

133 FERC ¶ 61,167
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Enbridge Pipelines (North Dakota) LLC

Docket No. OR10-19-000

Enbridge Pipelines (Bakken) L.P.

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued November 22, 2010)

1. On August 26, 2010, Enbridge Pipelines (North Dakota) LLC (EPND) and Enbridge Pipelines (Bakken) L.P. (Enbridge Bakken U.S.)¹ filed a petition for a declaratory order approving the proposed tariff and priority service structure for the EPND portion of the Bakken Expansion Program (Program), as well as the overall tariff and rate structure for the Enbridge Bakken U.S. portion of the Program.² Enbridge seeks expedited consideration of the petition so that it can develop needed infrastructure to transport additional volumes of crude petroleum from the oil-rich Bakken Formation in North Dakota to refinery markets in the U.S. Midwest and eastern Canada. As discussed below, the Commission grants the Enbridge petition.

I. Background

2. Enbridge states that EPND owns a gathering and interstate transmission system that collects crude petroleum from origin points in the Williston Basin of eastern Montana and western North Dakota (North Dakota System). According to Enbridge, EPND transports an average of approximately 161,500 barrels per day (bpd) of that production, primarily to Clearbrook, Minnesota, where EPND connects to the Minnesota Pipeline and the Lakehead System.

¹ In this order, EPND and Enbridge Bakken U.S. may be referred to jointly as Enbridge.

² Enbridge states that the components of the Program are described in Exhibit A to its petition, which is the Affidavit of Perry F. Schuldhaus (Schuldhaus Aff.).

3. Enbridge observes that the Bakken Formation encompasses approximately 200,000 square miles below the surface of the Williston Basin. According to Enbridge, the U.S. Geological Survey (USGS) estimates that the Bakken Formation contains up to 4.3 billion barrels of recoverable crude oil – making it the largest continuous oil accumulation ever assessed by the USGS.³ Enbridge points out that crude oil production from this formation has increased dramatically; for example, the Bakken production in North Dakota alone has increased from approximately 3,250 bpd in 2005 to more than 250,000 bpd in early 2010, with further increases expected.⁴ Enbridge adds that North Dakota’s current oil production makes it the fourth largest oil-producing state.⁵

4. Enbridge explains that EPND has achieved its current capacity by constructing a number of expansions.⁶ However, Enbridge emphasizes that the capacity added by each of these expansions has been filled immediately, causing EPND to be in constant

³ Enbridge cites Press Release, U.S. Department of the Interior, U.S. Geological Survey, 3 to 4.3 Billion Barrels of Technically Recoverable Oil Assessed in North Dakota and Montana’s Bakken Formation – 25 Times More Than 1995 Estimate (April 10, 2008) (*available at* <http://www.usgs.gov/newsroom/article.asp?ID=1911>).

⁴ Enbridge cites *Schuldhaus Aff.* ¶ 6. *See also* Monica Davey, *Oil in North Dakota Brings Job Boom and Burdens*, N.Y. Times, January 1, 2008 (noting that “many scientists suspect that the Bakken may contain 200 billion barrels of oil – significantly more, for instance, than the much debated field in the Arctic National Wildlife Refuge”).

⁵ Enbridge cites *Schuldhaus Aff.* ¶ 6. Enbridge asserts that current news reports demonstrate the dramatic recent increases in Bakken oil output. *See Platts Analysis: U.S. Crude Oil Production in 2009 Poised to Show Biggest Jump in 40 Years*, Platts, November 27, 2009 (stating that “Bakken oil output has already elevated North Dakota into fifth place among U.S. states for oil production with average daily output of 202,000 b/d at the end of 2008. But that number already appears to be old, even though it was 50% more than 2007 figures. For example, in June of this year, production in North Dakota had climbed to 215,000 b/d”); James MacPherson, *ND Rig Count Jumps 25 Percent in 3 Months*, Salon, June 14, 2010 (noting that the number of rigs drilling in North Dakota’s oil patch has jumped 25 percent in three months and more than tripled in the past year).

⁶ Enbridge cites *Enbridge Pipelines (North Dakota) LLC*, 117 FERC ¶ 61,131 (2006); *Enbridge Pipelines (North Dakota) LLC*, 120 FERC ¶ 61,197 (2007) (discussing EPND’s Phase 5 and 6 expansions, which effectively doubled EPND’s capacity over a 25-month period).

apportionment since 2006.⁷ Enbridge asserts that EPND's ability to expand capacity in Clearbrook is limited without the construction of a new pipeline from Berthold, North Dakota, to Clearbrook. Enbridge further explains that, to provide an interim solution to the constrained pipeline capacity prior to full implementation of the Program, EPND and a counterpart pipeline in Canada will undertake the Portal Link Reactivation and Reversal Project (Portal Link), which will provide temporary transportation service into Cromer Manitoba, for up to 25,000 bpd of crude oil.

