

126 FERC ¶ 61,073
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Acting Chairman;
Suedeem G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Nexen Marketing U.S.A. Inc.

Docket No. OR08-11-000

v.

Enbridge Pipelines (North Dakota) LLC

ORDER ON COMPLAINT

(Issued January 28, 2009)

1. On June 18, 2008, Nexen Marketing U.S.A Inc. (Nexen) filed a complaint against Enbridge Pipelines (North Dakota) LLC (Enbridge) alleging that Enbridge improperly failed to give effect to the force majeure provision of its tariff and as a result unfairly and unreasonably imposed penalties that substantially reduce the quantity of crude oil that Nexen is able to ship on Enbridge's pipeline. This order finds that Enbridge correctly determined that its force majeure provision did not excuse Nexen's failure to deliver the amount of crude oil it nominated and that the imposition of penalties for such failure was appropriate. Accordingly, the order denies Nexen's complaint.

Background

2. Enbridge's system consists primarily of a 950-mile underground pipeline that transports approximately 110,000 barrels per day (bpd) of crude from eastern Montana and North Dakota oil fields to refineries in North Dakota and, via connecting pipelines, to destinations in the upper Midwest and eastern Canada. The mainline of the system runs from Beaver Lodge, North Dakota east through Minot, North Dakota to Clearbrook, Minnesota where it connects with the Lakehead and Minnesota Pipeline systems. Crude oil petroleum from various producing fields enters the mainline from feeder lines originating south and north of the line and through various stations, including Reserve station in Montana, and Sherwood, Maxbass, Glenburn, Newburg, Grenora, Alexander, Trenton, Stanley and Beaver Lodge stations in North Dakota.

3. Despite recent expansions of Enbridge's pipeline, increased production from the Williston Basin has caused Enbridge's mainline to be in prorationing consistently for the past 31 months. As a result of the shortage of capacity on Enbridge, a strenuous competition has developed among shippers to obtain space in the line. Among other things, this has led to shippers' submitting huge nominations for the purpose of obtaining a larger allocation through the apportionment process. Implementation of Enbridge's prorationing process eventually became so unwieldy that the pipeline undertook a series of changes to its process in an attempt to better manage the pipeline.

4. Enbridge's current procedures require all nominations to be made by the 15th day of the previous month. Enbridge's rules and regulations state that if a shipper fails to deliver 90 percent of the crude oil that it nominated, it will nevertheless be charged for the full amount of its nomination. In addition, a shipper who fails to deliver 90 percent of its nomination will have a three-month cap on its allocation based on the actual shipments made during the month it failed to meet the 90 percent threshold.

5. Enbridge's tariff does recognize that the non-performance penalty will not apply in case of force majeure. Section 65 of Enbridge's rules and regulations states:

“Force Majeure” means an event which is unforeseen, and beyond the control of the Shipper, that either prevents the Shipper from delivering the affected volume to Carrier or prevents the Shipper from accepting delivery of the affected volume from Carrier. The following are the examples of Force Majeure events: earthquakes; floods; landslides; civil disturbances; sabotage; the acts of public enemies; war; blockades; insurrections; riots; epidemics; the act of any government or other authority or statutory undertaking; the inability to obtain or the curtailment of electric power, water or fuel; strikes, lockouts, or other labor disruptions; fires; explosions; breakdowns or failures of pipe, plant, machinery or equipment; and contamination or poisoning of catalyst and/or solvent or biological treatment facilities. For greater certainty, a lack of funds; the availability of a more attractive market; Shipper's inability to purchase Crude Petroleum; or inefficiencies in operations do not constitute events of Force Majeure.

6. Nexen is a marketer of crude oil in a number of Rocky Mountain states, including North Dakota and Montana. With respect to its North Dakota operations, Nexen typically buys crude oil from a number of producers with whom it has had long-term relationships. Since these crude oil producing wells are not connected to a pipeline, Nexen uses trucking firms to transport crude oil from the producing wells to Enbridge origins at Alexander, Reserve, Grenora, Beaver Lodge, Stanley, and Sherwood.

