

122 FERC ¶ 61,170  
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 Pipelines (Southern Lights) LLC

Docket No. OR07-15-001

ORDER GRANTING CLARIFICATION AND DENYING REHEARING

(Issued February 22, 2008)

1. On January 23, 2008, Enbridge Pipelines (Southern Lights) LLC (Enbridge Southern Lights) filed a request for clarification or, in the alternative, rehearing of the Order on Petition for Declaratory Order issued December 31, 2007, in this proceeding (December 31, 2007 order).<sup>1</sup> Enbridge Southern Lights seeks clarification that the committed rates for the Southern Lights Pipeline will be set in accordance with the agreed-upon Transportation Services Agreement (TSA) entered into between Enbridge Southern Lights and the committed shippers following the open season. As discussed below, the Commission clarifies the December 31, 2007 order.

**Background**

2. The December 31, 2007 order contains a full description of the Southern Lights Pipeline project, which is expected to transport as much as 180,000 barrels per day (bpd) of light liquid hydrocarbons (diluent) from Chicago, Illinois, to Edmonton, Alberta. The diluent will be used to facilitate the transportation of heavy crude oil and bitumen from the oil sands in western Canada. Enbridge Southern Lights anticipates an in-service date of July 1, 2010, for the Southern Lights Pipeline.

3. In its July 20, 2007 petition for a declaratory order, Enbridge Southern Lights sought certain assurances from the Commission, including what it deemed the “central assurance,” that the agreed-upon terms of its TSA with the committed shippers will govern the determination of the tariff rates. Further, Enbridge Southern Lights sought assurance that the rate design established in the TSA, which is used to determine both the committed and uncommitted rates, will be upheld and applied during the term of the TSA.

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<sup>1</sup> *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310 (2007).

4. In the December 31, 2007 order, the Commission declined to authorize a specific return on equity (ROE), stating that Enbridge Southern Lights must propose and support its desired ROE when it files to implement its initial rates.<sup>2</sup> Similarly, the Commission declined to authorize a specific fixed capital structure and the pipeline's proposed depreciation methodology, instead deferring a decision on those issues until Enbridge Southern Lights files to implement its actual rates.<sup>3</sup>

5. However, the Commission accepted Enbridge Southern Lights' proposed rate design, finding that no party opposes it and that it does not violate the antidiscrimination and undue preference standards of the Interstate Commerce Act (ICA) because Enbridge Southern Lights offered the rate discount to all interested shippers and because the rate reflects the differences between firm and non-firm shippers.<sup>4</sup> The Commission also approved inclusion in the pipeline's rate base of the costs of the proposed asset swap in which Enbridge Southern Lights will acquire an existing pipeline in exchange for a new line to be constructed for the Lakehead system.<sup>5</sup> Further, the Commission also approved the proposed single rate from Chicago to the International Border that would allow short-haul U.S. shippers to pay that rate, as adjusted for power cost savings.<sup>6</sup> Finally, the Commission approved Enbridge Southern Lights' proposed annual true-up provision, finding that it will ensure that the pipeline will not over-recover its costs.<sup>7</sup>

### **Request for Clarification or Rehearing**

6. Enbridge Southern Lights states that the December 31, 2007 order appears to anticipate that it will make a cost-of-service filing to support its rates before the pipeline goes into service. However, Enbridge Southern Lights states that, in accordance with the Commission's regulations, it intends to file both the committed and uncommitted rates as negotiated rates that are agreed to by the unaffiliated committed shippers who will use the service.<sup>8</sup> Enbridge Southern Lights seeks clarification that the agreed-upon terms of the TSA will govern the determination of the committed shippers' rates over the term of the TSA.

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<sup>2</sup> *Id.* P 17-18.

<sup>3</sup> *Id.* P 20, 24.

<sup>4</sup> *Id.* P 29-31.

<sup>5</sup> *Id.* P 36-38.

<sup>6</sup> *Id.* P 41

<sup>7</sup> *Id.* P 45.

