

Enbridge Pipelines (Southern Lights) LLC

ORDER ON PETITION FOR DECLARATORY ORDER

141 FERC ¶ 61,244 (2012)

In this case, Enbridge Pipelines (Southern Lights) LLC (Enbridge Southern Lights) filed a petition for declaratory order seeking a Commission decision approving, among other things, a provision in transportation service agreements with committed shippers that gave them a right of first offer (ROFO) for unsubscribed capacity on a pipeline that would move diluent from the Chicago area to the province of Alberta, Canada. Diluent is a substance that when blended with the heavy oil from the Canadian tar sands made that oil easier to transport by pipeline. After an initial open season, certain shippers executed transportation service agreements (TSA) containing the ROFO. The TSAs also committed the shippers to ship or pay for the capacity they held. After the first open season, the pipeline was not fully subscribed. About 85,000 barrels per day (bpd) remained for future open seasons for committed shippers. Enbridge Southern Lights proposed to have another open season and would honor the ROFO contained in the TSAs of committed shippers by accepting from them first subscriptions to some or all of the 85,000 bpd. Enbridge Southern Lights by this petition seeks assurance from the Commission that its second open season is just and reasonable and not unduly preferential under the Interstate Commerce Act. The Commission approved the petition noting that the ROFO did not create an undue preference for the initial class of committed shippers because they were not similarly situated as subsequent committed shippers who might subscribe to any portion of the 85,000 bpd that the initial committed shippers did not take under the ROFO, or as uncommitted shippers. The initial class of committed shippers who were contractually bound in the ship-or-pay TSAs had born the risk of subscribing to the Enbridge Southern Lights diluent pipeline as they did not know upon executing the TSAs whether sufficient demand for the diluent would materialize.

20121220 0927 FERC ED (UNOFFICIAL) 12/20/2012

141 FERC ¶ 61,244
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 Pipelines (Southern Lights) LLC

Docket No. OR12-27-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued December 20, 2012)

1. This order addresses Enbridge Pipelines (Southern Lights) LLC's (Enbridge) petition requesting the Commission to issue a declaratory order confirming the validity of the contractual right of first offer (ROFO) for committed capacity on Enbridge's Southern Lights Pipeline (Southern Lights) as set forth in Section 6.06 of the Southern Lights Transportation Service Agreement (TSA). Enbridge plans to hold an open season in December 2012 offering additional committed capacity on the existing Southern Lights facilities pursuant to Section 6.06. Enbridge needs assurance that it can proceed with the open season because certain potential shippers have questioned the validity of the Section 6.06 ROFO in the past. For the reasons discussed below, the Commission grants Enbridge's petition for declaratory order.

Background

2. Southern Lights commenced service on July 1, 2010, with the capacity to transport up to 180,000 barrels per day (bpd) of light hydrocarbons (known as diluent) from Chicago, Illinois to Edmonton, Alberta for use in diluting heavy oil to facilitate its transportation by pipeline. The U.S. portion of the Southern Lights Pipeline is owned and operated by Enbridge and the Canadian portion is owned and operated by an affiliated company in Canada.

3. The Southern Lights Pipeline project involved the reversal of an existing crude oil pipeline between Clearbrook, Minnesota and Edmonton, Alberta and construction of a new 20-inch pipeline from Chicago to Clearbrook, Minnesota. Southern Lights was developed in response to rapidly increased production of heavy oil and bitumen from the oil sands in Western Canada. As the amount of diluent required to transport heavy oil from Western Canada was projected to eventually outstrip the availability of

conventional diluent in Alberta, a number of prospective shippers approached Enbridge about building a pipeline to export diluent from the United States into Canada.

