149 FERC ¶ 61,004
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

High Prairie Pipeline, LLC
Complainant,

v.

Enbridge Energy, Limited Partnership,
Respondent

Docket No. OR12-17-001

ORDER DENYING REHEARING

(Issued October 1, 2014)

1. On March 22, 2013, the Commission issued an order dismissing the complaint filed by High Prairie Pipeline, LLC (High Prairie) against Enbridge Energy Limited Partnership (Enbridge Energy) alleging violations of numerous sections of the Interstate Commerce Act (ICA) and sections 341.0 and 341.8 of the Commission's regulations.[1] High Prairie filed a timely request for rehearing. As discussed below, the Commission denies rehearing.

Background

2. High Prairie sought to construct a 450-mile pipeline system capable of transporting 150,000 barrels of crude oil per day from the Bakken region of North Dakota to Clearbrook, Minnesota, where it would interconnect with Enbridge Energy's pipeline system. In February of 2012, High Prairie entered into negotiations with Enbridge Energy regarding interconnection at Clearbrook, but the parties never reached agreement on terms for interconnection.

[1] *High Prairie Pipeline, LLC v. Enbridge Energy, Ltd. P'Ship*, 142 FERC ¶ 61,199 (2013) (March 22, 2013 Order).

3. On May 17, 2012, High Prairie filed a complaint against Enbridge Energy alleging numerous violations of the ICA, including failure to provide just and reasonable terms and conditions, failure to set forth an interconnection policy in its tariff, and undue discrimination against High Prairie and its shippers by refusing to grant High Prairie an interconnection at Clearbrook, Minnesota. High Prairie's arguments contained three primary elements: (1) the terms offered by Enbridge Energy to High Prairie for interconnection at Clearbrook were unjust and unreasonable; (2) Enbridge Energy's refusal to grant an interconnection at Clearbrook on just and reasonable terms violates the anti-discrimination provisions of the ICA; and (3) Enbridge Energy's failure to set forth an interconnection policy in its tariff is a violation of the ICA and Commission rules and regulations.

4. On June 6, 2012, Enbridge Energy filed an answer to High Prairie's complaint. In its answer, Enbridge Energy claimed that the Commission lacked the authority to mandate an interconnection, and that Enbridge Energy was not required to publish an interconnection policy in its tariff. On March 22, 2013, the Commission dismissed High Prairie's complaint. The Commission found that negotiations between High Prairie and Enbridge Energy were ongoing, and therefore any claims regarding the terms and conditions of a potential interconnection were premature. The Commission also found that because Enbridge Energy did not currently provide interconnection service, there could be no claim of discriminatory treatment, and Enbridge Energy was not required to set forth an interconnection policy in its tariff.

Request for Rehearing

5. High Prairie requests rehearing of numerous rulings of the March 22, 2013 Order. High Prairie alleges (1) that the Commission acted contrary to law by denying its answer to Enbridge Energy's Motion to Dismiss; (2) the Commission erred in not viewing facts in a light most favorable to High Prairie when dismissing the complaint; (3) the Commission's finding that interconnection service was not offered by Enbridge Energy, and that High Prairie's request for interconnection service had not been denied, was not supported by evidence; (4) the Commission erred in finding the complaint premature; (5) the Commission's determination that only existing interconnection policies must be published is inconsistent with the ICA and the Commission's regulations; (6) the Commission's ruling that discrimination requires disparate offers of service is legally invalid; (7) the Commission acted arbitrarily and capriciously by ruling that it cannot yet determine disparate treatment; (8) the Commission abused its discretion by rejecting High Prairie's attempts to lodge documents from other proceedings; and (9) the Commission failed to address High Prairie's claims of violations of Sections 1(6), 6(1), 1(4) and 6(7) of the ICA. The Commission addresses each request for rehearing below.

The Commission's Rejection of High Prairie's Answer

6. High Prairie requests rehearing of the Commission's denial of its June 20, 2012 Answer. High Prairie argues that its June 20, 2012 Answer was filed as a matter of right in response to Enbridge Energy's June 6, 2012 Motion to Dismiss, and that the Commission's rejection of its Answer was contrary to law.