<sup>8</sup> Enbridge Southern Lights cites 18 C.F.R. § 342.2(b) (2007).

7. Enbridge Southern Lights argues that Commission gas pipeline precedent supports its requested clarification.<sup>9</sup> Enbridge Southern Lights maintains that, in *Alliance*, the Commission expressly confirmed that negotiated rate shippers are bound by the terms of their contracts (even though the Commission did not rule on the specific components of the negotiated rates). Enbridge Southern Lights explains that *Alliance* had filed pro forma tariff sheets for both a negotiated rate and a recourse rate, but because the agreement was for a 15-year period, the pipeline would not fully recover its costs from shippers who opted out at the end of the agreement. Therefore, continues Enbridge Southern Lights, the pipeline and its negotiated shippers agreed to increase the rates applicable to shippers who did not agree to an additional 10-year term. Enbridge Southern Lights emphasizes that the Commission rejected a protest to that provision, holding as follows:

Alliance's negotiated rate shippers agreed to and do not complain about the rate adjustment which is a private contractual matter between Alliance and its shippers. The disputed provision is part of the negotiated rate formula which we will not review absent evidence of unfairness not present in this record.<sup>10</sup>

8. Enbridge Southern Lights argues that the same principle should apply to the relationship between oil pipelines and their shippers. Generally, contends Enbridge Southern Lights, when a shipper enters into a binding contract, the Commission will not consider a subsequent challenge by that shipper to that rate while the contract is in effect.<sup>11</sup> Further, states Enbridge Southern Lights, the Commission's regulations clearly allow oil pipelines to file and maintain rates that are the result of negotiations with unaffiliated shippers.<sup>12</sup> Enbridge Southern Lights emphasizes that it and the shippers who signed the TSA seek to rely on the TSA as a means of achieving certainty regarding

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<sup>9</sup> Enbridge Southern Lights cites *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149 (1997), *reh'g denied in relevant part*, 84 FERC ¶ 61,239, at 62,213 (1998) (*Alliance*).

<sup>10</sup> *Alliance Pipeline L.P.*, 80 FERC ¶ 61,149, at 61,600 (1997). *See also Kern River Gas Transmission Co.*, 117 FERC ¶ 61,077, at P 64 and n.113 (2006) (*Kern River*) (choices made by two classes of shippers were accorded the "sanctity of contract").

<sup>11</sup> Enbridge Southern Lights cites *SFPP, L.P.*, 86 FERC ¶ 61,022, at 61,075 (1999) (subsequent history omitted) (complaint was "arguably little more than an attempt to avoid a previously negotiated contract, agreements the Commission has held are lawful under the ICA").

<sup>12</sup> Enbridge Southern Lights cites 18 C.F.R. § 342.2 (2007); *see CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at P 21-22 (2007).

the Commission's treatment of their rates, and no party has questioned the terms of the TSA.

### **Commission Analysis**

9. Enbridge Southern Lights asks the Commission to affirm clearly that the agreed-upon terms of the TSA will govern the determination and application of the committed shippers' rates over the term of the TSA. Enbridge Southern Lights correctly states that the Commission's regulations allow an oil pipeline to charge a negotiated rate if it is agreed to by at least one unaffiliated shipper. Section 342.2 of the regulations provides that a carrier must justify an initial rate for new service by one of the two methods: (a) by filing cost, revenue, and throughput data supporting that initial rate as required by part 346 of the regulations, or (b) by filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question. However, the regulation also provides that, if a protest to the initial rate is filed, the pipeline must file the cost, revenue, and throughput data that supports the rate.<sup>13</sup>

10. In the December 31, 2007 order, the Commission found that Enbridge Southern Lights' proposed method of calculating the initial rate for its committed shippers did not comply with section 342.2(a) of the Commission's regulations. The Commission pointed out that Enbridge Southern Lights did not use the pipeline's design capacity to derive the committed rates, but instead relied on the volumes committed by shippers during the open season and projected spot volumes, contending that this amounts to approximately 90 percent of the pipeline's annual capacity.<sup>14</sup> Commission precedent generally dictates the use of actual design capacity for initial rates on a new pipeline, and a pipeline is placed at risk for the costs of unsubscribed capacity based on actual design capacity.<sup>15</sup> In the instant case, however, Enbridge Southern Lights' reliance on committed volumes and projected spot volumes is not consistent with that precedent and the Commission's regulations.