7. On January 15, 2008, Nexen submitted its nominations for February 2008. Numerous shippers nominated the maximum nomination permitted under Enbridge's tariff for February 2008. As a result of the apportionment process, the capacity of

Enbridge's system was allocated among 41 nominating shippers so that each shipper, including Nexen, received a specific binding nomination for the month. Nexen's allocation reflected its status as a historical shipper on Enbridge's system. Nexen did not meet the 90 percent threshold for its February nominations. As result the space that Nexen did not use went empty. Nexen sent letters to Enbridge stating that although it did not submit at least 90 percent of its nomination in February 2008, it should be excused from the non-performance penalty because of force majeure events. Nexen claimed that a number of unforeseen, severe and abnormal weather events negatively affected oil production and Nexen's ability to safely transport oil to the Enbridge pipeline. Enbridge responded to Nexen's letters and determined that the events described were not force majeure events that were unforeseen and beyond the control of the shipper, but rather were inefficiencies in operations. Accordingly, waiver of the non-performance penalty was denied.

Nexen's Complaint

8. Nexen asserts that Enbridge has unfairly and unreasonably imposed penalties that substantially reduce the quantity of crude oil that Nexen is able to ship on its pipeline. Nexen contends that contrary to typical February weather patterns, the temperature in February 2008 in North Dakota was far below normal, with an unusual number of ice storms and periods of high winds. As a result, Nexen asserts the producers and trucking firms on which Nexen relies to supply it with crude oil and deliver that crude oil to the Enbridge pipeline could not conduct normal operations. Nexen asserts that doing so would have jeopardized the lives of workers and would have been unsafe business practice. Nexen contends that during portions of the month, the North Dakota Department of Transportation advised semis and other large vehicles to stay off the roads. Nexen asserts that solely because of these unusually severe weather conditions, it was not able to deliver to the Enbridge pipeline in February 2008 the full amount of crude oil it had nominated.

9. Nexen argues that Enbridge reacted to the dilemma that Nexen faced in an unreasonable and unfairly harsh manner. Nexen states that Enbridge charged Nexen for the crude oil it was not able to ship in February and then reduced Nexen's allowable shipments in May, June, and July by the same amount. Nexen states that since the Enbridge system is prorated and has been prorated for at least the past 18 months, Enbridge's action means that Nexen could suffer a significant loss in revenues that would continue almost indefinitely. Nexen states that since it is classified as a regular shipper under Enbridge's tariff, Nexen's base period allocation for the indefinite future will be based on the lower shipment quantities that Enbridge imposed on it for the May through July period.

10. Nexen asserts that by penalizing Nexen in this manner, Enbridge has improperly failed to give effect to the force majeure provisions of its own tariff. Nexen contends that those provisions excuse the obligations of a shipper such as Nexen when forces beyond

its control, such as highly unusual winter weather, prevent a shipper from fulfilling its nominations. However, Nexen states that instead of implementing the force majeure provision, Enbridge claimed that Nexen's inability to deliver its full nomination was the result of inefficiencies in operations. Nexen contends that even apart from its unreasonable conduct in failing to implement the force majeure clause of its own tariff, Enbridge's course of conduct also violates the provisions of the Interstate Commerce Act that direct pipelines to treat shippers in a just and reasonable manner.

11. Nexen asserts that its nominations to Enbridge for February 2008 were reasonable and were in line with previous shipments on Enbridge. Nexen submits that in the months leading up to February 2008, the weather conditions in North Dakota were both warmer and drier than normal and, at many points, were significantly warmer than is typical for these months. Nexen contends that the weather during the first week of January was substantially warmer than is typical for North Dakota in January, and the coldest days of the month did not occur until the last few days of January, almost two weeks after Nexen submitted its nomination to Enbridge. Nexen states that for the entire eight-month period prior to February 2008, Nexen was able to secure its normal volumes of crude petroleum and tender them to Enbridge for shipment.