7. The Commission dismissed High Prairie's complaint for lack of jurisdiction based on the contents of the complaint as well as Enbridge Energy's June 6, 2012 Answer. Enbridge Energy's Motion to Dismiss, which was included as part of its Answer, as well as High Prairie's Answer thereto and subsequent filings by both parties, were either procedural nullities or unnecessary, and therefore not considered in the Commission's decision to dismiss High Prairie's complaint.

8. While Enbridge Energy did include in its answer to High Prairie's complaint a motion to dismiss, in effect embedding the request for dismissal into its answer, the style in which a party frames a document or the language used in the filing does not dictate how the Commission must interpret and treat it.[2] The Commission reasonably treated Enbridge Energy's June 6, 2012 filing as Enbridge Energy's Answer to High Prairie's complaint, a filing that is required by Commission Rule.[3] Rule 213 states that an answer may not be made to an answer.[4] Pursuant to the restrictions on filing answers to answers set forth in Rule 213, the Commission properly rejected High Prairie's Answer to Enbridge Energy's June 6, 2012 Answer. Rehearing on this issue is denied.

Dismissal vis-a-vis Summary Disposition

9. High Prairie next argues that the Commission erred in failing to view contested issues of facts in the light most favorable to High Prairie when deciding to dismiss its complaint. High Prairie states that the motion to dismiss should have been viewed as a motion for summary disposition pursuant to Rule 217, and states that under Rule 217 the Commission may only grant summary disposition when there is no genuine issue of fact material to a decision of the proceeding.

10. High Prairie is incorrect that the dismissal of its complaint should be considered a summary disposition. The Commission did not grant summary disposition; the Commission dismissed the complaint as premature, and for failing to state a claim that the Commission had jurisdiction to remedy. Rule 217 is not applicable in this case,

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[2] *Stowers Oil and Gas Co., et al.*, 27 FERC ¶ 61,001 (1984).

[3] 18 C.F.R. § 385.213(a)(1) (2014).

[4] 18 C.F.R. § 385.213(a)(2) (2014).

where dismissal was warranted due to both a prematurity of the claims and a lack of jurisdiction.[5] Commission Rule 206 and section 13(1) of the ICA, both concerning complaints, each require a demonstration that the Commission has jurisdiction over the alleged controversy and that the complaint is ripe for review. By failing to adequately demonstrate either Commission jurisdiction or the ripeness of its claims, High Prairie's complaint was dismissed, and not summarily decided pursuant to Rule 217. High Prairie's rehearing request on this issue is denied.

Interconnection Service on Enbridge Energy

11. In the March 22, 2013 Order, the Commission found that dismissal of the complaint was warranted, for it was not yet known whether an interconnection would occur, what the terms of that interconnection would be, and whether Enbridge Energy had offered interconnection to another pipeline for terms that could warrant a case for undue discrimination against High Prairie. On rehearing, High Prairie makes several arguments concerning the Commission's determination that High Prairie's complaint was premature. High Prairie claims that the evidence shows that Enbridge Energy not only currently offers interconnection service at Clearbrook but has in fact offered interconnection service to High Prairie. High Prairie goes on to allege that Enbridge Energy has also denied High Prairie interconnection service at Clearbrook. High Prairie states that the complaint was not premature because the terms and conditions for interconnections offered by Enbridge Energy were known, and that the Commission erred in dismissing the complaint because negotiations were ongoing.

12. On rehearing, High Prairie contends that the evidence submitted in this proceeding demonstrates that Enbridge Energy is currently providing interconnection service at Clearbrook. High Prairie points to a decades-old interconnection currently operated by an Enbridge Energy affiliate, Enbridge North Dakota. In its complaint, High Prairie also cited to plans for an interconnection at Clearbrook by the Enbridge Sandpiper pipeline. In its request for rehearing, High Prairie claims the fact that the interconnection was completed years ago is irrelevant, and also claims that by entering into negotiations with High Prairie, and offering terms and conditions for a potential interconnection, Enbridge Energy is currently offering interconnection service at Clearbrook.

