

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enbridge Energy, Limited Partnership

Docket No. IS07-114-000

ORDER ACCEPTING TARIFF, SUBJECT TO CONDITIONS

(Issued March 2, 2007)

1. On February 2, 2007, Enbridge Energy, Limited Partnership (Enbridge Energy) filed FERC Tariff No. 27 to cancel FERC Tariff No. 22. Enbridge Energy states that the purpose of FERC Tariff No. 27 is to implement a new definition in Item 1 and certain changes to Item 14 of its rules and regulations, which governs apportionment of pipeline capacity when more crude petroleum is nominated for transportation than Enbridge Energy can physically accommodate. Enbridge Energy states that FERC Tariff No. 27 is proposed to be effective March 5, 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, and, as applied to shippers like Murphy, will be unjust, unfair, and unreasonable. As discussed below, the Commission accepts FERC Tariff No. 27 to be effective March 5, 2007, subject to conditions.

Background and Description of the Filing

2. Enbridge Energy explains that it operates the U.S. portion of a coordinated pipeline system transporting crude petroleum and natural gas liquids from western Canada through the upper Midwestern U.S. to markets in both countries. Enbridge Energy further explains that the Canadian portion of the Enbridge system is operated by an affiliated company, Enbridge Pipelines Inc. (EPI), which is regulated by the National Energy Board of Canada (NEB).

3. Historically, states Enbridge Energy, the primary capacity constraint point on the combined EPI/Enbridge Energy system has been in Canada. For that reason, explains Enbridge Energy, EPI's Canadian tariff historically has contained a Non-Performance Penalty provision that penalizes shippers that fail to transport at least 95 percent of the capacity allocated to them under EPI's apportionment policy. Enbridge Energy states that its U.S. tariff has not contained a similar provision because that was unnecessary so long as the physical constraint point was in Canada; however, as a result of recent changes to the system configuration and the pattern of crude oil flows, the physical

constraint point is now at Superior, Wisconsin. Enbridge Energy maintains that its shippers have asked that it implement a Non-Performance Penalty provision identical to the one contained in EPI's Canadian tariff. Enbridge Energy states that the Canadian Association of Petroleum Producers (CAPP) supports this change.

4. Enbridge Energy asserts that, under Item 14 of its rules and regulations, for any month when nominations exceed available physical capacity, it will pro-rate the available capacity in accordance with its existing prorationing policy. However, as modified by FERC Tariff No. 27, states Enbridge Energy, Item 14 would require each shipper to transport 95 percent of its apportioned volumes in that month or incur the proposed Non-Performance Penalty in addition to all other applicable charges. Enbridge Energy further states that the Non-Performance Penalty will be excused in the case of Force Majeure events as defined in Item 1 of the tariff. Enbridge Energy explains that the Non-Performance Penalty will be US\$2.70 per barrel (which equates to US\$17.00 per cubic meter). As is the case under EPI's Canadian tariff, Enbridge Energy states that it will flow back to its shippers the excess (if any) of the revenue obtained from this penalty over the tariff revenue that would have been collected on the barrels if they had moved. Enbridge Energy explains that the mechanism for this adjustment will be to credit any excess Non-Performance Penalty revenues against the Facilities Surcharge calculation, which, pursuant to agreements with CAPP, is imposed on all Enbridge Energy mainline shippers.

Intervention, Protest and Answer

5. Murphy filed a Motion to Intervene and Protest, stating that it ships approximately 34,000 barrels per day (bpd) over the Enbridge Energy system to Murphy's refinery in Superior, Wisconsin. Murphy explains that approximately 14,000 bpd of its total volumes enter the pipeline at Clearbrook, Minnesota, where Enbridge Energy interconnects with Enbridge (North Dakota), LLC (Enbridge North Dakota), which is a gatherer of crude oil with hundreds of miles of gathering laterals. Murphy states that the balance of its shipments originate in Canada, where they are purchased by Murphy as they enter the facilities of Enbridge Energy's Canadian affiliate.

6. Murphy states that it is particularly concerned about the effect of the proposed penalty on its tenders and shipments of domestic production that enter the line at Clearbrook. Murphy states that this production comes from numerous small producing wells in North Dakota and Montana. Murphy contends that it is difficult or impossible to predict or control the output of these wells, individually or in the aggregate, within the five-percent tolerance proposed by Enbridge Energy. In addition to the crude oil shipped via Enbridge North Dakota, Murphy points out that, in many cases, production is trucked from the leases to the Enbridge North Dakota system. Murphy cites a number of events or conditions that might affect its ability to avoid the proposed Non-Performance Penalty, such as weather, equipment failures, and road access.

7. Murphy states that its problems would be exacerbated in North Dakota if Enbridge North Dakota is permitted to implement its FERC Tariff No. 46 filed January 26, 2007.¹ Murphy contends that FERC Tariff No. 46 will allow Enbridge North Dakota to penalize shippers, both financially and by means of future volume restrictions, if the shippers are unable to ship 95 percent of their confirmed nominations. Murphy argues that Enbridge North Dakota's FERC Tariff No. 46 in combination with Enbridge Energy's FERC Tariff No. 27 will subject Murphy to double penalties for the same production shortfalls.