12. Nexen states contrary to the predictions of warmer than usual weather conditions for February and in spite of the fact that the temperatures in the November 2007 to January 2008 period were warmer than usual, February 2008 weather conditions in North Dakota turned out to be so unusually cold and severe that Nexen's producers and trucking firms could not maintain their normal operations. Nexen submitted a sworn declaration from the owner of the trucking company used by Nexen in which the owner said that the weather for half of February 2008 was so harsh that transportation by truck became physically impossible and presented safety concerns. Nexen also submitted a sworn declaration of one of its crude oil producers who stated that as a result of the unusually severe weather in North Dakota in February 2008 its crude oil wells were unable to produce crude oil at normal rates due to safety concerns and physical limitations that prevented the continued operation of crude oil production. Nexen asserts that because its producers and trucking firms were unable to continue their operations in the face of unusually severe weather, Nexen was unable to deliver at least 90 percent of its nomination for February 2008.

13. Nexen asserts that during normal North Dakota winter conditions, crude oil production typically proceeds without serious interruption. Nexen contends that the month of February 2008 was anything but normal. Nexen submits that North Dakota experienced unusually severe weather in February 2008. Nexen asserts that the weather in that month was characterized by extraordinarily low temperatures, drastically low and dangerous wind chills, periods of blizzard-like conditions, and periods of high wind. Nexen asserts that according to the National Weather Service (NWS) the normal minimum temperature in February at Minot, North Dakota, based on the 30-year period

from 1971 through 2000, is 9.1 degrees Fahrenheit. Nexen asserts that in February 2008, however, the average minimum temperature was 0.6 degrees. Nexen contends that wind conditions were also a significant problem in Minot, North Dakota in February 2008. Nexen contends that the weather in Williston, North Dakota was also substantially colder than normal. Nexen submits that the NWS reports 5.9 degrees as the normal minimum temperature for February based on the 30-year period from 1971-2000. Nexen asserts, however, that in February 2008 the average minimum temperature was 1.6 degrees. Nexen submits that wind speed at Williston in February 2008 also reached significantly risky levels.

14. Nexen asserts that Enbridge acted unreasonably in finding that it was Nexen's own inefficiencies in operations that prevented it from meeting its February 2008 nominations. Nexen contends that there is no evidence whatsoever that Nexen, its producers or trucking firms ever operated their business in an inefficient manner in February 2008. Nexen submits the all of the data that Nexen brought to the attention of Enbridge shows that it was a legitimate concern for the life and safety of employees and property in the face of unusually severe weather conditions that prevented Nexen's producers and trucking firms from maintaining their operations in February.

15. Nexen argues that the anomalous weather conditions that prevented Nexen from fulfilling its February 2008 nomination qualify as force majeure events under the Enbridge tariff. Nexen contends that the weather conditions the Nexen's producers and trucking firms encountered in February certainly meet the definition of "unforeseen." Nexen asserts that the actual weather during February 2008 was marked by temperatures that were significantly below the 30-year normal temperature reported by the NWS. Nexen contends that according to the NWS each of the three months leading up to February 2008 were warmer than normal. Nexen argues that weather conditions in which cold temperatures dropped far below average to subzero levels and in which winds on a significant number of days peaked in excess of 20 mph were not and could not have reasonably been foreseen by anyone.

16. Nexen argues that these events were "beyond the control of the shipper." Nexen asserts that there was simply nothing that Nexen could have done when the North Dakota Department of Transportation stated that semis should not use the roads because of storms. Nexen contends that it was also powerless when its producers and trucking firms reported that the weather was so unusually cold that continued operations would jeopardize the safety of employees and the security of producing wells and trucks. Nexen states that the final element of the force majeure tariff provision is that the event "prevents the shipper from delivering the affected volume to the Carrier." Nexen submits that this requirement has been satisfied because it was the unusually adverse weather conditions that developed in February 2008 that prevented Nexen's producers and trucking firms from delivering crude oil for Nexen to the Enbridge pipeline.

17. Nexen asserts that federal courts¹ and the Commission² have recognized that adverse weather conditions can constitute a force majeure event. Nexen argues that these rulings by the federal appellate courts and the Commission provide persuasive guidance as to how the Enbridge tariff provision should be interpreted.