4. Before undertaking construction of Southern Lights, Enbridge conducted a widely publicized open season in which shippers were given the opportunity to commit volumes to the pipeline for a 15-year term under uniform terms embodied in the TSA. Due to the nature of the project, it was necessary to obtain financial support through long-term volume commitments without which the project could not move forward. The terms of the TSA included a formula for the Committed Rates, the requirement that Committed Shippers either ship their committed volumes or pay the contract rate, and a tariff rate for Uncommitted Shippers set at two times the Committed Rate. On December 31, 2007, the Commission issued an order on an unopposed petition for declaratory order approving the rate structure contained in Enbridge's Southern Lights TSA.¹

5. The TSA also provides the Committed Shippers with certain ROFO rights which they may exercise when Enbridge holds another open season for any remaining unsubscribed initial capacity of the pipeline. The Section 6.06 ROFO enables each Committed Shipper to submit a binding commitment to ship or pay for an additional share of the initial capacity of the Southern Lights pipeline at the Committed Rate. Enbridge is then free to offer the remaining committed portion of the initial capacity through a new open season process open to all prospective shippers.

6. The initial capacity of Southern Lights was 180,000 bpd, with 90 percent or 162,000 bpd available for committed shippers and 10 percent or 18,000 bpd available for uncommitted shippers. Initially, three Committed Shippers, including BP Products North America (BP) and Statoil North America, Inc. (Statoil) (the Committed Shippers), signed up for 162,000 bpd. Subsequently, one Committed Shipper exercised its right to terminate its commitment, reducing the committed volume to 77,000 bpd of the 162,000 bpd available for committed capacity. Thus, 85,000 bpd of the initial capacity remained available pursuant to the ROFO and future open seasons.

7. Pursuant to the terms of the TSA, Enbridge filed rates for Southern Lights in 2010 and 2011. The rates were protested by Imperial Oil and ExxonMobil Oil Corporation (Indicated Shippers) and the Commission set the rates for hearing.² There was a dispute over the scope of the hearing and the Indicated Shippers filed a motion with the

¹ *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310 (2007), order granting clarification and denying reh'g, 122 FERC ¶ 61,170 (2008).

² *Enbridge Pipelines (Southern Lights) LLC*, 131 FERC ¶ 61,288 (2010) and *Enbridge Pipelines (Southern Lights) LLC*, 134 FERC ¶ 61,067 (2011).

Administrative Law Judge (ALJ) arguing that a number of issues, including the ROFO, should be addressed in addition to the justness and reasonableness of the rates. In an April 5, 2011 unpublished order, the ALJ denied the motion finding that Commission orders were clear that the only issue to be addressed was whether the rates for Uncommitted Shippers were just and reasonable.³

8. Indicated Shippers later filed a complaint challenging the Southern Lights' pipeline tariffs and TSAs under which Enbridge was providing service to the Committed Shippers. The Indicated Shippers argued, among other things, that the Committed Shippers' ROFO was unduly discriminatory, preferential and anticompetitive contrary to the Interstate Commerce Act (ICA) and Commission policy and precedent. The Commission denied the Indicated Shippers' complaint finding that there was no reason to investigate the Committed Shippers' rights of first offer because there was no evidence that the exercise of those rights was imminent. The Commission stated that if, in the future, it appears that the exercise of a Committed Shipper's rights of first offer will unreasonably foreclose potential Uncommitted Shippers from obtaining any capacity on the Southern Lights Pipeline, the Commission will address such issues when they arise based on the known facts and circumstances.⁴

Enbridge's Petition

9. On May 16, 2012, Enbridge issued a notice stating that it was proposing to conduct an open season for up to 85,000 bpd of additional committed capacity of the initial capacity on Southern Lights. The notice also stated that in accordance with the Section 6.06 ROFO it provided the Committed Shippers with the first right to submit a binding commitment to ship or pay for up to 85,000 bpd of such capacity. As of the July 11, 2012 deadline for the exercise of the ROFO, the Committed Shippers subscribed to an additional 35,000 bpd of the remaining 85,000 bpd. As a result, Enbridge intends to offer the remaining 50,000 bpd of committed capacity to other potential shippers through an open season in which all interested shippers will have a right to participate. Shippers that sign a TSA during the open season process will commit to ship-or-pay for a defined term of years at the Committed Rate. Enbridge states that the principal differences between the new TSA and the original TSA are (1) the new TSA will have a shorter overall term because it starts later but ends on the same date as the original TSA; (2) the

³ An initial decision on the uncommitted rates is currently pending before the Commission on exceptions. *Enbridge Pipelines (Southern Lights) LLC*, 139 FERC ¶ 63,015 (2012).