II. Description of the Program

5. Enbridge states that the Program, consisting of three parts, is projected to go into service in the first quarter of 2013. Enbridge also explains that each part will be subject to a separate Transportation Service Agreement (TSA), although all three have been offered to shippers in a single open season extending from August 26, 2010, to October 29, 2010.

A. The EPND Bakken Projects

6. Enbridge states that the first of the EPND Bakken Projects will be the construction of either a new 12-inch or 16-inch pipeline from Beaver Lodge Station near Tioga, North Dakota, to Stanley, North Dakota, with an annual average capacity of approximately 90,000 bpd for a 12-inch pipeline or 145,000 bpd for a 16-inch pipeline,⁸ and a new 16-inch pipeline from Stanley to Berthold, North Dakota, with an annual average capacity of approximately 145,000 bpd. This project is a loop of the existing EPND pipeline and is designated as the "Beaver Lodge Loop." Enbridge states that up to 80 percent of the new Beaver Lodge Loop capacity will be available to the committed shippers, and a minimum of 20 percent will be available to uncommitted shippers.⁹

⁷ Enbridge cites Schuldhaus Aff. ¶ 7.

⁸ Enbridge states that EPND will determine whether to build a 12-inch or a 16-inch pipeline between Beaver Lodge and Stanley after the results of the open season are known. In either event, Enbridge emphasizes that the tariff rates for service on that segment will not be affected.

⁹ Enbridge states that all incremental costs of the Beaver Lodge Loop will be recovered through the rates for movements to Berthold and will not be imposed on the existing shippers transporting volumes to Clearbrook solely on the EPND system. Schuldhaus Aff. ¶ 9.

7. Enbridge explains that the second of the EPND Bakken Projects will be the construction of a new 10-inch pipeline from a new truck station to be constructed near Keene in northeastern McKenzie County, North Dakota, to Beaver Lodge, with an annual average capacity of approximately 100,000 bpd (SORTI Project). Additionally, Enbridge states that the third of the EPND Bakken Projects will be a new 23-mile, eight-inch pipeline from the Dunn Truck Station near the border of Dunn and McKenzie Counties, North Dakota, to the SORTI Project, with an annual average capacity of approximately 56,000 bpd (Dunn Project). Enbridge proposes to allocate approximately 40 percent of the total available capacity of the SORTI and Dunn Projects for committed shippers' priority service, leaving substantial additional capacity available for uncommitted shippers (i.e., the 60 percent or more reserved for their use on this new line).¹⁰

8. Enbridge states that it provided notice of the open season to all existing shippers on the North Dakota System and that it provided additional notice by means of a press release.¹¹ Enbridge states that EPND will provide participating shippers with a *pro forma* TSA that includes the estimated initial committed and uncommitted rates and proposed amendments to EPND's Rules Tariff that would exempt the committed shippers' volumes from prorationing under ordinary operating circumstances.¹² Enbridge adds that, following the open season, the sponsors will have the later of 60 days from that date or 35 days after the Commission issues an order in this proceeding to determine whether to go forward with the Program.¹³

9. Enbridge emphasizes that the Program will require major coordinated new infrastructure investments by several Enbridge-affiliated pipeline companies.¹⁴ Enbridge explains that shippers signing TSAs will commit minimum volumes to the new and expanded segments of the North Dakota System on a ship-or-pay basis for either a five-year or a 10-year term. Enbridge acknowledges that those commitments constitute substantial financial burdens for the committed shippers, but contends that these commitments are necessary to support the construction of this incremental expansion capacity.¹⁵ Enbridge observes that the committed shippers also will pay a premium rate.

¹⁰ Enbridge cites Schuldhaus Aff. ¶¶ 14-15.

¹¹ Enbridge cites Schuldhaus Aff. ¶ 16.

¹² Enbridge cites Schuldhaus Aff. ¶ 16.

¹³ Enbridge cites Schuldhaus Aff. ¶ 16.

¹⁴ Enbridge cites Schuldhaus Aff. ¶¶ 9-10.