18. Nexen states that in section 1(6) of the Interstate Commerce Act, the Congress prohibited all interstate petroleum pipelines from engaging in any practice that is unjust and unreasonable. Nexen argues that even if the Commission were not to accept Nexen's interpretation of the force majeure provision, section 1(6) of the ICA would still compel granting Nexen relief. Nexen asserts that it has described in detail the reasons why it acted in an entirely reasonable manner in submitting its February 2008 nomination to Enbridge. Nexen contends that it also has described how, through no fault of its own, Nexen was not able to fulfill its nomination. Nexen submits that it also has discussed in detail the unusually severe and anomalous weather conditions that prevented Nexen from fulfilling its nomination. Nexen concludes that it would be unjust and unreasonable and therefore a violation of section 1(6) of the ICA for Enbridge to penalize Nexen for its failure to fulfill its nomination under these circumstances.

19. Nexen argues that Enbridge has acted in a discriminatory manner by waiving for itself the type of obligation it is imposing on Nexen. Nexen cites to paragraph 85(a) of Enbridge's rules and regulations tariff that absolves the pipeline of liability under the following circumstances:

Carrier, while in possession of any Crude Petroleum, shall not be liable for any loss thereof, or damage thereto, or delay, cause by act of God, the public enemy, quarantine, the authority of law, or of public authority, strikes, riots, insurrection, inherent nature of the goods, or the act of default of the shipper or consignee.

Nexen states that in the event one of those enumerated events occurs, Enbridge will charge any loss to shippers in a proportionate manner. Nexen argues that the concept of "force majeure" and "act of God" are certainly closely related concepts. Nexen submits that it could be argued that events that constitute an "act of God" are a broader category of

¹ Citing, *Gulf Oil v. FERC*, F.2d 444, 445 (3rd Cir. 1983) (storms qualify as force majeure event because they are unexpected and out of the party's control); *Jon T. Chemicals, Inc. v. Freeport Chemical Company*, 704 F.2d 1412, 1414 (5th Cir. 1983) (force majeure was invoked because weather records were set).

² Citing, *Empire State Pipeline and Empire Pipeline, Inc.*, 116 FERC ¶ 61,074, at P 139 (2006); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-A, FERC Stats & Regs. ¶ 31,261, at P 1-3 (2007).

occurrences than force majeure. Nexen asserts that even though it would disagree with this conclusion, it is possible that unusually adverse weather conditions might not fall within the definition of “force majeure,” but would nevertheless fall within the common understanding of “act of God.” Nexen contends that since the “act of God” tariff provision excusing Enbridge from its obligations creates an imbalance in the rights and duties between the carrier and the shippers, either (a) the act of God provision should be applied to Nexen or (b) the force majeure clause should be read more broadly so as to encompass acts of God.

20. Nexen requests that the Commission require Enbridge to refund the monetary penalty imposed on Nexen because the quantity of crude oil shipped for February 2008 was less than the amount nominated. Nexen also requests that the Commission restore Nexen to the position it would have been in if Enbridge had not penalized it by reducing its shipment allocations in May, June, and July.

Public Notice and Interventions

21. A public notice of Nexen’s complaint was issued on June 20, 2008. The respondent’s answer, interventions and comments were due by July 18, 2008. A motion to intervene was filed by Eighty-Eight Oil LLC. A motion to intervene and comments were filed by Bullhorn Petroleum LLC (Bullhorn). Bullhorn states that, like Nexen, it was adversely affected by weather conditions in North Dakota during the winter of 2008 and was penalized by Enbridge for a failure to deliver the minimum percentage of its binding nomination through both a financial penalty payment and a limitation on its shipments in May, June and July 2008. Bullhorn believes that Enbridge’s nondiscriminatory treatment of its shippers in accordance with the terms and conditions of its tariff was the proper course of action. Bullhorn contends that a deviation in average low temperature of a few degrees in the middle of North Dakota winter cannot seriously be considered unforeseen. Bullhorn asserts that while Nexen cites decisions by both federal courts and the Commission recognizing that adverse weather conditions can constitute force majeure events, none of the cited authority supports the proposition that below average winter temperatures in a notoriously cold location can reasonably be described as unforeseen.

