

138 FERC ¶ 61,087  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Enbridge Pipelines (North Dakota) LLC

Docket No. IS12-104-000

ORDER REJECTING TARIFF

(Issued February 2, 2012)

1. On January 4, 2012, Enbridge Pipelines (North Dakota) LLC (Enbridge ND) filed FERC Tariff No. 71.10.0 to cancel FERC Tariff No. 71.9.0 effective February 4, 2012. Enbridge states that the primary purpose of the filing is to modify Item No. 26 to enhance and clarify the quality specifications contained in its tariff.
2. Plains Marketing, L.P. (Plains) filed a motion to intervene and protest contending that the proposed penalties are unnecessary and excessive, that the proposed tariff should include a dispute resolution mechanism, and that the proposed refund mechanism is not just and reasonable.
3. As discussed below, the Commission rejects FERC Tariff No. 71.10.0.

**Description of the Filing**

4. Enbridge ND states that it will continue rejecting any crude oil that does not meet the specifications included in Item No. 26(a). However, continues Enbridge ND, in cases where the failure to meet the quality specifications is not discovered until after the crude oil has entered its system, the proposed tariff establishes new volumetric penalties for excessive Sulfur, API Gravity, and Basic Sediment and Water (BS&W).
5. Enbridge ND states that it will reflect the penalties in each penalized shipper's inventory balance and will redistribute the withheld penalty volumes annually on a pro-rata basis to all shippers on the system that did not incur any penalties during that year. Enbridge ND explains that Item No. 26 also tightens the API gravity specification, which will help to maintain the quality of the crude oil currently transported on its system. Further, states Enbridge ND, it proposes to modify Item No. 9 to lower the maximum crude oil temperature permitted on the system to preserve the pipeline's coating integrity.

6. Enbridge ND explains that it also made minor modifications to the language of Item No. 40. It states that the first modification corrects two typographical errors in Item No. 40(a), and the second deletes certain wording in Item No. 40(c) to emphasize that it will reject crude oil not meeting the quality specification. Further, Enbridge ND states that it modified Item No. 45(b) to clarify that the penalties included in Item No. 26 are in addition to other deductions on the system. Finally, Enbridge ND explains that it changed the first page of the tariff in the General Application section to provide that any supplements to this tariff will be part of a successive tariff issue, rather than stand-alone documents.

7. Enbridge ND maintains that, based on historical quality data, it anticipates that approximately 0.5 percent of all volumes transported on its system will be subject to the new penalties, with the remaining 99.5 percent unaffected by the change. Additionally, Enbridge ND explains that this filing substantially revises the terms of the crude oil quality penalty established in FERC Tariff No. 71.8.0, filed September 30, 2011, and subsequently withdrawn as the result of shipper opposition. Enbridge ND states that, prior to that filing, it conducted two shipper meetings, during which it advised shippers of the proposed modifications. Enbridge ND states that it held an additional shipper meeting to acquaint shippers with the modifications anticipated in the instant filing and that the filing responds to shipper feedback from all of the shipper meetings.

### **Intervention and Protest**

8. Flint Hills Resources, LP filed a timely motion to intervene. As stated above, Plains intervened and protested Enbridge ND's filing.

9. Plains asks the Commission to reject the filing or to suspend it for the maximum seven-month statutory period and set it for investigation and hearing. Plains asserts that the proposed penalties are unnecessary. It contends that they might be appropriate if improvements to the quality of the common stream were necessary, but that is not the case based on Enbridge ND's statement that 99.5 percent of all current volumes comply with its specifications.

10. Plains also contends that the proposed penalties are excessive, given that Enbridge ND has not shown the harm that off-specification shipments would cause on its system. According to Plains, Enbridge ND does not justify or explain how it derived the percentage volume penalties, which range from one percent to six percent for excess Sulfur content, five percent to 25 percent for excess BS&W, and two percent to six percent for violations of API gravity requirements. Plains emphasizes that penalties should not be punitive, but rather should bear some relationship to the economic costs to the pipeline and its shippers. Additionally, Plains argues that penalties should not exceed levels necessary to encourage compliance and prevent gaming of the system. Plains argues that Enbridge ND has not shown that the proposed penalties bear any relationship

to actual costs and that the proposed penalties considerably exceed the value of the underlying service.

11. Moreover, continues Plains, the Enbridge ND proposed tariff lacks a dispute resolution procedure, which Plains contends is especially necessary because legitimate disputes may arise between the pipeline and its shippers concerning the specification measurements. Plains points out that Enbridge ND requires shippers to submit certificates of compliance with the pipeline's quality specifications, but in the event of a conflict between the certificate and the pipeline's quality test, the tariff provides that the pipeline's test will prevail. Further, states Plains, the tariff also provides that, if this situation arises, Enbridge ND will deem the shipper's crude oil to be unmerchantable and will consider the shipper to have breached its warranty that the crude oil meets the pipeline's specifications. Plains asserts that this is unjust and unreasonable, and it asks the Commission to require Enbridge ND to incorporate language establishing a reasonable dispute resolution procedure.

