 is not prorated to accommodate excess heavy crude from Line 6B, Line 6B is not prorated to make way for excess light crude from Line 5.

32. Citing its FERC Tariff No. 41.1.0,<sup>17</sup> Enbridge Energy points out that, if more crude is tendered than can be transported, it “apportion[s] such tenders on a *pro rata* basis among all such Shippers on the basis of such current tenders and the current operating conditions of the facilities . . . applicable to the transportation. . . .”<sup>18</sup> Enbridge Energy emphasizes that these prorating practices have been effective on Lines 5 and 6B for at least six years without complaint from any other shippers.

33. Enbridge Energy states that, prior to July 2010, it had few significant prorating issues on Lines 5, 6A, and 6B; however, since that time, prorating of one or both lines 5 and 6B has been frequent (although the pattern of which line is prorated and by how much has not been consistent). Enbridge Energy also points out that Line 6B was entirely shut down between July 26, 2010, and October 4, 2010, because of an oil spill near Marshall, Michigan.<sup>19</sup>

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<sup>17</sup> Enbridge Energy states that the Commission recently accepted FERC Tariff No. 41.2.0 to become effective on May 20, 2012. *Enbridge Energy, Ltd. P’ship*, 139 FERC ¶ 61,134 (2012). Solely for purposes of responding to the complaint, Enbridge Energy states that it will refer to the prior version that is referenced in the complaint.

<sup>18</sup> Enbridge Energy cites FERC Tariff No. 41.1.0, Rule 14(a).

<sup>19</sup> Enbridge Energy states that, during that period, shipments of heavy crude were severely curtailed, including extensive rerouting to reach normal destinations. Despite may requests, Enbridge Energy states that it did not move heavy volumes from Line 6B onto Line 5 because doing so would have sharply reduced the available capacity of

(continued...)

34. Enbridge Energy maintains that the Commission imposes two restrictions with respect to prorating procedures. First, states Enbridge Energy, the first restriction is that a “prorating procedure may not be structured for the purpose of protecting a pipeline’s competitive position.” Enbridge Energy explains that the second restriction is that a prorating procedure “may [not] be structured to favor certain shippers or types of shippers over others if all have made ‘reasonable requests’ for transportation on the pipeline.”<sup>20</sup> Enbridge Energy reiterates that the Commission has concluded that “[t]here is no single method of allocating capacity in times of excess demand on oil pipelines.”<sup>21</sup>

35. Moreover, continues Enbridge Energy, the Commission recently recognized that a “common procedure for allocating capacity is a pro-rata methodology that awards a share of the available capacity to each shipper based on the shipper’s proportionate share of all nominations.”<sup>22</sup> Enbridge Energy argues that its apportionment procedure allocates available capacity on that basis. Enbridge Energy adds that the reference to the “current operating conditions of the facilities” in its prorating procedure clearly encompasses Enbridge Energy’s longstanding operating practice of assigning particular commodities to particular lines. Further, continues Enbridge Energy, distinctions between dissimilarly situated groups of shippers do not constitute undue discrimination for purposes of the statute.<sup>23</sup>

36. Enbridge Energy points out that, in 11 out of the last 24 months, it has apportioned Line 6B more than Line 5 (treating the shutdown of Line 6B as 100 percent apportionment). Enbridge Energy also states that in only 10 of the last 24 months has it apportioned Line 5 more than Line 6B (with the remaining three months being equal).

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Line 5 (due to the greater viscosity and density of heavy crude as well as the necessity of extreme measures to batch heavy and light crudes) and degraded the quality of the light crude on Line 5.

<sup>20</sup> Enbridge Energy cites *Suncor Energy Marketing Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 24 (2010).

<sup>21</sup> Enbridge Energy cites *Mid-America Pipeline Co. LLC*, 106 FERC ¶ 61,094, at P 14 (2004).

<sup>22</sup> Enbridge cites *Suncor Energy Marketing Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 26 (2010).

<sup>23</sup> Enbridge Energy cites, *e.g.*, *Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,259 (1996) (finding that different rates to different shippers or types of shippers did not violate the antidiscrimination or undue preference provisions of the ICA where such differences reflected relevant differences among the shippers).