22. Enbridge filed an answer and motion for summary disposition. The issues raised in those pleadings will be discussed below.

Enbridge’s Motion for Summary Disposition and Answer

23. Enbridge states that the non-performance penalty in its tariff exists to deter shippers from over-nominating to the pipeline and to ensure that once a shipper is given an allocation of space it is encouraged to utilize that space fully, since it is unfair to other shippers (as well as the pipeline) to deny other shippers the use of valuable space that they otherwise would have obtained in the apportionment process when the nominating

shipper does not use that space itself. Enbridge states that the force majeure exception in the tariff is designed to excuse non-performance in circumstances, such as a major disaster, that preclude a shipper from fulfilling its obligations even with the most diligent efforts. Enbridge contends that it is not designed to provide an automatic exemption to shippers that fail to meet their obligations due to their own operational inefficiencies or because they are unable to purchase sufficient crude oil.

24. Enbridge contends that even viewing the objective facts in the light most favorable to Nexen, Enbridge was more than justified in rejecting Nexen's claim of force majeure for February 2008. Enbridge states that the overwhelming majority of its shippers were able to meet their tariff obligations in February, even though all were exposed to the same weather conditions that Nexen claims impaired its ability to perform. Enbridge asserts that one important measure of whether the weather in February 2008 was so extraordinary as to qualify as catastrophic is whether most other shippers were prevented from making their deliveries to the pipeline during the same period. Enbridge submits that there is no evidence that the weather in February 2008 substantially affected the other shippers on the pipeline that month. Enbridge states that it had 41 total shippers during the month of February 2008. Enbridge states that only six shippers, including Nexen, were subject to non-performance penalties, which were fewer shippers than received a penalty in the following month (when no shipper has claimed force majeure).

25. Enbridge states that even with the weather, most shippers were able to continue deliveries. Enbridge states that out of 41 shippers, 28 managed to make 100 percent of their binding nominations in February 2008 in spite of the weather conditions, and 7 additional shippers were above 90 percent. Enbridge contends that it was this comparative analysis that led it to conclude that Nexen's failure to meet its binding nominations in February 2008 was not caused by adverse weather conditions, but rather by operational inefficiency on its part. Enbridge asserts that in a true force majeure event, such as a hurricane, earthquake or flood, shippers generally would be unable to perform their obligations no matter how diligently they attempted to do so. Enbridge argues that in such circumstances, the pipeline would expect to find many or indeed virtually all of its shippers unable to perform. Enbridge contends that here, however, the number of non-performing shippers was small, and none of those fell short of their obligations by anything approaching the volume by which Nexen was short in February. Enbridge states that not a single other shipper filed a force majeure claim for February. Enbridge asserts that given this pattern, it was fully justified in concluding that if other shippers were able to perform, including those that depended wholly or in part on trucking deliveries, then Nexen should have been able to do so as well, had it operated efficiently and planned appropriately. Otherwise, Enbridge submits that the force majeure exception would swallow the penalty provision and there would be no point in having a penalty.

26. Enbridge argues that Nexen has not demonstrated that the weather in North Dakota in February 2008 rose to the level of an extraordinary and unforeseeable event of the type constituting force majeure. Enbridge submits that February in North Dakota is usually very cold, snowy, and windy. In fact, Enbridge states that in the previous February of 2007 average temperatures at Williston, Bismarck, and Minot were below those recorded in February 2008 and wind speeds were higher. Enbridge asserts that the experience in 2007 shows not only that February 2008 was not an outlier, but also that a cold February can be preceded by temperate months. Enbridge submits that the cold February 2007 was preceded by temperate conditions from November 2006 through January 2007, just as the cold February 2008 was preceded by temperate conditions from November 2007 through January 2008. Enbridge argues that this undercuts Nexen's argument that the temperate conditions in the months before February 2008 made the conditions in that month unforeseeable.

