139 FERC ¶ 61,134
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enbridge Energy, Limited Partnership Docket No. IS12-236-000

ORDER ACCEPTING TARIFF

(Issued May 18, 2012)

1. On April 19, 2012, Enbridge Energy, Limited Partnership (Enbridge Energy) filed FERC Tariff No. 41.2.0 canceling FERC Tariff No. 41.1.0 to become effective May 20, 2012. Enbridge Energy states that FERC Tariff No. 41.2.0 proposes changes to the Nomination Verification Procedure contained in its Rules and Regulations.

2. High Prairie Pipeline, LLC (High Prairie) protests the filing. High Prairie contends that Enbridge Energy's proposed tariff changes are unjust, unreasonable, and unduly discriminatory because they would afford Enbridge Energy almost unlimited discretion in determining whether to grant shippers access to its system.

3. As discussed below, the Commission accepts FERC Tariff No. 41.2.0 to become effective May 20, 2012.

Description of the Filing

4. Enbridge Energy states that proposed Rules 6(b) and (c) add new language to the tariff setting out its Mainline Nomination Verification Procedure. Enbridge Energy explains that the Mainline Verification Procedure fully describes the existing upstream and downstream verification process that it undertakes after it receives nominations. Additionally, Enbridge Energy states that it made minor changes throughout the tariff to improve its readability.

High Prairie's Protest

5. High Prairie asserts that, under Enbridge Energy's currently-effective tariff, a shipper seeking access to the pipeline is required to tender barrels at one of Enbridge Energy's established origin points. However, continues High Prairie, proposed FERC Tariff No. 41.2.0 would not only require a shipper to tender the barrels at an origin point specified in the tariff, but also would require the shipper to nominate those barrels on

"upstream connecting carriers or facilities."[1] According to High Prairie, at this time, Enbridge Energy or its affiliates own all of the upstream connecting carriers. High Prairie further states that, under the language of proposed section 6(c)(2), Enbridge Energy may deny new shippers access to transportation to a specific delivery facility if that the shipper did not ship any volumes to that facility during the 24-month period leading up to July 2010.

6. High Prairie states that it intends to construct a 450-mile pipeline system (HP Pipeline) capable of transporting 150,000 barrels per day (bpd) of crude oil per day from the Bakken region to Clearbrook, Minnesota. Additionally, High Prairie states that it is developing significant long-term storage facilities at or near Clearbrook and that it has offered to pay for all reasonable costs of the interconnection with Enbridge Energy at Clearbrook, including any necessary tankage.

7. High Prairie explains that it held an open season for shippers on the proposed HP Pipeline and that the open season resulted in commitments from prospective shippers for a significant portion of High Prairie's proposed capacity. High Prairie emphasizes that a number of those commitments are contingent on High Prairie establishing an interconnection with Enbridge Energy at Clearbrook. However, High Prairie argues that, although Enbridge Energy has granted interconnections for its affiliates at Clearbrook, Minnesota, it has denied High Prairie's request for a similar interconnection without providing a nondiscriminatory basis for its denial.

8. High Prairie maintains that the Interstate Commerce Act (ICA) requires carriers to grant interconnections on a basis that is just, reasonable, and not unduly discriminatory.[2] High Prairie also cites sections 341.0 and 341.8 of the Commission's regulations, stating that they require an oil pipeline to include a connection policy in its published tariff.[3] High Prairie maintains that the Commission has stated that a connection policy is encompassed within the term "transportation" and that such a policy affects the value of service to the shipper. Moreover, continues High Prairie, if a carrier's denial of an interconnection request is unjust, unreasonable, or unduly discriminatory, the Commission can order the pipeline to grant the interconnection, no matter whether the

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[1] High Point cites FERC Tariff No. 41.2.0, Section 6(c)(1).

[2] High Prairie cites ICA sections 1(3), 1(4), 1(6), 3(1), and 6(7), 49 U.S.C. app. §§ 1(3), 1(4), 1(6), 3(1), and 6(7).

