118 FERC ¶ 61,162
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Enbridge Pipelines (North Dakota) LLC Docket No. IS07-105-000

ORDER ACCEPTING TARIFF, SUBJECT TO CONDITIONS

(Issued February 28, 2007)

1. On January 26, 2007, Enbridge Pipelines (North Dakota) LLC (Enbridge North Dakota) filed FERC Tariff No. 46 to cancel FERC Tariff No. 30. Enbridge North Dakota states that the purpose of FERC Tariff No. 46 is to implement proposed changes to Item 65 of its rules and regulations tariff, which governs prorationing of pipeline capacity when more crude petroleum is nominated for transportation than Enbridge North Dakota can physically accommodate. Enbridge North Dakota states that FERC Tariff No. 46 is proposed to be effective March 1, 2007. Murphy Oil USA, Inc. (Murphy) protested the filing, contending that the proposed revisions to the prorationing provisions will have an inequitable and unduly discriminatory effect, will be ineffective to achieve their stated purpose, and are unjust, unfair, and unreasonable. As discussed below, the Commission accepts FERC Tariff No. 46 to be effective March 1, 2007, subject to conditions.

Background and Description of the Filing

2. Enbridge North Dakota states that its 950-mile domestic pipeline system historically has transported approximately 84,000 barrels per day (bpd) from eastern Montana and western North Dakota to refineries in North Dakota and, via connecting pipeline systems, to destinations in the upper Midwest and eastern Canada. Enbridge North Dakota further states that crude petroleum enters its mainline from numerous feeder lines originating north and south of the line and through various stations.

3. Enbridge North Dakota asserts that, over the past few years, it has been required to prorate throughput on its pipeline system to address increasing capacity demands. According to Enbridge North Dakota, the increased demand is the result of numerous factors, including rising crude oil production in the Williston Basin producing fields. For example, states Enbridge North Dakota, production in eastern Montana has risen from below 40,000 bpd in 1999 to its current level of 90,000 bpd. Moreover, continues Enbridge North Dakota, production in North Dakota has experienced a similar increase, and projections indicate that production is expected to increase over the next few years.

Enbridge North Dakota points out that it has several expansions of its capacity currently underway.

4. Enbridge North Dakota contends that the dramatic increase in Williston Basin production has created an oversupply condition at the Guernsey,Wyoming market hub, with the further result that Enbridge North Dakota's mainline has been prorated in 10 of the last 12 months. Additionally, Enbridge North Dakota explains that its feeder line from the area of the expanding production has been in proration for approximately two years.

5. Enbridge North Dakota maintains that, despite its ongoing expansion programs, the over-nomination problem is aggravated by inflated nominations that are not consistent with providing each shipper an equitable share of the available capacity. Enbridge North Dakota asserts that the changes included in this filing represent an initial step toward correcting the inflated nominations problem.

6. First, states Enbridge North Dakota, to create a more realistic basis on which to pro-rate capacity, it is amending Item 65(d) of its tariff to limit nominations to the physical capacity of the pipeline segment through which the nominations would be transported. Enbridge North Dakota explains that nominations exceeding that limit would automatically be reduced to the applicable physical capacity limit before the prorationing process occurs. Enbridge North Dakota points out that in December 2006 and January 2007, shipper nominations far exceeded the physical capacity of the pipeline. Enbridge North Dakota contends that reducing all nominations to the total volume that can be delivered into the pipeline will create a more realistic starting point for the prorationing process.

7. Enbridge North Dakota states that the second proposed change would penalize shippers who do not ship at least 95 percent of the volume allocated to them through the nomination and prorationing process. Enbridge North Dakota explains that it will review the nominations for a given month, and if they exceed capacity, it will notify the shippers to allow them to reduce their nominations before it proceeds with the prorationing process. Enbridge North Dakota states that the resulting allocations will be deemed each shipper's Binding Nomination.

8. Enbridge North Dakota also explains that, under new Item 65(e)(i), except in the case of Force Majeure events, shippers will be penalized for their failure to transport at least 95 percent of their Binding Nominations in a given month. First, continues Enbridge North Dakota, if a shipper fails to meet the 95 percent requirement, the shipper must pay the posted tariff rate for the difference between the actual volume shipped and the shipper's Binding Nomination. Enbridge North Dakota also states that, in addition to the financial penalty provided in Item 65(e)(i), the volume of crude petroleum that it will

accept from the shippers in the next three months will be limited to no more than the amount the shipper actually shipped during the month of deficiency.

9. Enbridge North Dakota maintains that these penalties are designed to require shippers to transport the barrels allocated to them, thereby promoting full utilization of the pipeline and reducing the likelihood of shippers over-nominating. Enbridge North Dakota contends that these penalties generally are consistent with similar penalties that the Commission has approved for other pipelines. Finally, Enbridge North Dakota points out that, to reinforce the fact that the penalties are intended solely to defer inflated nominations, the revised tariff contains a provision requiring Enbridge North Dakota to refund to shippers annually on a pro rata basis any penalties collected under these provisions.

Intervention, Protest, and Answer

10. Murphy filed a Motion to Intervene and Protest, stating that it ships approximately 6,000 bpd over the Enbridge North Dakota system to a downstream refinery. Murphy explains that it purchases the crude petroleum from approximately 75 independent producers whose leases are physically located behind the hundreds of miles of Enbridge North Dakota's gathering lines, and then Murphy tenders the crude petroleum at a number of receipt points along the gathering laterals. Murphy also points out that it transports some crude petroleum to Enbridge North Dakota via common carrier trucks. In this situation, asserts Murphy, the number of barrels available for delivery at or behind each nomination point is unpredictable as the result of a variety of factors beyond Murphy's control. Thus, Murphy asserts that it will be unduly prejudiced and disadvantaged by the proposed penalty provisions of FERC Tariff No. 46.