¹⁵ Enbridge cites Schuldhaus Aff. ¶ 17.

In return, continues Enbridge, EPND proposes to provide priority service to those shippers for up to 80 percent of the expansion space created by the Beaver Lodge Loop (which equals 40 percent or less of the total capacity on that segment) and up to 40 percent of the new space on the SORTI and Dunn Projects.¹⁶ Enbridge explains that this priority capacity allocation accounts for 40 percent or less of the total capacity of the various segments of the EPND Bakken Projects, and leaves ample space for uncommitted volumes to move (at a lower rate than committed shippers will pay).¹⁷

10. Enbridge states that the rates for committed volumes moving on the EPND Bakken Projects will be the sum of a negotiated per-barrel base committed rate (which is uniform for all committed shippers having the same commitment term) and a per-barrel flow-through operating cost charge for operating costs, which is uniform for all committed shippers, regardless of term. Enbridge further explains that the base committed rate will be adjusted each July 1 by the Commission's rate change indexing methodology, or, if that indexing methodology were to terminate, by the annual change in the Producer Price Index plus two percent. Enbridge maintains that the operating cost charge is designed to track the net operating costs of the expansion so that shippers to Berthold will bear all of the incremental operating costs of the Beaver Lodge Loop, and existing shippers will not see any increase in their rates as a result of that project.¹⁸

11. Enbridge states that the uncommitted rates to Berthold will not be divided into base rates and an operating cost charge, but instead will be traditional one-part rates for spot movements. According to Enbridge, those uncommitted rates also will be adjusted annually using the Commission's indexing methodology. Further, states Enbridge,

¹⁶ Enbridge cites Schuldhaus Aff. ¶¶ 14-15.

¹⁷ Enbridge cites Schuldhaus Aff. ¶ 15. Enbridge explains that, if the pipeline's normal operating capacity is oversubscribed, priority shippers will be able to move their committed volumes without prorationing and the remaining space will be apportioned among all uncommitted volumes nominated to the pipeline. Further, states Enbridge, if operating capacity is curtailed due to *force majeure* or other causes, the volume of space reserved for committed shippers will be reduced proportionately, but the committed shippers will continue to have first call on that reduced amount of priority space, thereby ensuring that uncommitted shippers always will have access to the same percentage of the total space, even in times of reduced overall capacity.

¹⁸ Enbridge states that the calculation of the operating cost charge to committed shippers and the manner in which it prevents costs of the expansion from being shifted into the rates paid by uncommitted shippers are described in the Schuldhaus Aff. ¶¶ 18-19.

committed shippers will pay premium rates that will exceed the uncommitted rates between Beaver Lodge and Berthold, initially by approximately \$0.01 to \$0.09 per barrel (depending on the term and volume).¹⁹ Enbridge explains that shippers may commit barrels to the Beaver Lodge Loop alone or together with a volume commitment to the SORTI and/or Dunn Projects.²⁰

12. Enbridge states that, in exchange for the committed shippers' ship-or-pay commitment to the pipeline and the premium rate that they will pay, the TSAs will provide that such shippers will not be subject to prorationing under normal operating conditions. Enbridge maintains that this priority service provision protects committed shippers against the risk that the barrels they have committed to move could be prorated out of the pipeline by uncommitted shippers that made no financial commitment to support the pipeline project.²¹ At the same time, contends Enbridge, at least 20 percent of the expansion space will be reserved for uncommitted shippers, who will pay a discounted rate relative to the priority service committed rates, meaning that at least 60 percent of the total capacity created by the Beaver Lodge Loop will be available under EPND's existing historical proration policy (as will 60 percent of the new capacity on the SORTI and Dunn facilities).²²

¹⁹ Enbridge cites *Schuldhaus Aff.* ¶ 21. Enbridge explains that, because of the operating cost charge, the differential between the committed rates and the uncommitted ceiling rates will not be a fixed number. In fact, continues Enbridge, because of fluctuations in operating costs, the committed rates may increase or decrease at a faster rate than the uncommitted rates. However, Enbridge emphasizes EPND's intent to maintain the uncommitted rates at a level no higher than the lowest committed rate while the priority service terms are in effect.

²⁰ Enbridge cites *Schuldhaus Aff.* ¶ 24.

²¹ Enbridge cites *Schuldhaus Aff.* ¶ 22.