27. Enbridge contends that the weather data that Nexen submits in support of its force majeure claim shows that February 2008 broke no weather records. Enbridge submits that the historic data show that the temperatures in February can go to exceedingly low levels, much lower than those actually experienced in February 2008. Enbridge submits that the fact that, on some days in February 2008, the lows went below the 30-year average or that the average temperature for the month was a few degrees lower than the 30-year average cannot in and of itself justify a force majeure claim. Enbridge states that Nexen does not even attempt to match any particularly cold day with a day when it actually had difficulty obtaining crude. Enbridge asserts that a close examination of the weather data Nexen supplied shows that even on those days with lows below the normal minimum temperature, the temperature usually exceeded the normal minimum temperature at some point during the day.

28. Enbridge questions the effect weather conditions in February 2008 had on the ability of Nexen's trucking company to make deliveries on specific days in February 2008. Although Nexen's complaint cites travel advisories in effect on several days in February 2008 Enbridge asserts that only one of those days overlaps with a day that Nexen claims its trucking company was unable to deliver crude because of the weather. Enbridge submits that even on that one day, the travel alert advised drivers to "use caution."

29. Enbridge states that Nexen has identified particular dates on which it claims that weather conditions made performance impossible. However, Enbridge asserts that the record of deliveries by truck to its meter station shows that the ability to transport crude on those days was not appreciably worse than the ability to do so on days without the particular weather conditions. Enbridge argues that there is no clear correlation between claimed days of force majeure and truckers' ability to get oil to the Enbridge pipeline. Enbridge states that on many of the days Nexen identified as force majeure, Enbridge actually received more oil than on days without the alleged force majeure.

30. Enbridge acknowledges that weather-related events might in certain circumstances excuse performance under the tariff's force majeure clause. However, Enbridge asserts that the question of whether a weather-related event excuses performance depends upon whether the event prevented the party from performing, or whether performance was still possible despite the weather. Enbridge rejected the claim of force majeure here because most shippers other than Nexen were able to deliver at least 90 percent, and in many cases 100 percent, of their nominations, while experiencing the same weather-related events as Nexen. Enbridge concludes that the most reasonable conclusion is that weather in February 2008 did not prevent Nexen's performance.

31. Enbridge states that Nexen alleges that it made extensive efforts to buy crude oil from other producers in different locations within North Dakota to mitigate the adverse impact of the alleged force majeure events. Enbridge submits that this allegation does nothing to advance Nexen's case. Enbridge states that its force majeure provision explicitly excludes a shipper's inability to purchase crude as a basis for a force majeure claim. Enbridge states that by its own admission, Nexen is a marketing company that purchases crude from multiple sources on an ongoing basis. Enbridge asserts that difficulties in procuring crude from one supplier do not necessarily constitute force majeure unless there is some evidence of an event that made crude generally unavailable (rather than unavailable from a particular source). Enbridge states that the target for each shipper remains 100 percent of its binding obligation (not 90 percent). Enbridge states that if the shipper aims for 90 percent (or even 95 percent) and then falls short because of its failure to have an adequate margin for safety, it cannot excuse its non-performance on grounds of incidental delays it encounters during the course of a given month.

32. Enbridge responds to Nexen's contention that Enbridge discriminates against its shippers by preserving for itself an exclusion from liability in the event of an "act of God" that disrupts the pipeline's operations. Enbridge asserts that Nexen's argument is unfounded, and submits that Nexen has not shown that its non-performance in February 2008 was due to any "act of God." Enbridge states that it has not claimed that an "act of God" prevented it from operating during February 2008, when Nexen alleges the weather was so bad. Indeed, Enbridge states that it has not sought to rely upon the "act of God" provision of its tariff to relieve it from liability for failure to perform. Enbridge contends that just as with force majeure, such an "act of God" event would be an extraordinary occurrence. Enbridge states that such an event has not occurred within recent memory. Finally, Enbridge states that both the force majeure and the "act of God" provisions are common in oil pipeline tariffs. Enbridge argues that Nexen has offered no legal authority supporting its position that an "act of God" provision is somehow discriminatory, and Enbridge is unaware of any such authority.