⁴ *Imperial Oil and ExxonMobil Oil Corp. v. Enbridge Pipelines (Southern Lights) LLC*, 136 FERC ¶ 61,115, at P 25 (2011).

new TSA does not provide ROFO rights; and (3) the new TSA does not contain certain language that was only relevant prior to the construction of Southern Lights. Enbridge anticipates that the open season will commence on or about December 10, 2012, and close on or about January 10, 2013.

10. In light of prior pleadings filed by the Indicated Shippers questioning the validity of the Section 6.06 ROFO, Enbridge seeks the assurance provided by a declaratory order in order to proceed with the open season in an expeditious manner. The assurance that Enbridge seeks from the Commission in advance of the planned open season is that the Section 6.06 ROFO, as exercised in this instance, is valid, so that the open season can proceed without a cloud of uncertainty that would be created if Enbridge first held the open season and then faced a regulatory challenge that resulted in invalidating the ROFO and requiring the open season to be re-run.⁵

11. Enbridge states the Indicated Shippers have questioned the validity of the Section 6.06 ROFO on the grounds that it is discriminatory, unduly preferential, and anti-competitive. Enbridge asserts the Indicated Shippers' attempts to muddy the waters concerning the validity of this contractual provision are unwarranted. Enbridge submits the Indicated Shippers' primary challenge to the Section 6.06 ROFO is that it will result in the Committed Shippers taking all of the capacity allocated for committed volumes, thereby preventing any Uncommitted Shipper from becoming a Committed Shipper. Enbridge contends that this allegation has clearly missed the mark, as the Committed Shippers have left substantial available capacity for any entity that wishes to become a Committed Shipper.

12. Enbridge submits that the Section 6.06 ROFO is also valid because it was an essential element of the package of benefits that induced the Committed Shippers to make the long-term volume commitments that made Southern Lights possible. Further, Enbridge states the Section 6.06 ROFO (as an element of the TSA package) was offered to all interested shippers through two well publicized, non-discriminatory open seasons. Enbridge states any prospective shipper, including the Indicated Shippers, could have had the benefit of the Section 6.06 ROFO if that shipper was willing to accept the burden of being an anchor shipper for this pipeline project. In addition, Enbridge asserts the practical effect of the Section 6.06 ROFO is an increase in the level of committed volume, which will ultimately result in lower rates for both Committed and Uncommitted Shippers.⁶ Enbridge argues there is no basis to conclude that the Section 6.06 ROFO,

⁵ Comments in support of Enbridge's petition for declaratory order were filed by the Committed Shippers.

⁶ The additional committed volume resulting from the exercise of the Section 6.06 ROFO (i.e., 35,000 bpd) will eventually result in a substantial decrease in the tariff rates

exercised here for less than half of the committed space available, violates any statute, regulation, or Commission policy.

13. Enbridge states the exercise of the Section 6.06 ROFO still leaves 50,000 bpd of capacity available to any interested shipper through the proposed open season. Thus, Enbridge contends ample capacity is provided to those shippers that wish to become Committed Shippers. Moreover, Enbridge states if the open season were to be over-subscribed, the shippers participating in the open season will each receive a *pro rata* allocation of committed capacity in proportion to their respective requests for such capacity. Finally, Enbridge states any remaining Uncommitted Shippers will be assured of at least 10 percent of the pipeline's total capacity in accordance with established Commission policy.

Indicated Shippers' Protest

14. Indicated Shippers request that the Commission deny Enbridge's petition. Instead, Indicated Shippers request that the Commission issue a ruling holding that the ROFO is unlawful under Sections 1(4) (common carriage), 2 (undue discrimination), and 3(1) (undue preference) of the ICA. In the alternative, Indicated Shippers request that the Commission set this proceeding for an evidentiary hearing.