13. The Commission upholds its original finding that Enbridge Energy does not currently offer interconnection service and thus High Prairie's complaint is premature. As the March 22, 2013 Order stated, the current interconnection at Clearbrook was established decades ago under far different circumstances then exist today.[6] While

[5] *See generally BP America Inc., et al.*, 147 FERC ¶ 61,130, at P 22, n.46 (2014).

[6] March 22, 2013 Order, 142 FERC ¶ 61,199 at P 26.

facilities that have been interconnected in the past may still be used, including the facilities required to achieve any potential interconnection with High Prairie, Enbridge Energy has not provided interconnection service itself, i.e., the actual physical interconnecting of facilities, since the original decades-old interconnection. Moreover, the actual physical interconnection of facilities High Prairie seeks to obtain from Enbridge Energy does not exist because Enbridge Energy does not currently offer or provide such service.

14. Just as a pipeline is not required to provide a particular service, a pipeline may also discontinue a service it previously provided at any time.[7] Even if the Commission found that Enbridge Energy at one time offered interconnection service at Clearbrook, the non-existence of any subsequent interconnections over more than four decades could be deemed an abandonment of this distinct service.[8] What is clear is that although the physical interconnection facilities exist at Clearbrook, this in and of itself does not establish that Enbridge Energy is currently offering interconnection service.

15. The Commission also notes that the Sandpiper Pipeline, originally referenced by High Prairie in its complaint as evidence that interconnection service is provided at Clearbrook, has been substantially modified since negotiations commenced. The project now calls for the abandonment of the interconnection at Clearbrook and its relocation downstream to Superior, Wisconsin.[9] The significant change in scope of the Sandpiper Pipeline Project during the negotiation process serves as an example of why the Commission does not generally review potential projects during the negotiation stage.

16. High Prairie also argues that Enbridge Energy's offer to provide interconnection at Clearbrook under certain conditions establishes that Enbridge Energy currently provides interconnection service. High Prairie's argues that it is not the filing of a tariff that demonstrates a pipeline is providing a service, but the entering into negotiations that establishes the service is in fact offered by the carrier.

17. Yet the mere fact that a pipeline explores whether it can come to agreement on offering a service in the future does not actually bind that pipeline to offering that service. As High Prairie has acknowledged in its pleadings, the services that a pipeline offers are

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[7] *Chevron Pipe Line Co.*, 64 FERC ¶ 61,213, at 62,616 (1993), *see also Enterprise TE Products Pipeline Co., LLC*, 143 FERC ¶ 61,191 (2013).

[8] The Commission does not have authority to regulate oil pipeline abandonments. *Enterprise TE Products Pipeline Co., LLC*, 143 FERC ¶ 61,191, at P 27 (2013).

[9] Petition for Declaratory Order of North Dakota Pipeline Co. LLC, filed Feb. 12, 2014, approved, *North Dakota Pipeline Co. LLC*, 147 FERC ¶ 61,121 (2014).

those it holds itself out to the public as providing, as set forth in its tariff.[10] Enbridge Energy has filed no tariff that contains the provisions for offering interconnection service at Clearbrook because it does not offer that service. Thus, Enbridge Energy entering into negotiations involving the potential for an interconnection is not sufficient to establish that the pipeline is providing the service.[11] The aforementioned changes to the terms and conditions ultimately offered on the Sandpiper Project provide a clear example of how projects may evolve from the negotiation stage to the proposal actually filed with the Commission. High Prairie's argument is without merit.