8. Murphy contends that Enbridge Energy has not justified FERC Tariff No. 27. Murphy asserts that, rather than justifying the tariff as appropriate for the U.S. system, Enbridge Energy merely claims that Canadian authorities require a parallel penalty on EPI's system and that CAPP supports the instant proposal.

9. Murphy further states that Enbridge Energy's proposed penalty provision is unduly discriminatory because it 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 asks the Commission to suspend FERC Tariff No. 27 for the maximum statutory period and set it for hearing.

10. Enbridge Energy filed an answer one day out of time on February 22, 2007, after the Commission's deadline for such a filing.² Enbridge Energy responds that it is not a gathering pipeline and does not transport oil from individual leases. To the extent that Murphy is concerned about the potential effect on shippers that gather crude oil from leases connected to a gathering system, Enbridge Energy contends that Murphy's complaint appears to be with the policies of Enbridge North Dakota. Thus, argues Enbridge Energy, the discrimination claims raised in Murphy's protest in this proceeding do not apply to Enbridge Energy.

11. Enbridge Energy emphasizes that, in proceedings relating to Platte Pipe Line Company, the Commission recognized that there could be a number of prorating 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

¹ Docket No. IS07-105-000.

² Section 343.3(b) of the Commission's regulations provides that "[t]he carrier may file a response to a protest no later than 5 days from the filing of the protest." 18 C.F.R. § 343.3(b) (2006).

and reasonable and not unduly discriminatory.³ Enbridge Energy further states that the Commission has approved the use of nomination change fees and “ship or pay” prorationing policies for other pipelines.⁴

Commission Analysis

12. Enbridge Energy filed its answer out-of-time, contending that it had not received Murphy’s protest by electronic mail, despite Murphy’s statement that it had served the protest on Enbridge Energy. The Commission will accept the answer because it has provided additional relevant information for the Commission’s consideration. As discussed below, the Commission accepts FERC Tariff No. 27 to be effective as of March 5, 2007, subject to conditions.

13. Enbridge Energy 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.⁵

14. Enbridge Energy points out that the constraint point on its system has moved downstream from Canada to the current constraint point at Superior, Wisconsin. However, Enbridge Energy points out that its current FERC tariff does not have adequate tools to address over-nominations, which contribute to this constraint and hamper Enbridge Energy’s ability to operate its system at the maximum effective level. The proposal it advances represents a reasonable effort to remedy this problem. Murphy has not advanced a compelling argument in opposition to imposition of this penalty or the amount of the proposed penalty. Further, Enbridge Energy states that it will return to its shippers the amount of the penalty it collects in excess of the revenue it would have collected if the excess barrels had moved as nominated. However, as stated below, the

³ Enbridge North Dakota cites *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 42 (2006) (*Platte*).

⁴ Enbridge Energy cites *Colonial Pipeline Co.*, 98 FERC ¶ 61,082 (2002); *Platte Pipe Line Co.*, 82 FERC ¶ 61,087 (1998).

⁵ *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 42 (2006).

Commission will require Enbridge Energy to modify its proposal to provide that refunds of the penalty will be subject to interest and that such refunds will be provided only to shippers that do not incur the penalties.

15. In an order issued February 28, 2007, in Docket No. IS07-105-000,⁶ the Commission accepted Enbridge North Dakota's FERC Tariff No. 46, but required Enbridge North Dakota to revise its proposal to clarify 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 the requirement to aggregate nominations at mainline receipt points. The Commission also required Enbridge North Dakota to provide for interest on the refunds at a rate consistent with the Commission's regulations and to limit refunds of the penalty proposed in that proceeding to shippers that do not incur the penalties. The Commission stated that to do otherwise would diminish the deterrent effect of the penalty.

16. Murphy filed a protest in Docket No. IS07-105-000 challenging that tariff on essentially the same grounds it has challenged Enbridge Energy's FERC Tariff No. 27. The Commission recognized in Docket No. IS07-105-000 that Enbridge North Dakota is experiencing over-nominations on its system and that it proposed reasonable penalties to address the problem. In the order issued February 28, 2007, in that proceeding, the Commission addressed Murphy's concerns by requiring Enbridge North Dakota to include in its tariff its clarification that it does not intend to require shippers to meet the 95-percent nomination requirement at each individual lease or gathering point, but instead that it intends to apply the requirement to aggregate nominations at mainline receipt points.⁷

17. Additionally, while Enbridge Energy must refund the penalties as it has proposed, it must also include interest at a rate consistent with the Commission's regulations, and it must further revise its proposal to provide for direct refunds to shippers that do not incur this penalty rather than crediting any excess penalty revenues against its Facilities Surcharge, which applies to all shippers.

18. Accordingly, the Commission accepts Enbridge Energy's FERC Tariff No. 27 to be effective March 5, 2007, subject to the conditions stated above.

⁶ *Enbridge Pipelines (North Dakota) LLC*, 118 FERC ¶ 61,162 (2007).

⁷ *Id.* at P 17.

The Commission orders:

Enbridge Energy's FERC Tariff No. 27 is accepted to be effective March 5, 2007, subject to Enbridge Energy's making a revised tariff filing within 15 days of the date of issuance of this order to incorporate the changes discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.