15. Indicated Shippers argue the question raised by the petition is fundamentally a legal question: whether exercise of the ROFOs is lawful under the ICA. Indicated Shippers' position is that ROFOs of any sort are unlawful under the ICA. Indicated Shippers contend not only are the ROFOs unlawful, but they create a new discrimination by virtue of the creation of three classes of shippers: (1) the original Uncommitted Shippers class; (2) the original Committed Shippers class; and (3) a third class of shipper that was neither contemplated nor approved by the Commission in the prior proceedings, a new inferior class of committed shipper. Indicated Shippers argue the emergence of this new class of committed shipper results because Enbridge has filed a revised TSA that differs in certain material respects from the original one presented to the Commission in the declaratory order proceeding in Docket No. OR7-15-000, and still applicable to the two original Committed Shippers. Indicated Shippers assert the most significant material aspect is that the new TSA does not include any ROFO rights for new committed shippers.

for both Committed and Uncommitted Shippers due to the increased number of committed barrels over which the TSA cost of service is spread in calculating the annual tariff rate filings. Moreover, the rate decrease will be even greater if the remaining 50,000 bpd of capacity is taken in the proposed open season.

16. Indicated Shippers state the 2006 TSA provided two other ROFOs in addition to the Open Season ROFO. Indicated Shippers state the original Committed Shippers have a one-time right to extend the term of the TSA for an additional fifteen years (Extension Right). Indicated Shippers state as part of this Extension Right Committed Shippers can increase their capacity commitment up to the level of the capacity available for transportation of committed volumes. Finally, Indicated Shippers state under the TSA, Committed Shippers have a right of first offer on the expansion capacity available for committed volumes (Expansion ROFO). Indicated Shippers argue any Commission ruling on the lawfulness of the Section 6.06 ROFO necessarily implicates the lawfulness of the Extension Right and Expansion ROFO. Indicated Shippers submit they are all conceptually the same rights afforded the original two Committed Shippers that will not be afforded to newcomers for committed capacity. As such, Indicated Shippers assert in this proceeding, the Commission cannot defer a ruling on the other two ROFOs.⁷

17. Indicated shippers contend the ROFOs granted under the 2006 TSA provide the original Committed Shippers with an undue contractual preference with respect to access to transportation service on the Southern Lights Pipeline in violation of the Section 3 of the ICA. Under the Commission's present policy, Indicated Shippers argue the only basis for finding contractual preferences nondiscriminatory is that such preferences are made available to all shippers. Indicated Shippers assert, according to Enbridge, new committed shippers who subscribe in the anticipated open season will not be offered the same ROFO rights that the original two Committed Shippers received. Among other things, Indicated Shippers also claim the original Committed Shippers continue to receive firm transportation at a discount, unlawfully, but the rest of the Committed Shippers do not.

18. While not the primary focus of their protest or their longstanding objection to the ROFO concept, Indicated Shippers contend the Commission must also consider the potential anticompetitive effects of its actions. In this vein, Indicated Shippers assert the ROFOs granted under the TSA provide unfair and unwarranted competitive economic advantages to the Committed Shippers and anticompetitive market impacts. Indicated Shippers assert controlling access to the Southern Lights Pipeline may permit the Committed Shippers essentially to extract monopoly profits, which may include buy-sell transactions with the Committed Shippers, because the shippers who then cannot gain access to Southern Lights Pipeline must move their diluent supplies to Alberta by alternative means. Indicated Shippers argue uncommitted shippers may be forced to

⁷ Should the Commission defer a ruling on the other ROFOs on the basis of ripeness or otherwise, Indicated Shippers reserve their rights to challenge those ROFOs at such time as appropriate or as they are deemed ripe.

purchase their transportation services not from the pipeline at a filed tariff rate, but directly from Committed Shippers at whatever commodity/transportation rate the Committed Shippers can extract. Indicated Shippers contend if uncommitted shippers end up paying a transportation rate well above the actual cost of transportation on the Southern Lights Pipeline, that result is anticompetitive.

Enbridge's Response

19. Enbridge states Southern Lights has been in operation for more than 27 months (since July 1, 2010), and the Indicated Shippers have not yet nominated a single barrel for transportation on the pipeline. Enbridge submits at some point, their continued claim to "potential shipper" status must wear thin. Nonetheless, in order to expedite a ruling in this proceeding, Enbridge does not oppose the Indicated Shippers' intervention, so that the ROFO issue can be promptly and fully resolved.