[3] 18 C.F.R. §§ 341.0 and 341.8 (2011).

denial is brought to the Commission's attention by a complaint or by a protest in response to a proposed tariff revision.[4]

9. High Prairie also relies on *Bonito Pipe Line Co.* (*Bonito*),[5] contending that the Commission denied Bonito's petition for declaratory order seeking a ruling that it was not required to grant an interconnection to Shell Pipe Line Corporation (Shell) under the ICA and the Outer Continental Shelf Lands Act (OCSLA). According to High Prairie, the Commission determined that Bonito was legally required to grant Shell's request for an interconnection, despite Bonito's claim that the oil to be tendered would have such a high sulfur that the commingled stream on Bonito's system would fail to meet the requirements of the downstream Ship Shoal system. High Prairie points out that the Commission recognized that Bonito had been receiving high-sulfur crude oil from other shippers for years, including through a recent interconnection with one of its owners. High Prairie states that the Commission held that Bonito's refusal to permit the interconnection and transport Shell's volumes constituted discrimination.[6]

10. Similarly, argues High Prairie, Enbridge Energy has granted interconnections at Clearbrook to its affiliate Enbridge (North Dakota) and recently announced plans for a new Enbridge Sandpiper Pipeline that would connect with Enbridge Energy at Clearbrook. Further, High Prairie claims that Enbridge Energy recently received a declaratory order from the Commission for what it calls a "virtual expansion" of the Enbridge (North Dakota) system to Clearbrook.[7]

11. High Prairie argues that the Commission has held that an oil pipeline's procedure for allocating capacity "may not be structured for the purpose of protecting a pipeline's competitive position, nor may it be structured to favor certain shippers or types of shippers over others if all have made 'reasonable requests' for transportation on the

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[4] High Prairie cites ICA sections 13(2), 15(1), and 15(7), 49 U.S.C. app. §§ 13(2), 15(1), and 15(7); *Suncor Energy Marketing Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 121 (2010) (rejecting oil pipeline tariff proposal governing the addition of new destinations because the process would give the pipeline almost unlimited discretion in processing, accepting, or denying a request for a new destination).

[5] 61 FERC ¶ 61,050 (1992).

[6] High Prairie cites *Plantation Pipe Line Co. v. Colonial Pipeline Co.*, 104 FERC ¶ 61,271 (2003) (*Plantation*).

[7] High Prairie cites *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167 (2010).

pipeline."[8] In addition, continues High Prairie, while the Commission has not prescribed a uniform methodology for allocating oil pipeline capacity, it has required oil pipelines to set aside a portion of capacity for new shippers.[9]

Answer

12. Enbridge Energy answers that High Prairie presents no valid basis for the relief it seeks. Enbridge Energy asserts that the protest is merely an attempt to gain leverage in carrier-to-carrier negotiations unrelated to any changes made by the filed tariff. Enbridge Energy further states that it has had ongoing negotiations with High Prairie regarding its interconnection request since March 9, 2012, but these negotiations have been hampered by a variety of changes to the proposed HP Pipeline that make it difficult to determine the operational impact of the possible interconnection.[10]

13. In fact, states Enbridge Energy, the proposed tariff changes do not create unlawful discrimination, regardless of whether High Prairie obtains an interconnection, because High Prairie will not be a shipper. Enbridge Energy alleges that High Prairie attempts to rely on the ICA's anti-discrimination provisions, which relate to service to shippers, not to a carrier-to-carrier interconnection matter.

14. Enbridge Energy maintains that the Commission has held that an oil pipeline carrier has no obligation to provide an interconnection on terms dictated by another carrier.[11] Further, states Enbridge Energy, the Commission has made it clear that it has no authority to mandate interconnections if the carriers cannot agree.[12]

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[8] High Prairie cites *Suncor Energy Marketing Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 24 (2010); *see also Seaboard Air Line Ry. Co. v. United States*, 254 US. 57, 61-63 (1920).

[9] High Prairie cites, *e.g.*, *TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at PP 46-49 (2008); *Enbridge (U.S.) Inc.*, 124 FERC ¶ 61,199, at PP 31-37 (2008); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007), *reh'g denied*, 122 FERC ¶ 61,123 (2008); *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at PP 42-48 (2006).

[10] Enbridge Energy states that High Prairie's estimates of the volumes to be delivered have ranged from 50,000 to 225,000 bpd. According to Enbridge Energy, each revision requires a new analysis of the operational issues, such as whether there will be sufficient capacity on existing facilities that already are experiencing prorationing.

[11] Enbridge Energy cites *Plantation*, 104 FERC ¶ 61,271 (2003).

[12] Enbridge Energy cites *Plantation*, 104 FERC ¶ 61,271 at P 22.

15. Enbridge Energy submits that the protest also fails to comply with the Commission's regulations because it does not demonstrate a sufficient economic interest in the tariff to establish standing,[13] and it challenges matters in the tariff that are not proposed to be changed.