11. While Murphy observes that Enbridge North Dakota models its proposal on a similar ship-or-pay provision approved for Platte Pipe Line Company (Platte),[1] Murphy argues that Platte's system is very different from that of Enbridge North Dakota in that it is a mainline system not connected to producing fields or to refineries, but is connected upstream and downstream to other large trunk pipelines; therefore, its transportation patterns and shippers are quite different. According to Murphy, under its operating circumstances, it is not realistic in all cases to match within such a limited range the volumes available for delivery and Binding Nominations made two to six weeks earlier.

12. Murphy further states that Enbridge North Dakota's proposed penalty provisions are unduly discriminatory because they will unreasonably single out and penalize shippers that rely on the gathering function and make multiple small nominations at numerous points on the small diameter lateral lines. Murphy states that Enbridge North

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[1] Murphy cites *Platte Pipe Line Co.*, 82 FERC ¶ 61,087 (1998); *Platte Pipe Line Co.*, 117 FERC ¶ 61,296 (2006).

Dakota has not provided adequate justification for the proposed new penalty provisions, and in fact, that the Platte methodology cited by Enbridge North Dakota does not work effectively on Platte's system. Moreover, continues Murphy, existing provisions of Enbridge North Dakota's tariff are adequate to allocate constrained capacity, such as the provisions allocating capacity on the basis of shipments made in a past base period. Murphy also proposes alternatives such as a preference for domestic crude, which is of a higher quality than Canadian crude. Murphy asks the Commission to suspend FERC Tariff No. 46 for the maximum statutory period and set it for hearing.

13. Enbridge North Dakota responds that Murphy has misunderstood the way in which Enbridge North Dakota intends to implement the proposed penalty provisions. Enbridge North Dakota states that it does not intend to require shippers to meet the 95-percent nomination requirement at each individual lease or gathering point, but rather intends to apply it to aggregate nominations at mainline receipt points. Enbridge North Dakota cites the statement of its affiant to that effect.

14. Enbridge North Dakota also emphasizes that, in the Platte proceedings, the Commission recognized that there could be a number of prorationing methodologies that might be appropriate for a pipeline, but that the Commission's only obligation in such a case is to determine whether the one proposed by the pipeline is just and reasonable and not unduly discriminatory.[2] Enbridge North Dakota contends that it has established that its current prorationing policy has not deterred over-nominations, that it intends to refund to shippers any revenues generated by this proposal, and that it will continue to monitor the operation of its pipeline to ensure that its prorationing methodology is successful.

Commission Analysis

15. As discussed below, the Commission conditionally accepts FERC Tariff No. 46 contingent upon Enbridge North Dakota's filing a revised tariff consistent with the discussion below within 15 days of the date of issuance of this order, to be effective as of March 1, 2007. Enbridge North Dakota has submitted a reasonable proposal for addressing the problem of over-nominations on its system, and Murphy has failed to demonstrate otherwise. As the Commission emphasized in the *Platte* proceeding,

> [T]here is no single prorationing policy that will satisfy all of the competing interests in this case, though there could be a number of different methods that might be appropriate for the Platte system. . . . Accordingly, the Commission must determine only if Platte's proposed historically-based prorationing policy is just and reasonable and not unduly discriminatory.[3]

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[2] Enbridge North Dakota cites *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 42 (2006).

[3] *Id*.

16. Enbridge North Dakota has sufficiently demonstrated that it is experiencing over-nominations on its system that hamper its ability to operate its system at the maximum effective level. The proposal it advances represents a reasonable effort to remedy this problem. It affords shippers two opportunities to conform their nominations to the system's volumetric limitations. However, while it penalizes shippers for their failure to achieve this goal, the proposed methodology penalizes such shippers only for a limited time, during which they can adjust their own business operations as necessary to comply with the tariff. The reasons advanced by Murphy for its claimed inability to conform to the requirements of this proposal do not render the proposal unjust and unreasonable or unduly discriminatory.

17. However, the Commission finds that Enbridge North Dakota's proposal requires certain clarifications. The Commission observes that Enbridge North Dakota has stated that it does not intend to require shippers to meet the 95-percent nomination requirement at each individual lease or gathering point, but rather intends to apply it to aggregate nominations at mainline receipt points. Enbridge North Dakota must revise its proposed tariff provisions to make that clear.

18. Additionally, while Enbridge North Dakota proposes an annual *pro rata* refund to its shippers of the amounts collected under FERC Tariff No. 46, it fails to provide for interest on such refunds. Enbridge North Dakota must further revise its proposal to provide for interest at a rate consistent with the Commission's regulations. Finally, the Commission will require Enbridge North Dakota to revise its proposal to limit the refunds of amounts collected under Item 65(e)(ii) of FERC Tariff No. 46 to shippers that have not incurred the over-nominations penalties established in FERC Tariff No. 46. To allow shippers that have failed to comply with Enbridge North Dakota's prorationing provisions to obtain refunds of the penalties with interest would diminish the potential deterrent effect of the penalties.

<u>The Commission orders:</u>

Enbridge North Dakota's FERC Tariff No. 46 is accepted to be effective March 1, 2007, subject to Enbridge North Dakota's making a revised tariff filing within 15 days of the date of issuance of this order to incorporate the changes directed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.