18. In addition to arguing that Enbridge Energy currently offers interconnection service, High Prairie also claims that Enbridge Energy has denied it interconnection service. However, High Prairie admits that during negotiations, Enbridge Energy considered offering High Prairie an interconnection based on certain terms and conditions and considered whether an interconnection was appropriate at Clearbrook or Superior, Wisconsin.[12] Although High Prairie considers Enbridge Energy's terms and conditions to be unacceptable and perhaps unjust and unreasonable, the failure of High Prairie to achieve every one of its goals during the negotiation process does not represent a denial of service, because Enbridge Energy is under no obligation to provide interconnection service at all.[13] Thus, even if Enbridge Energy's negotiating stance was considered an outright refusal to offer High Prairie interconnection service, such negotiation posture would not present a cause of action under either the Commission's regulations or the ICA because the Commission cannot compel nor is Enbridge Energy required to offer interconnection service.

19. High Prairie objects to the Commission's determination that its complaint was premature because negotiations between High Prairie and Enbridge Energy are ongoing. High Prairie claims that Commission's holding is based on speculation, conjecture, and

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[10] *See* ICA at §§ 6(1), 6(7); *Enterprise Products Partners L.P. and Enbridge Inc.*, 146 FERC ¶ 61,115 (2014) (citing *Potomac Elec. Power Co. v. U.S.*, 584 F.2d 1058, 1063 (D.C. Cir. 1978)).

[11] Pipelines have provided service not set forth in a tariff, in violation of section 6(1) and 6(7) of the ICA. *See Ultramar Inc. v. SFPP, L.P.*, 77 FERC ¶ 61,191 (1996). Yet we know of no instances where a pipeline has been required, for example, to reverse flow on its system, merely because it has talked to a customer about the possibility of someday offering to reverse flow.

[12] The Commission notes again that the Sandpiper Project, identified as a similar project by High Prairie, ultimately resulted in an interconnection at Superior.

[13] *Chevron Pipe Line Co.*, 64 FERC ¶ 61,213, at 62,616 (1993).

divination, and not based on factual findings based on substantial evidence.[14] High Prairie's argument is based upon prior decisions completely unrelated to High Prairie's circumstances.

20. For example, High Prairie attempts to characterize its present situation as similar to disputes where parties raised timely and valid concerns to the Commission, but still settled their disputes. This is simply not the case here where the claims appear premature and jurisdictionally tenuous, and there is no resolution obtainable either by settlement or by agency decision. High Prairie improperly conflates the issue of the potential settlement of claims properly before the Commission, and general preliminary negotiations that may never ultimately lead to an agreement or resolution. The Commission did not dismiss High Prairie's complaint based on the potential that the parties may settle the dispute. There is a considerable difference between dismissing a complaint that raises a cognizable claim solely because it may eventually settle, and dismissing a complaint concerning activities taken solely in the negotiation stage which have not resulted in any filing or other action that would or could warrant the Commission's review. The Commission is avoiding speculation and conjecture by requiring that negotiations be complete and the facts and circumstances of those negotiations be properly presented in a cognizable claim before a determination can be made on the merits.

21. High Prairie argues that the Commission need not await the actual filing of an executed interconnection agreement before it can determine whether the terms contained therein are unjust and unreasonable. However, to support this argument High Prairie cites to several cases involving electric utilities that are not analogous to the situation in the present case. Electric utilities are generally required to file standard interconnection agreements with the Commission.[15] Oil pipelines, on the other hand, are not required to file standard interconnection agreements, or to offer interconnection service at all. The cases cited by High Prairie involved unexecuted agreements that did not conform to the pro forma electric utility interconnection agreements previously filed with the Commission, or raised issues concerning the proper application of those agreements. In such cases, filing an unexecuted agreement allows the Commission to review the terms and conditions with respect to the standard agreements. This in no way provides support

[14] Request for Rehearing at p. 14.

[15] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

for High Prairie's claim that the Commission should review terms raised in a negotiation, yet never agreed to by the parties, and determine whether such terms are just and reasonable. The Commission continues to decline to interject itself into ongoing negotiations.