²² Enbridge states that the provisions of the proposed amended Rules Tariff reflecting those procedures are included as Schedule E to Attachment 1 of the *Schuldhaus Aff.*

B. Bakken Pipeline Expansion Project U.S. (Bakken Pipeline U.S.) and Bakken Pipeline Expansion Project Canada (Bakken Pipeline (Canada))²³

13. Enbridge states that the second and third major components of the Program will provide the remainder of the transportation from the Bakken and Three Forks Formations to Cromer, Manitoba. Enbridge states that the second component of the Program – the Bakken Pipeline (U.S.) portion – will be operated by Enbridge Bakken U.S. and will have approximately 145,000 bpd of capacity flowing from Berthold north to the Canadian border. From that point, continues Enbridge, the Canadian entity will operate the third component of the Program, Bakken Pipeline (Canada), which will have equivalent capacity to provide transportation to Cromer.²⁴ Enbridge adds that, at Cromer, the Canadian line will interconnect with the mainline system of Enbridge Pipelines Inc., which, together with the Lakehead System in the U.S., provides approximately two million bpd of total capacity to transport crude oil into the U.S. and to various downstream markets.²⁵

14. Enbridge explains that the Bakken Pipeline (U.S.) segment of the Program will be an expansion of the reversed and refurbished Portal Link pipeline that will run from Berthold to the border near Portal, North Dakota. Enbridge points out that, in the past, the Portal Pipeline transported Canadian crude oil across the border to Berthold, where it could be transported via EPND's mainline to Clearbrook and, through other connections, to downstream refineries.

15. Enbridge states that the Portal Pipeline was idled in 2006 because the increasing flow of North Dakota production (and the elimination of bottlenecks on the Enbridge/Lakehead mainline flowing through Saskatchewan to the U.S.) made it impractical to transport Canadian crude through EPND's system.²⁶ However, continues Enbridge, reopening and reversing the flow of the Portal Pipeline will allow North Dakota production to go north to Steelman, Saskatchewan, and on to Cromer. Enbridge

²³ Together, the Bakken Pipeline U.S. and the Bakken Pipeline (Canada) segments may be referred to in this order as the Bakken Pipeline.

²⁴ Enbridge emphasizes that information regarding Bakken Pipeline (Canada) is included only for background purposes because it will be regulated by Canada's National Energy Board (NEB).

²⁵ Enbridge cites Schuldhaus Aff. ¶ 11.

²⁶ Enbridge cites Schuldhaus Aff. ¶ 8.

maintains that both Portal Link lines will be operated on a spot basis with a single rate applicable to all shippers.²⁷ Enbridge adds that service on the Portal Link is expected to commence in the first quarter of 2011, at the time the Bakken Pipeline is ready for service, and it will be limited to 25,000 bpd.

16. Finally, Enbridge explains that the third component of the Program will be an expansion of the reversed and refurbished Canadian segment of the Portal Link pipeline, which will run from the U.S.-Canada border near North Portal, Saskatchewan, to Steelman, Saskatchewan, combined with a new 16-inch pipeline from Steelman to Cromer, Manitoba. Enbridge states that the Canadian facilities also will include one new pump station and a new 16-inch pipeline from Steelman to Cromer, where the pipeline will connect to the Enbridge/Lakehead mainline. Enbridge points out again that Enbridge Bakken (Canada) will be subject to NEB regulation, and the Bakken Pipeline (Canada) aspect of the open season will offer volume commitments on a priority basis, consistent with NEB standards, for up to 80 percent of the space in the Canadian line.

17. According to Enbridge, the facilities on each side of the border will be subject to separate TSAs, reflecting the different pipeline entities and different regulatory structures in the U.S. and Canada. Enbridge explains that committed shippers on Bakken Pipeline U.S. will agree to ship-or-pay for a minimum volume over a five or 10-year term. Enbridge states that the Bakken Pipeline U.S. Rules Tariff²⁸ will not immunize committed shippers from apportionment in case of overnominations. However, Enbridge states that, for operational reasons, the tariff rules will provide that Bakken Pipeline U.S. shippers will not be allocated space in the U.S. pipeline in excess of the space they are allocated in the Bakken Pipeline (Canada).

18. Enbridge further states that Enbridge Bakken (Canada) will establish an international joint tariff with Enbridge Bakken U.S., under which shippers will make a single nomination to move from Berthold to Cromer. According to Enbridge, the international joint tariff will provide discounts from the sum of the local spot rates, which will vary depending on the term and volume level of the committed shippers' minimum volume commitments. Enbridge anticipates that those discounts will range from

²⁷ For this reason, Enbridge states that it is not seeking any prior Commission approvals regarding the Portal Link project, which will not have committed shippers.