Nexen's and Enbridge's Other Pleadings

33. Nexen and Enbridge filed a number of pleadings after Enbridge's answer. Nexen filed a motion to strike certain material in Enbridge's answer and motion for summary

disposition asserting that because it was confidential and subject to a protective order it would violate its due process rights and prevent it from defending its position. The Commission denies the motion to strike. Nexen itself filed a complaint that contained information that was confidential and subject to a protective order. As Enbridge explained in an answer, it filed the information pursuant to the protective order filed by Nexen and to protect other shippers' confidential information pursuant to section 15(13) of the ICA. Nexen has the ability to review the information it seeks by following the procedures outlined in its own protective order, and further, certain of the information relating to Nexen's own shipments has already been provided to Nexen.

34. Nexen also filed a motion to strike the comments of Bullhorn. The Commission denies the motion to strike. Bullhorn is a shipper on Enbridge and was also assessed a non-performance penalty and therefore has an interest in the outcome of the proceeding. The fact that Nexen may disagree with Bullhorn's arguments, including its assertion that granting relief to Nexen without granting relief to other affected parties would be discriminatory and cause problems on Enbridge's system is not a basis for striking Bullhorn's comments.

35. The information contained in the other pleadings filed by Nexen and Enbridge will be discussed below to the extent such information is helpful to the disposition of this proceeding.

Discussion

36. The issue in this complaint proceeding is whether Enbridge correctly determined that its force majeure clause did not excuse Nexen from a non-performance penalty that was imposed on Nexen because it failed to deliver at least 90 percent of its requested nominations for February 2008. Whether Enbridge's determination was correct turns on whether it was so abnormally cold and windy in North Dakota in February 2008, as alleged by Nexen, that it created conditions that were "unforeseen," "beyond the control of the shipper," and "prevented the Shipper from delivering the affected volume to the Carrier," and thus qualified as a force majeure event. Based upon a review of both parties' pleadings and exhibits, the Commission finds that the weather in North Dakota in February 2008 did not qualify as a force majeure event. Accordingly, Enbridge was correct in not excusing Nexen from the non-performance penalty.

37. Nexen first argues that its nominations in February 2008 were reasonable and in line with its previous shipments on Enbridge in the months prior to February 2008. The Commission finds that whether Nexen's nominations were reasonable based on some subjective standard is irrelevant to the determination of whether or not Enbridge properly imposed a non-performance penalty, or whether Nexen should be excused from that penalty because of a force majeure event. The provision in Enbridge's tariff requiring a shipper to tender at least 90 percent of its nominations or face a penalty does not contain any excuse from the penalty for the shipper if its nominations were reasonable.

Similarly, Enbridge's force majeure clause does not contain any provision excusing a shipper from the non-performance penalty based on the subjective "reasonableness" of its nominations.

38. Nexen's primary argument is that the weather in North Dakota was so unusually cold and severe that its producers and trucking companies could not maintain their normal operations thus preventing Nexen from tendering at least 90 percent of its nominations. While Nexen provides statistics showing that the temperature in North Dakota in February 2008 was lower than a thirty-year average, the wind speeds were higher than normal, and also shows that travel advisories were issued in North Dakota for several day in February 2008, Nexen has not presented any evidence to show that these conditions constituted the type of "unforeseen" condition that is contemplated by the force majeure clause of Enbridge's tariff. In addition, as discussed more fully below, Enbridge has rebutted Nexen's evidence with its own evidence showing that the weather was not so out of the ordinary as to constitute the type of event that would qualify under the force majeure clause.

39. Nexen's temperature statistics for the relevant cities in North Dakota show that the temperatures for February 2008 were in fact lower than a thirty-year average from 1971 through 2000. On the other hand, Enbridge has shown that the average temperatures for February 2007 for the relevant cities in North Dakota were below those recorded in February 2008. In addition, Enbridge also shows that the February 2007 weather was preceded by some temperate conditions in the prior months just as the colder weather in February 2008 was preceded by milder conditions. Enbridge also points out that none of the data submitted by Nexen shows that the temperatures in February 2008 broke any weather records. In fact, Nexen's own Exhibit G, a National Weather Service weather summary for February 2008 for Bismarck, North Dakota, states that "no record temperatures occurred during the month." The fact that no weather records were broken in February 2008, that February 2007 was colder than February 2008, and that in both years the colder temperatures were preceded by temperate months, undermines Nexen's argument that the conditions were "unforeseen." Moreover, the assertions of Nexen's witnesses, who state that based on their experiences the weather was unusually severe and extreme in February 2008, are also undermined by the actual weather data.³

