140 FERC ¶ 61,193
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enbridge Pipeline (North Dakota) LLC Docket No. IS12-548-000

ORDER ACCEPTING TARIFF

(Issued September 14, 2012)

1. This order accepts effective September 15, 2012, Enbridge Pipelines (North Dakota) LLC's (Enbridge North Dakota) FERC Tariff No. 71.13.0, filed on August 15, 2012, which modifies Enbridge North Dakota's prorationing policy. The modifications are in Item 40 (Tenders and Quantities Accepted), Item 70 (Proration of Pipeline Capacity), Item 75 (Lottery Process) and related definitions in Item 10 (Definitions).

Background

2. The Enbridge North Dakota system is a 330 mile crude oil gathering and 620 mile interstate transportation system that gathers and transports crude oil from points in North Dakota and Montana for delivery at various points in North Dakota and Clearbrook, Minnesota. Due to a substantial regional increase in crude production, prorationing has occurred continuously on the Enbridge North Dakota system since February 2006. At that time, the maximum system capacity was 80,000 barrels per day (bpd). Enbridge North Dakota has increased its capacity and as of July 2012 pipeline capacity to Clearbrook, Minnesota was 210,000 bpd. Enbridge North Dakota states that despite the increases in capacity the system is vastly overnominated, with shippers requesting over 45 million bpd each month (which equates to more than 200 times the capacity of the line to Clearbrook, Minnesota).

3. Enbridge North Dakota states that due to significant and prolonged apportionment on the system and subsequent shipper proliferation, it modified its rules and regulations on seven separate occasions in an effort to ensure that both Regular and New Shippers

are allocated capacity equitably and fairly.[1] Enbridge North Dakota states that as of October 2010, the number of approved shippers on the system increased from 10 in 2006 to 180 in 2010. On October 1, 2010, FERC Tariff No. 71.1.0 became effective as a temporary emergency measure to discourage shipper proliferation and mitigate the erosion of shipper allocations on the system.[2] The tariff implemented a twenty-four month freeze on New Shippers' ability to earn Regular Shipper status, until a permanent solution could be found to balance the rights of Regular and New Shippers. For the duration of this interim freeze, New Shippers continued to have access to the pipeline but were limited to 10 percent of pipeline capacity and could never become Regular Shippers. Enbridge North Dakota states that while the freeze was successful in preventing the erosion of Regular Shipper allocations (and in fact may have increased Regular Shipper allocations to the extent some of the expanding pool of New Shippers are affiliated with Regular Shippers), it only marginally slowed the growth of New Shippers. Enbridge North Dakota states that the number of approved shippers went from 180 in October 2010 to 256 in July 2012.

Enbridge North Dakota's Proposed Tariff

4. Enbridge North Dakota states that the temporary freeze implemented in FERC Tariff 71.1.0 will expire on October 1, 2012. Enbridge North Dakota indicates that under the current tariff 104 New Shippers that have met the requirement to ship for 9 of the previous 12 months would graduate into the Regular Shipper class upon expiration of the freeze. Enbridge North Dakota notes at that time the combined history of the existing Regular Shippers and the shippers newly attaining Regular Shipper status would exceed the 90 percent of capacity available to Regular Shippers and, therefore, would result in proration of the allocations of all the Regular Shippers. Enbridge North Dakota states that in the case of the 104 newly graduated Regular Shippers, use of the current tariff would bring such shippers' individual allocations below the minimum batch size of the system and result in each of the newly graduated Regular Shippers receiving a zero barrel allocation for the month, with that space then being re-allocated back to the existing Regular Shippers. Based on shipper meetings between November 2011 and July 2012, as well as one-on-one meetings with various shippers, Enbridge North Dakota proposes a number of modifications to its tariff to take effect upon expiration of the freeze.

---

[1] Regular Shippers were those shippers who established and maintained a sufficient shipping history over a twelve month rolling period on the pipeline to be eligible for a portion of 90 percent of the pipeline capacity in the event of prorationing. New Shippers are those who are not Regular Shippers and are eligible for a portion of 10 percent of the pipeline capacity in the event of proratiioning.

[2] *Enbridge Pipelines (North Dakota) LLC,* 132 FERC ¶ 61,274 (2010).