²⁸ Enbridge states that a *pro forma* copy of this document is included as Schedule D to Attachment 2 of the Schuldhaus Aff.

approximately nine percent to 36 percent for different term and volume commitment levels.²⁹

C. Rulings Requested

19. Enbridge seeks rulings from the Commission on the following three issues:
- a. Approval for EPND to provide up to 80 percent of the expansion capacity created by the Beaver Lodge Loop (constituting less than 40 percent of the total capacity of that segment) as priority committed space at a premium rate for shippers that commit to move volumes on a ship-or-pay basis;
 - b. Approval for EPND to provide up to 40 percent of the new capacity of the SORTI and Dunn Projects as priority committed space at a premium rate for shippers that commit to move volumes on a ship-or-pay basis; and
 - c. Approval for Enbridge Bakken U.S. to provide up to 80 percent of the space in the Bakken Pipeline U.S. on a term-volume discount basis to be implemented through an international joint tariff with Enbridge Bakken (Canada), subject to the tariff rules and terms of the TSA to be executed by committed shippers.³⁰

III. Notice and Interventions

20. Notice of Enbridge's filing was issued September 10, 2010, providing for interventions and protests to be filed by September 27, 2010. Flint Hills Resources, LP filed a timely motion to intervene. Hess Corporation (Hess) also filed a timely motion to intervene, as well as comments in support of the petition. Hess states that a fundamental feature of the TSA structure is that shippers will pay a higher rate for transportation on the Beaver Lodge Loop and the SORTI and Dunn Projects in order to receive priority service for their committed volumes. (i.e., those volumes would not be subject to

²⁹ Enbridge cites Schuldhaus Aff. ¶ 13.

³⁰ Enbridge explains that copies of the *pro forma* TSAs for the EPND Bakken Projects and Bakken Pipeline U.S. are attached to the Schuldhaus Affidavit as Attachments 1 and 2, respectively, although for competitive reasons, specific information about costs and rates has been redacted.

prorating during normal operating conditions). Hess views this reliability feature as one of the primary benefits of the proposal.

21. PowerMark, LLC filed a timely motion to intervene and a limited protest, but subsequently withdrew its protest. No other shipper voiced opposition to the petition for a declaratory order.

IV. Discussion

22. The Commission is granting Enbridge's petition for a declaratory order, as Enbridge has demonstrated that its proposal is consistent with Commission precedent and will provide important additional transportation capacity for the vast crude oil supplies from the Bakken Formation.

A. Enbridge's Position

23. Enbridge states that the Program will require an estimated capital investment of more than \$700 million.³¹ Enbridge acknowledges that this new routing will be more expensive than direct service to Clearbrook on the current system; however, Enbridge maintains that it will be attractive to shippers because it will provide additional incremental capacity to meet the growing demand for the transportation of Bakken crude in a more cost-effective and timely manner than a looping expansion of the existing line to Clearbrook.³²

24. Enbridge explains that the total cost to transport a barrel of crude oil from western North Dakota to Cromer via the Canadian route is expected to be \$1.50 to \$2.50 per barrel higher than the cost of transporting that barrel directly to Clearbrook through the existing system. Thus, asserts Enbridge, the new routing is likely to carry only incremental barrels for which there is no available capacity in EPND's current system or for committed barrels that are subject to the take-or-pay obligation under the TSAs.

25. According to Enbridge, to ensure the success of the Program, EPND must be able to assure committed shippers that they will be able to ship their barrels through the constrained portions of the North Dakota System, as well as through the new SORTI and Dunn Projects.³³ Enbridge reiterates that priority shippers will not be subject to prorating of their committed volumes under normal operating conditions and that at

³¹ Enbridge cites Schuldhaus Aff. ¶ 9.

³² Enbridge cites Schuldhaus Aff. ¶ 7.

³³ Enbridge cites Schuldhaus Aff. ¶ 14.

least 20 percent of the capacity on both sides of the border will be reserved for spot shipments. Enbridge emphasizes that it is not seeking a Commission ruling on any matter that is subject to the NEB's jurisdiction.

26. Enbridge explains that Enbridge Bakken U.S. and Enbridge Bakken (Canada) will offer an international joint tariff with the following basic terms:

- a. Uncommitted movements will be subject to a joint rate equal to the sum of the local rates set under the respective regulatory standards in the U.S. and Canada;
- b. Committed movements will be subject to tiered discount rates depending upon the volume committed and the term of the commitment; and
- c. Both committed and uncommitted shippers on the Bakken Pipeline U.S. will be subject to the apportionment rules in the Enbridge Bakken U.S. tariff, and movements in Canada will be subject to the rules in the Enbridge Bakken (Canada) tariff.