Enbridge Energy argues that this is not evidence of a systematic bias for or against either set of shippers.

37. Enbridge Energy explains that while it can move blends such as LSB, it is not required to do so and that doing so might create unwarranted harm and disruption to other shippers. Enbridge Energy emphasizes that it does not move light sour blend on Line 6B solely for the purpose of relieving the apportionment on Line 5, and it would not be reasonable to require it to do so. In fact, argues Enbridge Energy, the Commission has stated that “[t] fact that the shippers may not be able to move the volumes they wish to move . . . does not violate the common carrier obligations to provide service. . . .”<sup>24</sup>

38. According to Enbridge Energy, PBF has not identified an alternative practice or shown that any such practice would be reasonable and non-discriminatory with respect to the other shippers. Enbridge Energy states that, under Rule 206 of the Commission’s Rules of Practice and Procedure,<sup>25</sup> a complaint “must do more than make mere unsubstantiated allegations, which, without more do not provide the basis, either in law or in fact, for ordering a hearing or a Commission-initiated investigation.”<sup>26</sup>

39. Enbridge Energy states that PBF’s request for damages is overbroad, improper, and in contravention of well-established Commission precedent. In part, Enbridge Energy states that PBF does not ship on the Lakehead System, but rather purchases quantities of light crude from another entity that ships it through Line 5. Therefore, argues Enbridge Entity, PBF is not in privity with Enbridge Energy and has no standing to obtain a damages award under the ICA.<sup>27</sup>

### **PBF’s Answer**

40. PBF states that Enbridge Energy’s motion to dismiss confirms a number of important facts relevant to the complaint. According to PBF, contrary to the impression created by Enbridge Energy, it does not appear that grades of crude oil are allocated

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<sup>24</sup> Enbridge Energy cites *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 46 (2006).

<sup>25</sup> Enbridge Energy cites 18 C.F.R. § 385.206 (2012).

<sup>26</sup> Enbridge Energy cites *National Energy & Trade, LP v. Texas Gas Transmission, LLC*, 121 FERC ¶ 61,064, at P 60 (2007).

<sup>27</sup> Enbridge Energy cites *Big West Oil Co. v. Frontier Pipeline Co.*, 106 FERC ¶ 61,171, at P 26 (2004) (there is no basis to impose a “requirement that a carrier award reparations to a party not in privity with the carrier”); *Big West Oil Co. v. Frontier Pipeline Co.*, 108 FERC ¶ 61,183, at P 87 (2004), *aff’d in part and remanded in part sub nom.*, *Frontier Pipeline Co. v. FERC*, 452 F.3d 774 (D.C. Cir. 2006).

strictly on the basis of physical qualities or that apportionment levels are determined by shipper nominations. Rather, states PBF, the documentation provided by Enbridge Energy indicates that apportionment is one of the factors expressly included in the criteria for allocating commodities.

41. PBF states that the Supplemental Affidavit of Robert E. Foti attached to its answer includes Enbridge Energy's apportionment announcements for June and July 2012.<sup>28</sup> According to PBF, these announcements show that Line 5 was apportioned by 17 percent in June and will be apportioned by 26 percent in July, while Line 6B will experience no apportionment in either month. Thus, states PBF, over the eight-month period from December 2011 through July 12, Line 5 will have incurred apportionment ranging from 16 percent to 27 percent, while Line 6 will have incurred no apportionment.

42. PBF argues that the motion to dismiss further confirms that there is no physical or operational obstacle that prevents Enbridge Energy from allocating LSB to Line 6B. PBF points out that Enbridge Energy acknowledges that LSB has been transported on Line 6B in the past and could be transported on Line 6B in the future if the capacity is not needed by shippers of heavy crude oil. Further, states PBF, Enbridge Energy's motion to dismiss also concedes that the basis for declining to allocate LSB to Line 6B is to satisfy the needs of heavy oil shippers on Line 6B.