22. As the Commission stated in the March 22, 2013 Order, High Prairie's complaint was premature because the agreed to terms were as yet unknown. It is not enough that an offer from Enterprise Enbridge is, in High Prairie's opinion, unjust and unreasonable. High Prairie claims that this places it in an untenable catch-22 situation, where it must agree to terms before they can be challenged as unjust and unreasonable. Yet, as has been stated, the Commission cannot force an oil pipeline to offer a particular service. Enbridge Energy is not required to offer interconnection service. Once the pipeline provides a service, it must be offered on just and reasonable terms, and in a non-discriminatory manner. Prior to offering service, the pipeline is free to negotiate the terms it deems acceptable for it to begin providing the service. If a pipeline is already providing a service, then a similarly situated shipper may also acquire service on nondiscriminatory terms. However, in this proceeding Enbridge Energy is not providing interconnection service, and we affirm our decision to dismiss the complaint as premature. Rehearing on this issue is denied.[16]

Publication Requirement

23. High Prairie seeks rehearing of the Commission's holding that the requirement to publish an interconnection policy only applies when interconnection service already exists or is offered by the pipeline. High Prairie claims that the Commission's regulations expressly require that each carrier publish an interconnection policy in its tariff. High Prairie argues that the Commission's ruling in the March 22, 2013 Order is erroneous and contrary to the text of the regulations.

24. Publication requirements are set forth in section 6(1) of the ICA, which states that all rates, fares and charges for transportation must be filed with the Commission. Section 6(1) goes on to require filing of any rule or regulation "which in any wise change, affect, or determine" the filed rates. Section 341.0 of the Commission's regulations requires each carrier to file tariffs containing "all the rules and regulations governing the rates and charges for service performed in accordance with the tariff."[17]

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[16] The Commission notes that if the circumstances change or have changed, for example if due to the Sandpiper Pipeline project Enbridge Energy is now offering interconnection service at Clearbrook, High Prairie is not prejudiced from filing a new cause of action.

[17] 18 C.F.R. § 341.0(b)(1) (2014).

Further, section 341.8 of the Commission's regulations states that a carrier must publish in its tariffs rules governing such matters as connection policy, and all other rules "which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of service to the shipper."[18]

25. The requirement that carriers publish the terms and conditions with which it provides services is of paramount importance for ensuring that services are provided in a non-discriminatory manner. Publication of an interconnection policy in tariff form entails binding and serious consequences for a carrier.[19] The requirement, however, presupposes that the pipeline offers the service in question. Section 341.8 of the Commission's regulations includes an extensive list of services which must be published in a carrier's tariffs, including such services as pro-rationing, odorization, storage, batching, blending, and commingling services as well as a connection policy, if the pipeline offers such services or policy. Not every carrier provides all of these services or policy as part of transportation service. A pipeline is not required to provide, and consequently set forth in its tariff, every possible adjunct to transportation service.[20] The publication requirements of the ICA and the Commission's regulations also presuppose the pipeline is offering a FERC-jurisdictional service. However, services such as odorization may not be FERC-jurisdictional and thus need not be referenced in a tariff if such services are provided with non-jurisdictional facilities.[21] Finally, the Commission has found that services need not be explicitly set forth in a tariff if the service is included in other rates.[22]

26. It is clear that the services listed in section 341.8 need only be set forth in a carrier's tariff if those services are in fact offered, are offered as a distinct and separate FERC-jurisdictional service, and are offered at facilities within the Commission's jurisdiction. High Prairie fails to establish any of these requirements. Negotiations specific to an interconnection request are not sufficient to support publication of a "connection policy" as referenced in section 341.8, just as negotiations over other costs

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[18] 18 C.F.R. § 341.8 (2014).

[19] *Arco Alaska, Inc. v. FERC*, 89 F.3d 878, 886 (D.C. Cir. 1996).

[20] *See, e.g., Chevron Pipe Line Co.*, 106 FERC ¶ 61,338 (2004) (A sweet crude pipeline was not required to offer batching or blending services necessary to provide transport to sour crude products).

[21] *TE Products Pipeline Co., LLC*, 131 FERC ¶ 61,277, at P 12 (2010).