20. Enbridge argues the Indicated Shippers' suggestion that the Commission must rule on unripe, unexercised ROFOs is inconsistent with the Enbridge's petition and contrary to a prior Commission ruling in this case. Enbridge states only one issue was submitted to the Commission in the petition - whether the Section 6.06 ROFO is valid. Therefore, Enbridge contends the protest conflicts with the basic principle that protests and comments on a petition for declaratory order cannot raise new issues outside the scope of the petition.

21. In addition, Enbridge asserts the Commission has previously ruled that the future, as yet unexercised, ROFOs are not ripe for adjudication.⁸ Enbridge states the Commission found that there was "no reason to investigate the Committed Shippers' rights of first offer because there is no evidence that the exercise of those rights is imminent."⁹ Enbridge states the Commission noted that arguing about future hypothetical ROFOs would be "wasteful of administrative resources," and that there was "no way to know what the specific terms of any exercise of a right of first offer would be, whether the Committed Shippers would exercise such rights, or what the effect of such exercise would be. . . ."¹⁰

⁸ See *Imperial Oil and ExxonMobil Oil Corp. v. Enbridge Pipelines (Southern Lights) LLC*, 136 FERC ¶ 61,115 at P 25.

⁹ *Id.*

¹⁰ *Id.*

22. Enbridge asserts the Indicated Shippers incorrectly assume that any difference in treatment between the original Committed Shippers and later generations of Committed Shippers in new open seasons is necessarily discriminatory and therefore invalid. However, Enbridge argues it is well established that the anti-discrimination provisions in the ICA are not absolute, and that shippers who are not similarly situated may be treated differently. Enbridge submits the original Committed Shippers here took on much of the risk of Southern Lights. Enbridge contends those potential shippers (including the Indicated Shippers) that did not sign up in the first two open seasons took none of those risks. Enbridge asserts the original Committed Shippers are appropriately considered a different class than the shippers who chose not to shoulder the burden of supporting the pipeline in its formative stages. Thus they are not similarly situated shippers for the purpose of a discriminatory treatment analysis under the ICA. Indeed, Enbridge argues this case presents an unusually vivid demonstration of the risk of being an anchor shipper because the original Committed Shippers, who are contractually obligated to ship or pay for a minimum of 77,000 bpd through Southern Lights, have yet to attain that level on an average basis over any calendar quarter since the pipeline began operations. Enbridge states the absence of sufficient market demand for diluent in Alberta has required the original Committed Shippers to pay for shipment of barrels for which there was no market. By comparison, Enbridge contends the Indicated Shippers (and other non-committed parties) have been able to avoid that obligation entirely because they made no volume commitment to support the construction of Southern Lights. Nevertheless, because Southern Lights is a common carrier pipeline, Enbridge states those parties continue to have the opportunity to nominate barrels to the pipeline at any time when they find it in their economic interest to do so.

23. Enbridge argues the Indicated Shippers fail to cite any precedent demonstrating that the ROFO must be offered in subsequent open seasons. Enbridge asserts that it is common for committed shippers who supported a project at the outset to receive different terms than other shippers later down the line. Indeed, that result is inherent in the concept of an open season, which is essentially a time-limited offer to provide certain rate and service terms in exchange for a binding commitment to ship a specified volume of product on the pipeline in the future. Enbridge argues if the pipeline were required to make the identical terms available to all future shippers, there would be no incentive for any shipper to make an advance commitment, and very few new infrastructure projects would be able to proceed. Because later shippers are not similarly situated to the anchor shippers, Enbridge asserts there is nothing discriminatory about providing them different (including less favorable) terms.

24. Enbridge asserts that contrary to the Indicated Shippers' assertions, new Committed Shippers will not be apportioned in a different manner than original Committed Shippers, and therefore original Committed Shippers are not receiving firm service at a discount.