27. Enbridge contends that its proposal is consistent with Commission precedent.³⁴ Specifically, states Enbridge, the proposed Bakken Pipeline (U.S.) terms are consistent with numerous pipeline projects for which the Commission has approved term and volume discount tariff structures offered through an open season, where the uncommitted shippers retain the option to move their barrels at a spot rate. Further, states Enbridge, the use of a joint international tariff rate meets the requirements of *Texaco Pipeline, Inc. (Texaco)*,³⁵ because the proposed joint rates will be equal to or less than the sum of the local rates for the same movement.

28. Enbridge points out that the Commission has recognized that it is appropriate to provide rate guidance for projects of this nature through the declaratory order mechanism. Enbridge states that the Commission explained its reasoning as follows:

[I]t is better to address these issues [term rate structure and validity of proposed rates] in advance of an actual tariff filing than to defer until the rate filing is made, when the decision-

³⁴ See, e.g., *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 (2005); *Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040, at P 24 (2006) (*Mid-America*); *Express Pipeline Partnership*, 77 FERC ¶ 61,188 (1996).

³⁵ 72 FERC ¶ 61,313 (1995).

making process would be constrained by the deadlines inherent in the statutory filing procedures. The public interest is better served by a review of the issues presented before a filing to put the rates into effect.³⁶

29. Enbridge further points out that, in *CCPS*,³⁷ the Commission granted a petition for declaratory order seeking approval for priority contract service for an expansion of the Spearhead Pipeline. Enbridge emphasizes that the “key to [the] expansion [was] the support from the Expansion Shippers to commit a minimum of 30,000 bpd to the system once the Expansion goes into service and to pay an agreed-upon rate of \$1.80 per barrel to facilitate the Expansion.”³⁸ Enbridge adds that the Commission explained its rationale as follows:

Premium rate firm shippers have made long-term agreements and must pay for their contracted amounts even if not used, but they are not subject to prorationing. Uncommitted shippers may choose to ship on CCPS in any month. Thus, uncommitted shippers have maximum flexibility to react to changes in their own circumstances or in market conditions, although they do not provide the assurances and financial support for the Expansion that the firm shippers provide.³⁹

³⁶ *Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,253 (1996). On rehearing, the Commission explained that “issuing a declaratory order [is] procedurally appropriate for a new oil pipeline entrant, such as Express, because it needs to acquire and guarantee financing in order to begin construction.” *Express Pipeline Partnership*, 77 FERC ¶ 61,188, at 61,755 (1996). See also *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007) (*CCPS*) (declaratory order prior to expansion); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073, at P 23 (2007) (declaratory order prior to expansion); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078, at P 9 (2006) (*Colonial*); *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 (2005); *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002) (*Plantation*).

³⁷ 121 FERC ¶ 61,253 (2007), *order on reh’g*, 122 FERC ¶ 61,123 (2008).

³⁸ *CCPS*, 121 FERC ¶ 61,253 at P 6.

³⁹ 121 FERC ¶ 61,253 at P 19.

30. Enbridge next cites *Mid-America*,⁴⁰ in which the Commission accepted a tariff provision providing priority service for a class of contract shippers. Enbridge explains that *Mid-America* had undertaken two expansions of its existing system, and under the terms of *Mid-America*'s tariff, 80 percent of the 90,000 barrels of expansion capacity would be reserved for contract shippers that signed up to support the second expansion, while the remaining 20 percent would be available to non-contract shippers. In addition, continues Enbridge, the original base capacity of 185,000 bpd would continue to be available to non-contract shippers.⁴¹ Enbridge states that the Commission rejected a shipper's challenge because (1) "[a]ll shippers, both current and new" would be equally eligible to participate in the program; (2) the program offered all shippers the "same low rates that [the shipper was] receiving under the existing volume incentive program"; and (3) "neither historical shippers nor new shippers" would be "denied access even if they [did] not sign long-term volume dedications."⁴²

31. Enbridge also points out that the Commission has rejected priority service proposals for oil pipelines that have failed to provide reasonable access for uncommitted shippers,⁴³ but a pipeline reserves sufficient space for uncommitted shippers, the Commission normally has approved the proposed allocation.⁴⁴ Enbridge emphasizes that its proposal provides at least 60 percent of the total capacity on the EPND Bakken Projects for uncommitted shippers.