5. Under Enbridge North Dakota's proposal, all shippers who have shipped in 9 of the most recent 12 months will be considered "Historical" Shippers rather than "Regular" Shippers and during periods of apportionment will be allocated capacity equal to their histories. Enbridge North Dakota states that adding up the combined histories of all current shippers on the system who have achieved this status, including those shippers who are currently frozen out of the regular shipper pool but would graduate to become Historical Shippers upon expiration of the freeze, totals approximately 94 percent of pipeline capacity today and results in no Historical Shipper being allocated less than a batch size.[3]

6. Any shippers who do not qualify as Historical Shippers because they have not shipped for nine of the previous twelve months will be considered New Shippers who will be allocated no more than a minimum batch, *i.e.,* 168 bpd.

7. The definition of Affiliate now includes Shippers affiliated by and through intermediaries. As of October 2012, no affiliate of a Historical Shipper will be permitted to be a New Shipper.

8. If there are more New Shippers than there are minimum batches available, a lottery will be held to allocate the available capacity among the New Shippers. New Shippers will be allocated the percentage of space on the pipeline not utilized by Historical Shippers. In October 2012, it is estimated that Historical Shippers will require 94 percent of pipeline capacity, leaving 6 percent or approximately 75 minimum batches for New Shippers. To allow for growth in the Historical Shipper pool while also ensuring that New Shippers will always have access to capacity on the system, the eligible capacity available to Historical Shippers will be capped at 95 percent of total capacity. New Shippers thus will be able to graduate to become Historical Shippers until the capacity available to Historical Shippers reaches 95 percent. In addition, Enbridge North Dakota commits that any future expansions of capacity to Clearbrook, Minnesota will first benefit New Shippers until such time as the space reserved for New Shippers reaches at least 10 percent of the available capacity from Minot, North Dakota to Clearbrook, Minnesota.

9. No shipper will be allowed to roll into the Historical Shipper pool if doing so results in any Historical Shipper being allocated less than a minimum batch size.

10. A Historical Shipper cannot increase its historical percentage through an acquisition, merger or other combination with a New Shipper. The prohibition does not prevent two Historical Shippers from combining their historical percentages through acquisition, merger, consolidation, assignment or combination or series of transactions

[3] A minimum batch size is 168 bpd.

with one another, nor does it prevent any party (including a New Shipper) from retaining the historical percentage of a Historical Shipper acquired by such party, provided that the historical percentage cannot be increased by such acquisition.

11. Both the monthly minimum tender amount and a shipper's history, or average monthly volume, are being converted to their equivalent percentage of capacity to provide sufficient flexibility in situations where system capacity fluctuates, so that no shippers will be excluded from receiving an allocation solely because they were prorated below the minimum tender volume. The proposed tariff thus converts the minimum tender volume on the system of 168 bpd to a percentage (0.08 percent) of available capacity to Clearbrook.

12. Enbridge North Dakota asserts that the proposed tariff provides relief for all New Shippers who have been frozen in the New Shipper class during the 24 month shipper freeze but have developed sufficient history on the pipeline to have qualified as a Regular Shipper in the absence of the freeze. Enbridge North Dakota submits that the unique circumstances of the pipeline justify a change to reserving less than 10 percent of capacity for New Shippers with the understanding that any future expansions of capacity to Clearbrook, Minnesota would solely benefit New Shippers until such time as their access to space totals at least 10 percent of the total available capacity to Clearbrook. Enbridge North Dakota contends that the proposed changes prevent Historical Shippers from being squeezed off the system by graduating New Shippers and also prevents a system where shippers with larger histories slowly gain capacity and history to the detriment of smaller shippers.

Interventions and Protests

13. An intervention and protest was filed by Plains Marketing, L.P. (Plains Marketing), currently a Regular Shipper on Enbridge North Dakota. Plains Marketing asserts that Enbridge North Dakota's proposed tariff is unjust and unreasonable. Plains Marketing requests that the tariff be rejected and that the Commission order Enbridge North Dakota to adopt tariff language extending the freeze on New Shippers attaining Regular Shipper Statues for another year. In the alternative, Plains Marketing requests that the tariff be suspended for seven months and set for technical conference. Plains Marketing argues that at meetings with Enbridge North Dakota a majority of shippers took the position that the freeze should be extended by one year until October 1, 2013, to allow certain relief valves in the form of rail and other pipeline transportation alternatives to come on line. Plains Marketing contends that the allocation procedure goes to great lengths to permanently guarantee that each graduating New Shipper would be allocated at least the minimum batch size even though in the process Classic Regular Shippers would be permanently deprived of capacity that, under the existing proration rules, would have been allocated to them. Plains Marketing submits that at the same time, the only remaining unoccupied capacity on the pipeline would be awarded to new New Shippers.