[22] *Santee Distributing Co. v. Dixie Pipeline Co.*, 71 FERC ¶ 61,205, at 61,754 (1995).

or services are not "rates or charges" until they are finalized and actually set forth in rates. Once a carrier does agree to provide an interconnection, and the interconnection is established, the policies associated with this interconnection must be published. To require Enbridge Energy to publish a policy when it is not currently providing interconnection service is beyond the requirements set forth in section 341.8. Further, it would be impractical if not impossible for carriers to set forth in tariffs each and every service that could possibly affect value to a shipper, even when that service is not provided by the carrier. Yet High Prairie's reading of section 341.8 would require just that. As the Commission stated in Order No. 561 when addressing the publication requirement, it is in the public interest for the Commission and the interested public to have ready access to information concerning a pipeline's operations.[23] If a pipeline does not offer interconnection service, it is not a part of the pipeline's operations.

27. To adopt High Prairie's reasoning concerning the publication requirement would negate all previous Commission decisions that found the Commission lacked the statutory authority to force oil pipelines to interconnect, or that the Commission lacked the authority to force oil pipelines to provide specific services. Simply put, since the Commission is statutorily barred from forcing an oil pipeline to interconnect, or provide a specific service, it is untenable to rule the Commission, pursuant to section 341.8, has the authority to force oil pipelines to set forth in their respective tariffs those very services, which in turn would require those services be provided upon reasonable request. High Prairie's improper attempt to bootstrap Commission jurisdiction so as to force interconnection service on an unwilling pipeline through an unduly broad interpretation of section 341.8 and section 6(1) of the ICA is unavailing to support its complaint. Rehearing on this issue is denied.

Discrimination

28. High Prairie argues that Enbridge Energy's refusal to interconnect is unduly discriminatory and in violation of section 3(1) of the ICA. High Prairie alleges that it is similarly situated to pipelines granted or offered interconnection at Clearbrook. High Prairie also alleges that Enbridge Energy is granting undue preference to Enbridge Energy shippers, its affiliated pipeline(s), and its affiliated pipeline(s)' shippers. High Prairie seeks rehearing of the Commission's determination that it is premature to determine whether any disparate treatment occurred.

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[23] *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, Stats. & Regs. Regulations Preambles, 1991-1996 ¶ 30,985, at 30,969 (1993), *order on reh'g*, Order No. 561-A, FERC Stats. & Regs. Regulations Preambles 1991-1996 ¶ 31,000 (1994).

29. Discrimination can only occur when service is offered on disparate terms.[24] In general terms, the act of discrimination occurs when a carrier accords different treatment to one shipper or locality than to another.[25] To support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, terms or conditions, (2) that the complaining party is competitively injured, actually or potentially, (3) that the carrier is the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates, terms or conditions is not justified by transportation conditions.[26] The complaining party has the burden of proving the presence of the first three factors and the carrier has the burden of justifying the disparity, if possible, in connection with the fourth factor.[27]

30. High Prairie's complaint failed to meet the requirements necessary to establish a claim of discrimination or undue preference. High Prairie did not establish the fundamental element of such an allegation, evidence of a disparity in rates, terms or conditions. There are no actual rates, terms or conditions for interconnection service on Enbridge Energy because such service is not currently provided and thus no tariff has been filed. High Prairie states that during its negotiations, Enbridge Energy conditioned an interconnection, in part, on the payment of approximately $100 million for facilities necessary to interconnect at Clearbrook, and the payment of an additional estimated $1 billion for construction of downstream expansions.[28] While these are unquestionably significant amounts, nowhere in High Prairie's complaint was there any evidence or claim that the amounts are different from what would have been or has been offered by Enbridge Energy for similar service to similarly-situated pipelines.

31. High Prairie also argues that it is discriminatory that existing shippers on Enbridge Energy would not incur the charges to complete the interconnection, including the downstream expansion.[29] However, High Prairie has not provided any evidence that

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[24] *Harborlite*, 364 ICC 585, *see also New York v. United States*, 331 U.S. 284.