12. Plains next asserts that Enbridge ND has failed to meet its burden of proving that the proposed refund mechanism is just and reasonable. Plains contends that some of the proposed tariff language is unclear and contradictory, including the manner in which Enbridge ND will redistribute the penalties (cash or in-kind). Plains also submits that the Commission should require Enbridge ND to pay interest on refunds at the rate specified in the Commission's rules,<sup>1</sup> regardless of the form of the redistributions.

13. Finally, Plains states that the proposed tariff's approach to determining the class of shippers eligible for refunds is unjust and unreasonable. According to Plains, it appears that, to be eligible for redistributions or refunds under the new tariff, a shipper must not have incurred a penalty, no matter how small, during the entire calendar year. Plains characterizes this as arbitrary because it groups shippers incurring even a small one-time penalty with those who incur much larger or more frequent penalties. Plains suggests remedying this by requiring redistributions of product or cash on a quarterly basis.

### **Enbridge ND Response**

14. Enbridge ND asks the Commission to reject the protest and accept its proposed tariff revisions without suspension or further proceedings. Enbridge ND asserts that it established the tariff's proposed penalties after extensive consultations with shippers, and it emphasizes the need to deter shippers from tendering off-specification crude oil. Enbridge ND also emphasizes that it will not retain the penalties; rather, it will distribute the penalties to shippers that were penalty-free for a year. Enbridge ND compares this filing to its September 30, 2011 Filing, under which it would have retained the penalties.

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<sup>1</sup> Plains cites 18 C.F.R. § 340.1(c) (2011).

Enbridge ND points out that this tariff filing not only redistributes the penalties, but also proposes lower penalties for Sulfur (from 25 percent to six percent).

15. Enbridge ND further asserts that the proposed penalties are necessary because off-specification crude oil often is not discovered until it is already in the system. Enbridge ND claims that Commission precedent demonstrates that penalties must be strong to deter unwanted behavior.<sup>2</sup> Enbridge ND observes that Plains admits that any penalties are likely to be infrequent.

16. Moreover, continues Enbridge ND, the mechanism for distributing the penalties is clear and fair. Enbridge ND emphasizes that it does not intend to market the penalty barrels or otherwise earn a profit from those volumes. For that reason, continues Enbridge ND, there is no merit in Plains' claim that the pipeline should pay interest on the penalties. Enbridge ND further argues that, because the penalties are in-kind volumes, there will be no interest to pay. Moreover, adds Enbridge ND, requiring penalty redistributions on a quarterly basis would subject it to unwarranted administrative burdens.

17. Enbridge ND next argues that no additional dispute resolution process is required and submits that Plains has not explained why it anticipates disputes, particularly because it seems likely that the quality will remain high, making penalties less necessary. Further, states Enbridge ND, Plains has not explained why it believes that current dispute resolution processes are insufficient, including the Commission's dispute resolution process.

### **Commission Analysis**

18. The Commission finds that Enbridge ND has failed to meet the burden of proof of demonstrating that FERC Tariff No. 71.10.0 is just and reasonable and not unduly discriminatory. The Commission finds Enbridge ND's proposal to be speculative and not based on demonstrable facts.

19. Specifically, Enbridge ND contends that the proposed volumetric percentage penalties are necessary because it may not discover off-specification crude until after it enters the system. However, Enbridge ND insists that it tests the crude oil entering its

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<sup>2</sup> Enbridge ND cites, *e.g.*, *Trunkline Gas Co.*, 90 FERC ¶ 61,017, at 61,078 (2000) ("properly designed penalties will be successful in their goal of deterring violations"); *Columbia Gulf Transmission Co.*, 115 FERC ¶ 61,135, at P 5, 21 (2006) (Commission stating that it has consistently approved high penalties to deter conduct that might threaten pipeline operations).

system and that it will continue that practice. Additionally, shippers must certify that their volumes are within the required specifications.

20. Enbridge ND has not presented evidence to support the need for and the levels of the proposed penalties. It has not supplied evidence of a history of previous violations, showing the number of off-specification violations, the volumes involved, the resulting damage to the pipeline or to other shippers, the actual costs to the pipeline of such events, or any other pertinent facts. Enbridge ND anticipates that approximately 0.5 percent of all volumes transported on its system will be subject to the volumetric penalties, but it has not explained how it reached that conclusion or why such relatively small volumes make it necessary to adopt the proposed penalties.

21. Absent such data to support the proposal, the Commission lacks any basis for finding that the proposed tariff changes are just and reasonable and not unduly discriminatory. Accordingly, the Commission rejects Enbridge ND's FERC Tariff No. 71.10.0.

The Commission orders:

Enbridge ND's FERC Tariff No. 71.10.0 is rejected, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.