32. According to Enbridge, ship-or-pay commitments from creditworthy companies provide assurance to lenders that the pipeline will have a steady cash flow, regardless of changing market conditions. By contrast, continues Enbridge, uncommitted shippers

⁴⁰ 116 FERC ¶ 61,040 (2006).

⁴¹ 116 FERC ¶ 61,040 at P 15, 24.

⁴² 116 FERC ¶ 61,040 at P 23-24.

⁴³ See, e.g., *Enbridge (U.S.) Inc.*, 124 FERC ¶ 61,199, at P 34 (2008) (reserving 90 percent of space for priority contract shippers would unreasonably restrict access to the pipeline by uncommitted shippers); *Texaco Pipeline, Inc.*, 74 FERC ¶ 61,071, at 61,201 (1996) (rejecting a proposed tariff provision that would essentially lock uncommitted shippers out of 80 percent of the pipeline's capacity).

⁴⁴ *Mid-America Pipeline Company, LLC*, 116 FERC ¶ 61,040, at P 24 (2006) (approving an arrangement where approximately 25 percent of the pipeline's space would be reserved for contract shippers); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253, at P 19 (2007) (approving priority service for just over 15 percent of total pipeline space).

have no obligation to use the pipeline at any time and can choose to ship in one month but not the next, without incurring a penalty. Enbridge contends that reserving a portion of a pipeline's capacity for committed shippers that pay a higher rate is reasonable because it rewards the shippers for their financial commitments that make an expansion possible.

33. In any event, continues Enbridge, the Commission has explained that there is no single prescribed method of allocating scarce capacity and that pipelines should have some latitude in crafting allocation methods to meet circumstances specific to their operations.⁴⁵ Here, argues Enbridge, the proposed priority service terms have been crafted based on the specific experience of EPND with respect to the increasing production from the Bakken Formation and the resulting increased prorationing. Enbridge maintains that the proposal will provide uncommitted shippers with more available capacity on all affected segments than they otherwise would have, and in fact, the total space for uncommitted shippers on the Enbridge pipelines out of the Williston Basin will substantially exceed the space held for committed shippers.

34. Enbridge states that the Commission previously has accepted similar discounted rate structures through declaratory orders it issued for other proposed oil pipeline projects. Enbridge argues that, under these decisions, committed shippers are not considered to be "similarly situated" for purposes of the ICA's anti-discrimination provisions.⁴⁶ Specifically, continues Enbridge, in the cases it cites, committed shippers were obligated to ship (or pay for the minimum committed volume) each month during the term of the contract, thus providing the assured revenues necessary to permit financing of the pipeline. In contrast, states Enbridge, uncommitted shippers could choose whether to ship each month, did not provide revenue or planning assurances, and did not provide the financial basis for constructing the pipeline as did the term shippers.⁴⁷

35. Similarly, continues Enbridge, in the *Plantation* case, the Commission issued a declaratory order approving a term rate structure for a refined products pipeline from Baton Rouge, Louisiana, to Greensboro, North Carolina.⁴⁸ According to Enbridge, the

⁴⁵ *Mid-America Pipeline Company, LLC*, 106 FERC ¶ 61,094, at 61,336 (2004) (citing *SFPP, L.P.*, 86 FERC ¶ 61,022, at 61,115 (1999)); *Total Petroleum Inc. v. Citgo Products Pipeline, Inc.*, 76 FERC ¶ 61,164, at 61,947 (1996).

⁴⁶ *Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,249 (1996).

⁴⁷ *Express Pipeline Partnership*, 76 FERC ¶ 61,245, at 62,254, *order on reh'g*, 77 FERC ¶ 61,188 (1996).

⁴⁸ *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002).

Commission stated that, as long as a carrier makes term rates available to all shippers who are willing and able to meet the terms of the contract, term rates are not unduly discriminatory. Further, states Enbridge, the Commission affirmed that a volume incentive rate filed by an oil pipeline that is lower than the applicable ceiling rate level normally will not require any further regulatory action.⁴⁹

36. Enbridge reiterates that the joint international tariff between Enbridge Bakken U.S. and Enbridge Bakken (Canada) will provide for through rates for volumes from Berthold to Cromer and that the joint rates will all be equal to or less than the sum of the underlying local rates on file, consistent with Commission precedent.⁵⁰ In particular, continues Enbridge, Enbridge Bakken U.S. and Enbridge Bakken (Canada) propose to file local rates on their respective sides of the border under the applicable regulatory rules in effect in each country,⁵¹ and they will also file an international joint rate tariff.⁵²

B. Commission Analysis

37. The Commission concludes that Enbridge's unopposed proposal is just and reasonable and not unduly discriminatory. Moreover, the proposal is consistent with Commission precedent, as reflected in the cases cited by Enbridge.