Discussion

25. The question raised by Enbridge's petition for declaratory order is whether the Committed Shippers' exercise of their Section 6.06 ROFO is valid so that they may acquire an additional 35,000 bpd of committed capacity and that Enbridge can offer the additional 50,000 bpd of committed capacity to other potential committed shippers in an upcoming open season. In order to answer this question the Commission must decide a legal issue raised by the Indicated Shippers on several different occasions but not previously addressed because of ripeness, that is, whether there is any violation of the ICA because the original Committed Shippers received a ROFO in their TSA but such ROFO will not be offered in subsequent open seasons to new Committed Shippers.¹¹

26. Having considered the arguments of the parties, the Commission here finds that the Section 6.06 ROFO is valid, and the fact that it will not be offered to new Committed Shippers is not discriminatory under the ICA. Consistent with the principles first established in *Express Pipeline Partnership*,¹² Enbridge offered the original TSA, including the Section 6.06 ROFO, to any and all shippers in a widely publicized open season. Because all shippers had the opportunity to take advantage of the terms and conditions of the original TSA, there is no issue of undue discrimination or undue preference among the resulting classes of shippers. Those shippers who elected not to make an anchor commitment are, by their own choices, not similarly situated to the original Committed Shippers. The Indicated Shippers had the opportunity to become Committed Shippers and sign a TSA containing the Section 6.06 ROFO, but did not. There is no requirement that rates, or terms and conditions offered in an initial open season must be identically offered in any subsequent open seasons. In fact, unlike here, in many instances oil pipelines who seek to finance large projects through up front contractual commitments may contract for 90 percent of a pipeline's capacity. Despite the fact that they have yet to ship a barrel on Southern Lights, the Indicated Shippers still have the opportunity to become Committed Shippers on Southern Lights, and even if they

¹¹ Consistent with the discussion in *Imperial Oil and ExxonMobil Corp. v. Enbridge Pipelines (Southern Lights) LLC*, 136 FERC ¶ 61,115 at P 25, the Commission finds that it is premature to address issues concerning the validity of Extension and Expansion ROFOs that were not raised in the petition and may not ever be exercised.

¹² 76 FERC ¶ 61,245, at 62,253, *order on reh'g*, 77 FERC ¶ 61,188 (1996) (*Express*). For recent applications of the principles in *Express* see *Shell Pipeline Co. LP*, 139 FERC ¶ 61,228, at P 20 (2012); and *Shell Pipeline Co. LP*, 141 FERC ¶ 61,017, at PP 14-15 (2012).

still choose not to commit, can ship on Southern Lights using the 10 percent of capacity reserved for Uncommitted Shippers.

27. The Indicated Shippers' claim that the Committed Shippers are receiving firm service at a discount contrary to Commission policy and precedent has been refuted by Enbridge. Enbridge explains that the Indicated Shippers are confused between Section 17 in the TSA and Section 17 in a *pro forma* tariff attached to its 2007 petition for declaratory order. Section 17 of the TSA, which does not appear in new TSAs, did not address apportionment while Section 17 of the *pro forma* tariff did address apportionment and was adopted when Enbridge filed actual tariffs. All shippers, including any new Committed Shippers, will be apportioned in the same manner according to the Southern Lights tariff.¹³

28. The Commission also rejects the Indicated Shippers' suggestion that finding the Section 6.06 ROFO valid will result in anticompetitive effects. It is not accurate for the Indicated Shippers to assert that the Committed Shippers will control access to the Southern Lights pipeline given the fact that, even after the exercise of the Section 6.06 ROFO, 50,000 bpd or 30 percent of the remaining committed capacity will remain available. Indicated Shippers have the ability to obtain committed capacity during the next open season and pay the committed rate in the tariff if they choose. Moreover, even if all of the committed capacity was subscribed, Indicated Shippers always have the opportunity to ship on a month-to-month basis using the 10 percent uncommitted capacity with no ongoing financial commitment to the pipeline. It is disingenuous for the Indicated Shippers to complain that the original Committed Shippers, who are actually paying for capacity that they are not using, are somehow going to extract monopoly profits from the Indicated Shippers who have yet to ship any barrels on Southern Lights,

¹³ A similar issue was addressed in the 2011 complaint order where the Commission found "Indicated Shippers claim that the Committed Shippers receive firm service in the event of apportionment is incorrect." *Imperial Oil and ExxonMobil Oil Corp. v. Enbridge Pipelines (Southern Lights) LLC*, 136 FERC ¶ 61,115 at P 23.

which has been in operation since 2010. Accordingly, for the reasons discussed above, the Commission grants Enbridge's petition for declaratory order.

The Commission orders:

Enbridge's petition for declaratory order is granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

OR12-27-000.DOC.....1-11