Plains Marketing contends that the arrangement, which appears to be exclusively aimed at accommodating New Shippers is unjust and unreasonable.

14. Plains Marketing asserts that the proposed allocation procedure would result in the creation of an unprecedented number of small volume shippers shipping the minimum tender volume of 168 bpd. Plains Marketing contends that when prorationing disappears, most small volume shippers will disappear with it. Plains Marketing is concerned that the proliferation of small volume shippers, who may lack a long-term commitment to support the pipeline, could negatively affect the viability of the pipeline by undermining the stability of the customer base. Plains Marketing also protests the affiliate restrictions proposed by Enbridge North Dakota preventing a Historical Shipper from acquiring the history of a New Shipper. While Plains Marketing recognizes that acquisition of a New Shipper history by a Historical Shipper would increase its allocation and reduce the allocation of other Historical Shippers, it asserts that Historical Shippers could protect their historical positions by engaging in the same type of acquisition and merger transactions.

15. Double B Energy filed a letter requesting clarification of how a New Shipper would become a Historical Shipper but did not intervene in the proceeding. In a footnote in its answer to Plains Marketing, Enbridge North Dakota addressed Double B Energy's issue and confirmed its intent that New Shippers who meet the requirement to ship for 9 out of the previous 12 months will be accorded Historical Shipper status and, subject to space availability, will be assigned a Minimum Tender Volume, regardless of whether the New Shipper's 12 month average is less than the Minimum Tender Volume.

Enbridge North Dakota's Answer

16. On September 4, 2012, pursuant to section 343.3(b) of the Commission's regulations, Enbridge North Dakota filed its response to the protest of Plains Marketing. Enbridge North Dakota states that the pre-existing tariff provides that the freeze on New Shippers becoming Regular Shipper expires as of October 1, 2012, and it has not proposed to change that provision. Therefore, Enbridge North Dakota submits that the timing of the expiration of the freeze is not an issue before the Commission. Enbridge North Dakota states that the freeze was always intended as a temporary measure only, until a permanent solution was established. Enbridge North Dakota argues that while extending the freeze would be beneficial for existing Regular Shippers such as Plains Marketing, it would not be equitable to the New Shippers who would have become Regular Shippers during the prior two years if the freeze had not existed. Enbridge North Dakota submits that if future rail and pipeline alternatives result in eliminating apportionment on the Enbridge North Dakota system between Minot, North Dakota and Clearbrook, Minnesota, a balancing of Regular and New Shipper interests would be unnecessary because all shippers could then be accommodated. However, Enbridge North Dakota asserts that if those alternatives do not eliminate apportionment on the Minot to Clearbrook segment, Enbridge North Dakota needs a lasting solution and not

one that is simply an extension of a freeze on New Shippers' ability to graduate to Historical Shipper status.

17. Enbridge North Dakota notes that of the 255 shippers on the system, only one has protested the tariff. Enbridge North Dakota submits that this remarkable degree of consensus reinforces the reasonableness of its proposal and confirms that neither rejection nor suspension of the tariff is warranted. Enbridge North Dakota states the fact that numerous shipper meetings have already been held on this topic demonstrates why a technical conference likely would not be useful in this case.

18. Enbridge North Dakota contends that the proposed apportionment procedure is a reasonable trade-off for ensuring that New Shippers again can achieve historical status after being prevented from doing so during the 24-month freeze. Enbridge North Dakota submits that Plains Marketing's protest essentially seeks preferential treatment for Regular Shippers at the expense of Graduating New Shippers and future New Shippers. Enbridge North Dakota asserts that the fact that shippers cannot move all the volumes they wish does not violate the common carrier obligation, which requires that a carrier provide transportation service "upon reasonable request.[4] Enbridge North Dakota states that the Commission has recognized that a prorationing policy may not satisfy all competing interests.[5]

19. Enbridge North Dakota submits that the proposed affiliate restrictions are a reasonable way to prevent manipulation of the prorationing process. Enbridge North Dakota states it designed the proposed affiliate restrictions to balance the competing interests of Historical and New Shippers, while preventing "gaming" of Enbridge North Dakota's system through the proliferation and acquisition by Historical Shippers of New Shippers. Enbridge North Dakota states that the proposed affiliate restrictions were explicitly designed to allow additional New Shippers to enter the Historical Shipper pool until Historical capacity reaches 95 percent and to continue to allow New Shippers to graduate to Historical Shipper status as Historical Shippers leave. Contrary to Plains Marketing's claims, Enbridge North Dakota believes the acquisition restriction serves this purpose by treating shipping history as a fact rather than a commodity. Enbridge North Dakota submits that the acquisition restriction removes an incentive for Regular Shippers to game the system by gaining an advantage in relation to other Historical Shippers through acquisition of New Shippers and, correspondingly, blocking entry of bona fide New Shippers. Enbridge North Dakota believes this supports adoption of the proposed affiliate restrictions. Finally, Enbridge North Dakota asserts that the Commission approved similar affiliate restrictions in *Platte* for the purposes of

[4] Citing *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at P 46 (2006) (*Platte*).