43. PBF contends that satisfying the needs of heavy crude oil shippers on Line 6B does not justify allocating the entire burden of apportionment on light crude oil shippers using Line 5. PBF agrees that the Commission accords pipelines discretion over proration of their capacity; however, it asserts that the issue here is whether Enbridge Energy is exercising its discretion in a reasonable and non-discriminatory manner. PBF maintains that its Toledo refinery competes directly with other petroleum refineries that receive heavy crude oil on Line 6B, and PBF is similarly situated with those other refineries.<sup>29</sup>

44. PBF challenges Enbridge Energy's claim that PBF's complaint must propose a reasonable and non-discriminatory alternative to the challenged procedures and practices. According to PBF, the precedents cited by Enbridge Energy do not require that a claim of discriminatory practice must include a valid alternative practice, but rather provide that

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<sup>28</sup> PBF cites Answer of PBF Holding Company LLC and Toledo Refining Company LLC to Motion to Dismiss of Enbridge Energy, Limited Partnership, Supplemental Affidavit of Robert E. Foti, June 26, 2012

<sup>29</sup> PBF cites *Gulf Central Pipeline Co.*, 75 FERC ¶ 61,231, at 61,613 (1988) (ICA prohibits undue preference or discrimination as between shippers that are similarly situated).

the proponent of an alternative practice has the burden of demonstrating that the alternative is reasonable and non-discriminatory. PBF submits that it does not have sufficient information at this point to propose a valid alternative to Enbridge Energy's apportionment practices, but that discovery may enable it to propose one or more reasonable and non-discriminatory alternatives to the current apportionment practices and to analyze other relevant issues.

45. Finally, PBF states that, contrary to the motion to dismiss, it is eligible to receive damages for injury caused by the unduly preferential apportionment practice of Enbridge. PBF argues that the ICA allows damages to the person upon whom the burden of transportation costs fall, "regardless of who initially pays the freight to the carrier."<sup>30</sup>

### **Enbridge Energy's Reply**

46. Enbridge Energy argues that PBF's Answer does not resolve the central flaw in its complaint, which Enbridge Energy characterizes as the failure to provide any reasonable ground to support its claim. Enbridge Energy continues to assert that PBF has not demonstrated any undue discrimination or preference in the pipeline's prorating policies and practices. Enbridge Energy also reiterates that PBF has failed to propose an alternative apportionment proposal that would be just and reasonable and that PBF has not shown that it is eligible to recover any alleged damages.

### **Commission Analysis**

47. Rule 385.213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to answers unless otherwise ordered by the decisional authority. In the instant case, the Commission will accept PBF's answer because it has provided additional information and argument relevant to the issues.

48. The Commission's preliminary analysis indicates that PBF's complaint raises issues about Enbridge Energy's allocation policies and practices that cannot be resolved on the basis of the record at this point. Therefore, the Commission will set PBF's complaint for hearing and settlement judge procedures.

49. While the Commission is setting this matter for hearing, the Commission encourages parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, the Commission will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule

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<sup>30</sup> PBF cites *Gabbert v. Atchison, Topeka, & S.F. Ry Co.*, 93 F2d 562, 563 (5<sup>th</sup> Cir 1938); *George F. Hinrichs, Inc. v. Wells Fargo & Co.*, 53 ICC 362, 364 (1919).

603 of the Commission's Rules of Practice and Procedure.<sup>31</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Administrative Law Judge (Chief ALJ) will select a judge for this purpose.<sup>32</sup> The settlement judge shall report to the Chief ALJ and the Commission within 30 days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief ALJ shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a Presiding Administrative Law Judge (Presiding ALJ).

The Commission orders:

(A) Pursuant to the authority conferred on the Commission by the ICA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the ICA, a public hearing shall be held concerning PBF's complaint against Enbridge Energy. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the body of this order and the ordering paragraphs below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure,<sup>33</sup> the Chief ALJ is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief ALJ designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief ALJ within five days of the date of this order.

(C) Within 30 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief ALJ on the status of the settlement discussions. Based on this report, the Chief ALJ shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a Presiding ALJ for a trial-type evidentiary hearing, if appropriate. If settlement

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<sup>31</sup> 18 C.F.R § 385.603 (2012).

<sup>32</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief ALJ by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

<sup>33</sup> 18 C.F.R. § 385.603 (2012).

discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief ALJ of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a Presiding ALJ, to be designated by the Chief ALJ, shall, within 15 days of the date of the Presiding ALJ's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The Presiding ALJ is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.