[25] *Id*.

[26] *Chicago & Eastern Illinois R.R. Co. v. United States*, 384 F.Supp. 298, 300 (N.D. Ill. 1974), cited in *New York v. United States*, 568 F.2d 887, 897 (2nd Cir. 1974). *See also Harborlite Corp. v. S. Pac. Transp. Co., et al.*, 364 I.C.C. 585 (1981), *remanded*, *Harborlite v. ICC*, 613 F.2d 1088 (D.C. Cir. 1979).

[27] *New York v United States*, 568 F.2d at 897.

[28] High Prairie Complaint at 5.

[29] *Id*. at 11.

existing shippers are similarly situated to the potential shippers on High Prairie such that different rates for separate groups of shippers would be contrary to Section 3(1) of the ICA. When evaluating a discrimination claim, the Commission evaluates whether there is equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities exist.[30] Current shipments on Enbridge Energy are taking place without need for an interconnection with High Prairie, and current shippers on Enbridge Energy would not be using the interconnection at Clearbrook unless they also became High Prairie shippers. Further, it is unclear how existing shippers would utilize any facilities associated with the interconnection. Not only are shippers on Enbridge Energy not similarly situated to potential shipping on High Prairie that would require an interconnection, but requiring current Enbridge Energy shippers to pay for interconnection facilities not necessary for their shipments raises significant concerns regarding cross-subsidization and whether such facilities would be used and useful to current Enbridge Energy shippers.[31]

32. The Commission is not taking a narrow view of the anti-discrimination provisions of the ICA, or their applicability in the present proceeding. As the Supreme Court aptly stated, "[t]he principle evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations."[32] Yet, the mere fact that Enbridge Energy is refusing or conditioning an interconnection does not constitute discrimination in the absence of any evidence demonstrating an actual *disparity* in rates, terms and conditions.[33] Consequently, the Commission affirms High Prairie's complaint is premature, for it would be far too speculative to compare potential rates, terms and conditions raised in negotiations for purposes of determining whether discrimination occurred. Rehearing on this issue is denied.

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[30] *Sea-Land Serv., Inc. v. I.C.C.*, 738 F.2d 1311, 1316 (D.C. Cir. 1984).

[31] An asset must be used and useful to current shippers in order to be properly included in rates. *See, e.g., Tennessee Gas Pipeline Co. v. FERC*, 606 F.2d 1094, 1123 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 920 (1980), *New England Power Co.*, 42 FERC ¶ 61,016, at 61,078 (1988). In *Enbridge Energy Co., Inc. et al.*, 123 FERC ¶ 61,130 (2008), the Commission denied a petition for declaratory order concerning a proposed pipeline expansion upon determining that it would be a violation of the Commission's policy against cross-subsidization for mainline shippers to incur a surcharge, and assume financial risk, for an expansion they may never use.

[32] *New York v. United States*, 331 U.S. at 296, *citing Louisville & N. R.R. Co. v. United States*, 282 U.S. 740, 749-50 (1931).

[33] *W. Refining Pipeline Co.*, 123 FERC ¶ 61,271, at P 12 (2008) (failure to provide a certain service does not constitute discrimination under the ICA).

Rejections of Subsequent Filings and Motions to Lodge

33. High Prairie argues the Commission's rejection of its protest of Enbridge North Dakota's Petition for Declaratory Order in Docket No. OR13-6-000, and its Answer to Enbridge Energy's motion to strike such documents, was arbitrary and capricious. High Prairie contends its protest in Docket No. OR13-6-000 contained information about Enbridge Energy's interconnection practices that were not previously available and was highly relevant to this proceeding.

34. The Commission's has discretion to accept or reject such filings.[34] The Commission will not accept motions to lodge or similar filings when these filings contain information that is repetitive,[35] outside the scope of the proceeding,[36] or of no assistance in the decision-making process.[37] The information High Prairie sought to include was either procedurally improper or surplusage unnecessary to the Commission's decision to dismiss the complaint, and the Commission was well within its discretion to reject the filings.[38] Rehearing on this issue is denied.