[5] *Id.* P 42.

allowing New Shippers to become Historical Shippers and limiting the ability of shippers to game the system through the use of affiliates.[6]

Discussion

20. For over six years, due to increased regional crude production coupled with a lack of pipeline and other transportation infrastructure in the area, competitive pressure was placed on the Enbridge North Dakota system in the form of overnomination of the available capacity resulting in continuous prorationing. This problem was exacerbated by the proliferation of new shippers on the pipeline seeking a portion of the valuable capacity, and existing shippers trying to maintain or expand their allocations through the creation of new affiliated shippers. In 2010, Enbridge North Dakota was permitted to institute an extraordinary two-year temporary freeze on the creation of additional Regular Shippers, while allowing existing New Shippers continued access to 10 percent of the pipeline capacity, but barring their entry into the Regular Shipper class. The temporary freeze expires October 1, 2012, pursuant to the terms of the tariff. Enbridge North Dakota has filed the instant proposal after extensive consultations with all of its shippers in an attempt to devise a more lasting solution to the serious system apportionment issues that balances the interests of both Historical and New Shippers.

21. The Commission has reviewed Enbridge North Dakota's proposed tariff including the provisions on Historical and New Shipper classes, the 5 percent capacity reservation for New Shippers (with an ultimate reservation of 10 percent of capacity after further expansions), the apportionment procedures that ensure that Historical Shippers are not squeezed off the system, affiliate restrictions, and the conversion of the minimum batch size to a percentage of capacity. Notwithstanding the lone protest filed by Plains Marketing, the Commission finds that the proposed tariff is just and reasonable. The proposal is based on broad shipper input and is not opposed by any of the shippers on Enbridge North Dakota's system except Plains Marketing. The proposal appropriately balances the interests of Historical and New Shippers and eliminates incentives of shippers to create new affiliated shippers as a means of increasing their allocations of capacity. The continuation of the extraordinary freeze measure would be unjust to New Shippers who have already been barred for two years from becoming Regular Shippers, and could further aggravate the issues on the system in the event that the current overnomination and apportionment issues continue.

22. While the Commission recognizes that 10 percent of Enbridge North Dakota's capacity has historically been set aside for New Shippers, the Commission finds that the proposed 5 percent capacity reservation for New Shippers is reasonable given the unique circumstances on Enbridge North Dakota's system. Moreover, Enbridge North Dakota

---

[6] 117 FERC ¶ 61,296, at P 15 and P 46 (2006).

has committed that any capacity in future expansions to Clearbrook, Minnesota would be used to support capacity allocations to New Shippers until they have access to 10 percent of the total capacity.

23. Given the difficult prorationing issues faced by the Enbridge North Dakota system, we believe that Enbridge North Dakota and its shippers have reached a fair and equitable accommodation. We commend Enbridge North Dakota for working with its shippers to develop this proposal.

<u>The Commission orders</u>:

FERC Tariff No. 71.13.0 is accepted to become effective September 15, 2012.

By the Commission. Commissioner Clark is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Enbridge Pipelines (North Dakota) LLC Docket No. IS12-548-000

(Issued September 14, 2012)

CLARK, Commissioner, *concurring*:

This order speaks to the extraordinary opportunities and challenges presented by the shale oil revolution taking place in North Dakota and elsewhere. The long-term solution to these challenges is more pipeline infrastructure as a means to transport oil to market. While prorationing is not an ideal situation, it is necessary until adequate capacity can be brought on-line. I commend Enbridge, its shippers, and the Commission staff for working together to facilitate an agreement that the Commission can support. I also encourage all stakeholders to engage the Commission in an ongoing discussion of how to best facilitate needed takeaway capacity. This is an issue that is of utmost importance, not only to the regions directly affected by oil development, but also to American energy security.

Accordingly, I respectfully concur,

____

Tony Clark
Commissioner