38. Enbridge has demonstrated that current volumes and the projected increase in production of crude oil from the Bakken Formation have created and will continue to

⁴⁹ *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219, at 61,866 (2002); *see also Williams Pipe Line Co.*, 80 FERC ¶ 61,402 (1997) (volume incentive rates less than applicable ceiling do not require any further regulatory action).

⁵⁰ *Big West Oil Co. v. Frontier Pipeline Co.*, 119 FERC ¶ 61,249, at P 19-22 (2007); *Express Pipeline, LLC*, 104 FERC ¶ 61,207, at P 8 (2003); *Texaco Pipeline, Inc.*, 72 FERC ¶ 61,313 (1995).

⁵¹ Enbridge states that Enbridge Bakken (U.S.) likely will file the initial rate for uncommitted service from Berthold to the border based on the agreement of an unaffiliated shipper to such initial rate. However, Enbridge states that, if challenged, Enbridge Bakken (U.S.) will support the uncommitted rate on a cost-of-service basis, consistent with Commission policies and procedures.

⁵² Enbridge asserts that the Commission previously has accepted the validity of international joint tariffs between Canada and the U.S., acknowledging the NEB's role in regulating pipeline tolls in Canada. *Express Pipeline, LLC*, 104 FERC ¶ 61,207, at P 10 (2003).

create strains on existing pipeline infrastructure. Enbridge proposes to address this problem by means of an aggressive pipeline expansion, which will be accomplished through a combination of new pipeline construction, line reversals, and refurbishment of existing facilities. The Enbridge proposal will provide additional necessary transportation for crude oil supplies to be produced from an important domestic source, and the structure and schedule for completing the Program will make the increased capacity available in a timely manner. The proposed Program will require an estimated capital investment of more than \$700 million; therefore, Enbridge seeks approval of the rate structure and rules of the proposed Program so that it can obtain the necessary revenue and planning assurances provided by shipper commitments.

39. The Enbridge proposal provides for an open season offering TSAs to shippers that commit to ship or pay for the shipment of minimum volumes on the new facilities for either a five-year or ten-year term. To avoid having their volumes prorated under ordinary operating conditions, the committed shippers will pay a premium rate in excess of the rate to be paid by uncommitted shippers that will not enjoy such protection because they are not providing the financial backing required for the Program. However, the proposal provides for a significant percentage of the new capacity for use by the uncommitted shippers.

40. The elements of Enbridge's proposal are consistent with other Commission-approved proposals. Enbridge has sought Commission approval of its proposal so that it can obtain shipper commitments that are required for it to obtain financing for the Program. The Commission endorsed this process in earlier proceedings.⁵³ The proposal appropriately distinguishes committed and uncommitted shippers and provides for rates consistent with the obligations of each class of shipper.⁵⁴ Additionally, the Enbridge proposal provides a significant amount of capacity for uncommitted shippers.⁵⁵ It offered

⁵³ See, e.g., *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007), *order on reh'g*, 122 FERC ¶ 61,123 (2008); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073 (2007); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078 (2006), *order on reh'g*, *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 (2005); *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002); *Express Pipeline Partnership*, 76 FERC ¶ 61,245, *order on reh'g*, 77 FERC ¶ 61,188 (1996).

⁵⁴ See, e.g., *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007), *order on reh'g*, 122 FERC ¶ 61,123 (2008); *Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040 (2006).

⁵⁵ See, e.g., *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007), *order on reh'g*, 122 FERC ¶ 61,123 (2008); *Mid-America Pipeline Co., LLC*, 116 FERC ¶ 61,040 (2006).

all potential shippers the opportunity to become committed shippers.⁵⁶ Finally, the proposed joint rates will be no more than the sum of the underlying local rates.⁵⁷

41. Accordingly, the Commission grants Enbridge's petition for a declaratory order.

The Commission orders:

The petition for a declaratory order is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵⁶ See, e.g., *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002).

⁵⁷ See, e.g., *Texaco Pipeline, Inc.*, 72 FERC ¶ 61,313 (1995).