11. Despite this, in the December 31, 2007 order, the Commission found that Enbridge Southern Lights' proposed rate structure does not violate the antidiscrimination

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<sup>13</sup> 18 C.F.R. § 342.2; see *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 at P 21-22 (2007).

<sup>14</sup> *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310 at P 29 (2007) (citing Petition for Declaratory Order of Enbridge Pipelines (Southern Lights) LLC, Ex. D, Statement G of Exhibit Nos. RGV-2 and RGV-3).

<sup>15</sup> *Enbridge Energy Company, Inc.*, 110 FERC ¶ 61,211 (2005); *Great Lakes Gas Transmission Limited Partnership*, 66 FERC ¶ 61,118 (1994); *Equitrans, Inc.*, 63 FERC ¶ 61,070, (1993); *Arkansas Western Pipeline Co.*, 63 FERC ¶ 61,006 (1993).

or undue preference provisions of the ICA. Because the committed rate discount was offered to all interested shippers through an open season, reflects the differences in service between firm and non-firm shippers, and is unchallenged, the Commission determined that Enbridge Southern Lights can justify the committed rate as an agreed-upon rate. As stated above, section 342.2(b) of the regulations allows a carrier to justify an initial rate for new service by filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question. However, if a protest is filed against the agreed rate, the carrier must file cost-of-service and throughput data.

12. The Commission is concerned, however, because the proposed rate design provision of the TSA sets the uncommitted rate at twice the level of the committed rate. Because the proposed committed rate is not supported by cost-of-service data and determined in accordance with the Commission's Opinion No. 154-B rate methodology, the uncommitted rate likewise is unsupported. The shippers that will pay the committed rate are known and have signed TSAs specifically agreeing to the proposed committed rate structure, but a future uncommitted or spot shipper may protest the uncommitted rate. As Enbridge Southern Lights correctly acknowledged, if the uncommitted rates are challenged, the appropriate framework for evaluating that challenge would be the Commission's Opinion No. 154-B methodology.<sup>16</sup>

13. Therefore, the Commission clarifies that the agreed-upon terms of the TSA will govern the determination of the committed shippers' rates over the term of the TSA, and that the rate design embodied in the TSA used to determine both the committed and uncommitted rates will be upheld and applied during the term of the TSA, but with one condition. That is, if the uncommitted rate is protested, Enbridge Southern Lights must comply with section 342.2(b) to support its uncommitted rate by filing cost, revenue, and throughput data supporting such rate as required by part 346 of the Commission's regulations. When a just and reasonable uncommitted rate is determined in this manner, Enbridge Southern Lights may derive its committed rate by applying the agreed-upon terms of the TSA.

14. Enbridge Southern Lights' reliance on *Alliance and Kern River* is misplaced. The Commission has required gas pipelines proposing negotiated rates to also make available a recourse rate to all customers not choosing to negotiate a rate.<sup>17</sup> The recourse rate is a cost-of-service based rate. Enbridge Southern Lights' uncommitted rate is not unlike a gas pipeline's recourse rate. It will be available to all shippers who choose not to select Enbridge Southern Lights' negotiated committed rate. As stated above, if the

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<sup>16</sup> *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310 at P 28 (2007).

<sup>17</sup> *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 at 61,240-41 (1996).

uncommitted rate is protested it must be supported by filing cost, revenue, and throughput data, similar to the requirement that gas pipelines must offer a cost-of-service based recourse rate.

The Commission orders:

(A) The December 31, 2007 order is clarified, as discussed in the body of this order.

(B) Rehearing of the December 31, 2007 order is denied as moot.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.