40. Nexen also asserts that it was not able to meet 90 percent of its February 2008 nominations because the alleged abnormally cold and windy weather prevented its crude oil suppliers and trucking companies from engaging in normal operations. With respect to this assertion, Enbridge has shown that the weather conditions did not constitute the

³ In addition, to the temperature data, Enbridge has also shown that, contrary to Nexen's assertions, the average wind speeds in February 2007 were higher than those experienced in February 2008.

type of major disaster that generally constitutes a force majeure event. Enbridge shows that while there were several travel advisories in February 2008, only one of those days overlaps with a day Nexen claims its trucking company was unable to deliver crude oil because of the weather. Enbridge also shows that on many of the days Nexen alleges were force majeure events, Enbridge actually received more oil than on days that were not considered force majeure events. Enbridge also shows that the weather was not so extraordinary as to qualify as a catastrophic event that impaired its other shippers' abilities to fulfill their delivery obligations, including those shippers that depended in whole or in part on trucking deliveries. Enbridge shows that out of 41 shippers, 28 managed to make 100 percent of their binding nominations in February 2008 and seven additional shippers were able to fulfill 90 percent of their obligations in accordance with the tariff requirements. Only six shippers did not meet the 90 percent threshold and Nexen was the only shipper to file a force majeure claim for February. Enbridge also states that the fact six shippers were unable to meet the 90 percent threshold for February 2008 is not unusual. Enbridge states that in March 2008 seven shippers failed to meet the threshold and no one has claimed force majeure for that month. The Commission finds that if the weather in North Dakota was so out of the ordinary as to constitute a force majeure event, most if not all shippers would not have been able to make their deliveries, given that they rely on the same producing areas and deliver to the same points on Enbridge's pipeline.

41. The Commission finds that the situation faced by Nexen was specifically excluded in the force majeure provision. Enbridge's force majeure clause states that "[f]or greater certainty . . . Shipper's inability to purchase Crude Petroleum; or inefficiencies in operations do not constitute events of Force Majeure." As Enbridge has pointed out, Nexen is a sophisticated crude oil marketing company that purchases crude oil from multiple sources on an ongoing basis. The fact that Nexen had difficulties procuring and transporting crude oil from certain sources does not constitute force majeure. Nexen has not provided any evidence showing that there was some type of catastrophic or abnormal event which made crude oil in North Dakota generally unavailable. Moreover the fact that all but six of Enbridge's shippers were able to meet the 90 percent nomination threshold indicates that there was no general force majeure event that prevented the procurement and transportation of crude oil in North Dakota.

42. The Commission also finds that there is no discrimination by Enbridge against its shippers because there are somewhat different provisions that govern whether the shipper or the pipeline is excused from performance. Here a force majeure clause applies to shippers while an act-of-God provision applies to the pipeline. As Enbridge point out, both provisions are common in oil pipeline tariffs and Nexen has not provided any legal authority showing that Enbridge's act-of-God provision is discriminatory. Further, even if the act-of-God provision was somehow construed to apply to shippers, Nexen has not shown how the weather in North Dakota in February 2008 constituted the type of extraordinary, catastrophic event that qualifies as an act-of-God.

43. Finally, the Commission finds that there is no evidence that Enbridge acted in an unjust, unreasonable, or unduly discriminatory manner, in the application of its non-performance penalty clause or force majeure clause. The non-performance penalty and force majeure clause were applied in a manner that was fair to all shippers. Enbridge properly fulfilled the purpose of the non-performance penalty which deters shippers from over-nominating to the pipeline and ensures that a shipper fully utilizes the space it is allocated.

The Commission orders:

Nexen's June 18, 2008 complaint is denied.

By the Commission. Commissioner Kelliher not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.