Violations of Sections 1(6), 6(1), 1(4), and 6(7) of the ICA

35. High Prairie requests rehearing arguing the Commission did not address its claims that Enbridge Energy was in violation of sections 1(4), 1(6), 6(1) and 6(7) of the ICA. High Prairie's request for rehearing on these issues is denied. The Commission explicitly rejected High Prairie's arguments concerning sections 1(4), 1(6), 6(1) and 6(7) of the ICA in the March 22, 2013 Order.

36. Section 1(4) of the ICA requires that services be provided upon reasonable request. However, service must first be provided in order for it to be regulated pursuant to section 1(4). Not only can the Commission not compel Enbridge Energy to offer interconnection service, but it has held that the failure to provide a certain service does

[34] *Pub. Serv. Co. of New Hampshire, New England Power Co.*, 56 FERC ¶ 61,105 (1991).

[35] *Cal. Indep. Operator Sys. Corp.*, 146 FERC ¶ 61,198, at P 11 (2014).

[36] *Peetz Logan Interconnect, LLC*, 142 FERC ¶ 61,035, at P 9 (2013).

[37] *ISO New England Inc.*, 147 FERC ¶ 61,027, at P 13 (2014).

[38] *See Mystic Development LLC*, 116 FERC ¶ 61,168, at P 9 (2006).

not constitute a refusal to provide service upon reasonable request in violation of section 1(4).[39]

37. High Prairie also contends Enbridge Energy's refusal to grant an interconnection on just and reasonable terms violated section 1(6) of the ICA, which requires carriers to establish just and reasonable practices for the receipt of property. High Prairie cited to *Suncor Energy*, which held that "[t]he lack of an objective reason for preventing particular types of shippers from having an equitable opportunity to obtain transportation on [a common carrier's] pipeline system could violate the ICA section 1(6) prohibition against any unjust and unreasonable classification, regulation or practice."[40] However, as discussed *supra* in regard to discrimination, High Prairie has failed to establish that Enbridge Energy has granted any other shipper or group of shippers the opportunity to obtain transportation that has been denied High Prairie. Without the requisite showing of disparate treatment, High Prairie's claims concerning violations of section 1(6) of the ICA are dismissed.

38. High Prairie also alleges Enbridge Energy is in violation of section 6(1) of the ICA, as well as Rules 341.0 and 341.8 of the Commission's regulations, by failing to set forth an interconnection policy in its tariff. High Prairie further alleges that Enbridge Energy's conditions for interconnection, or refusal thereof, violates section 6(7) of the ICA by granting privileges to current shippers and affiliated pipelines not set forth in Enbridge Energy's tariff.

39. The Commission rejects these arguments. In short, High Prairie does not contest that Enbridge Energy's tariff currently lacks an interconnection policy. As explained above, such exclusion is permissible because Enbridge Energy does not provide such service. Further, with respect to allegations of discrimination, High Prairie has failed to establish that any disparate treatment has occurred as between it and Enbridge Energy's affiliates or current shippers.

40. Finally, High Prairie has alleged throughout its pleadings that the terms offered by Enbridge Energy during the negotiation process have been unjust and unreasonable. The Commission, however, cannot determine the justness and reasonableness of a rate before a rate is established by the pipeline. As stated earlier, the Commission will not weigh in on the reasonableness of every offer made in a negotiation before a service is provided. Moreover, the offer put forth by Enbridge Energy in negotiations may involve charges that are beyond the Commission's jurisdiction, such as charges for non-jurisdictional

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[39] *W. Refining Pipeline Co.*, 123 FERC ¶ 61,271, at P 12 (2008).

[40] High Prairie Complaint at 17 (citing *Suncor Energy Mktg. Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 117 (2010)).

storage facilities. This further supports dismissal of the complaint as premature, and at this juncture not clearly within the Commission's jurisdiction.

The Commission orders:

The request for rehearing of the March 22, 2013 Order filed by High Prairie is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.