16. According to Enbridge Energy, section 341.8 of the Commission's regulations requires oil pipeline tariffs to include rules governing certain matters that increase or decrease the value of service to the shipper, but that does not apply to a connecting carrier.[14] Enbridge Energy adds that this focus on shipper impacts reflects the clear boundaries imposed by the ICA. For example, Enbridge Energy asserts that, in *ARCO Alaska, Inc. v. FERC*,[15] the court (based in part on section 341.8) rejected a requirement that an oil pipeline carrier publish in its tariff the terms of its agreement for sharing capacity with other carriers in an undivided interest line, explaining that carriers cannot be compelled to publish information "without some indication it makes a difference to shippers."[16]

17. Further, states Enbridge Energy, High Prairie ignores the statement in *Plantation* that "[g]iven the Commission's lack of authority over abandonment of service by oil pipelines, it would be illogical and inconsistent for the Commission to conclude here that it has the power to compel an interconnection that Colonial does not want and could abandon."[17] Enbridge Energy also maintains that *Bonito* does not apply because it arose under the OCSLA,[18] and the Commission does not have a general power to enforce OCSLA's open access provisions.[19] Finally, Enbridge Energy asserts that High Prairie also is wrong in claiming that non-discriminatory access provisions of the Mineral Leasing Act allow the Commission to order an interconnection.

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[13] Enbridge Energy cites, *inter alia*, 18 C.F.R. § 343.3(a) (2011); *Tri-States NGL Pipeline, L.L.C.*, 94 FERC ¶ 61,087, at 61,382, *reh'g denied*, 94 FERC ¶ 61,235 (2001).

[14] Enbridge Energy cites *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 31,000 (1994).

[15] 89 F.3d 878 (D.C. Cir. 1996).

[16] *ARCO Alaska, Inc. v. FERC*, 89 F.3d 878, 886 (D.C. Cir. 1996).

[17] *Plantation*, 104 FERC ¶ 61,271 at P 28.

[18] 43 U.S.C. § 1331, *et seq*.

[19] Enbridge Energy cites *The Williams Companies v. FERC*, 345 F.3d 910 (D.C. Cir. 2003); *Williams Gas Processing v. FERC*, 373 F.3d 1335 (D.C. Cir. 2004).

Commission Analysis

18. The Commission will accept FERC Tariff No. 41.2.0 to become effective May 20, 2012. Based on the arguments before us here, it is not clear that Enbridge Energy has actually denied any request from High Prairie for an interconnection.[20] Negotiations between Enbridge and High Prairie apparently are in the opening stages and there has been no action on behalf of either party that would lead to any conclusion that there has been a denial of a connection.[21] At any rate, there is no statutory authority, or judicial or Commission precedent that gives the Commission jurisdiction to compel Enbridge Energy to interconnect. To the contrary, the Commission has decided exactly the opposite.

19. In *Plantation*, the Commission reviewed the history of the ICA and concluded with a lengthy explanation that it cannot order an oil pipeline carrier to provide an interconnection with another carrier.[22] We affirm that conclusion here. The ICA does not allow the Commission to order the establishment of interconnections. As a final matter the Commission in *Plantation* pointed out that it has no jurisdiction over abandonment of service by oil pipelines, and that "it would be illogical and inconsistent for the Commission to conclude here that it has the power to compel an interconnection that Colonial does not want and could abandon."[23] The same holds true here.

20. Simply put, High Prairie (as a potential connecting pipeline), is not a current or prospective shipper that would be protected by the anti-discrimination provisions of the ICA. Therefore, it is unnecessary for the Commission to address arguments of High Prairie, including (a) the possible denial of nominations for shipments on upstream pipelines, (b) whether High Prairie has a substantial economic interest, and (c) whether Enbridge Energy has acted in a manner that is unjust, unreasonable, or unduly preferential. Accordingly, High Prairie's protest is dismissed.

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[20] On May 17, 2012, High Prairie filed a complaint against Enbridge raising allegations akin to those set forth in its protest to Enbridge's proposed tariff.

[21] In fact, Enbridge Energy states that discussions regarding the requested interconnection occurred as recently as May 1, 2012, three days before High Prairie filed its protest.

[22] *Plantation*, 104 FERC ¶ 61,271 at PP 21-28.

[23] *Id.* P 28.

The Commission orders:

The Commission accepts FERC Tariff No. 41.2.0 to become effective May 20, 2012.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.