

Enbridge Pipelines (Southern Lights) LLC

ORDER ACCEPTING AND SUSPENDING TARIFF, CONSOLIDATING PROCEEDINGS
AND GRANTING REHEARING

134 FERC ¶ 61,067 (2011)

In this case, Enbridge Pipelines (Southern Lights) LLC (Enbridge) filed an annual recalculation of committed and uncommitted shipper rates governing the transportation of diluent from Illinois to North Dakota. Diluent is a hydrocarbon that is used to dilute heavy oil and bitumen to facilitate their transmission. Two parties intervened and challenged the uncommitted rates, but neither had actually shipped under those rates or made nominations for shipments. Both claimed, nonetheless, to have standing by virtue of having substantial economic interest in the rates. The Commission agreed noting that the first party had indicated an intention and indeed had the ability to ship under the uncommitted rates. There was no requirement of imminence of shipping. Further, over the long term a substantial amount of money was involved since the second party would directly pay the first.

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134 FERC ¶ 61,067
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enbridge Pipelines (Southern Lights) LLC · Docket Nos. IS11-146-000
IS10-399-000
IS10-399-001
IS10-399-003
(Consolidated)

ORDER ACCEPTING AND SUSPENDING TARIFF, CONSOLIDATING
PROCEEDINGS AND GRANTING REHEARING

(Issued January 31, 2011)

1. This order addresses Enbridge Pipelines (Southern Lights) LLC's (Southern Lights) December 28, 2010 tariff filing reflecting its annual recalculation of committed and uncommitted rates pursuant to a rate structure approved by a Commission declaratory order. Southern Lights requests a February 1, 2011 effective date for its proposed FERC Tariff No. 4.3.0. For the reasons discussed below, the Commission will accept and suspend the tariff to be effective February 1, 2011, consolidate the instant proceeding with the ongoing proceeding in Docket No. IS10-399-000, and grant rehearing in Docket No. IS10-399-001 concerning Imperial Oil's procedural status.

Background

2. Southern Lights operates the U.S. segment of a diluent¹ pipeline that provides transportation service from Manhattan, Illinois to the International Boundary near Neche, North Dakota. Southern Lights pipeline commenced service on July 1, 2010. The tariff rate structure for Southern Lights was approved by a Commission declaratory order in Docket No. OR07-15-000.² The Commission approved the calculation of the rates for

¹ Diluent refers to a low density, low viscosity hydrocarbon used to dilute heavy oil and bitumen to make it transportable by pipeline.

² *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310 (2007), *order granting clarification*, 122 FERC ¶ 61,170 (2008).

committed shipments in accordance with the agreed-upon Transportation Services Agreement (TSA) entered into between Southern Lights and its committed shippers and further approved the setting of the initial uncommitted rate at two times the committed rate, subject to review of the uncommitted rate when filed.³ The TSA requires Southern Lights to recalculate and refile the tariff rates each year. Southern Lights states that FERC Tariff No. 4.3.0, filed here, contains the 2011 Southern Lights committed and uncommitted rates calculated as provided for in the TSA.

3. Southern Lights states that it is submitting cost of service schedules, in conformance with Part 346 of the Commission's regulations, in support of the uncommitted rate. Southern Lights states that the uncommitted rate of \$10.9744 per barrel is subject to the year end true-up mechanism previously approved by the Commission. Southern Lights states that because of the true-up mechanism, the effective tariff rate payable by an uncommitted shipper is initially \$10.9744 per barrel but may be less than that amount depending upon the volume of uncommitted movements during the year. Southern Lights states that since the pipeline went into operation on July 1, 2010, it has not received any nominations other than from committed shippers. Southern Lights states that since it is not feasible to calculate a cost-of-service based uncommitted rate on the assumption of zero uncommitted volumes, it provided cost, revenue and throughput information under three different volumes scenarios that capture the full range of possibilities. Southern Lights asserts that all three cases show that the effective rate paid by an uncommitted shipper after application of the true-up mechanism is lower than the cost-of-service rate for uncommitted shipments.

Interventions and Protests

4. Imperial Oil and ExxonMobil Oil Corporation (ExxonMobil) (together, Indicated Shippers) filed a motion to intervene, conditional protest, and request for consolidation. Indicated Shippers state that they have a substantial economic interest in the tariff filing. Indicated Shippers state that ExxonMobil is a potential uncommitted shipper on the U.S. portion of the Southern Light pipeline and will be required to pay the increased uncommitted rate for diluent proposed by Southern Lights on the U.S. side of the border. Indicated Shippers assert that Imperial Oil will purchase the diluent from ExxonMobil for

³ Southern Lights filed to establish initial committed and uncommitted rates in Docket No. IS10-399-000. The Commission accepted and suspended the tariffs to be effective July 1, 2010, and set the matter for hearing. *Enbridge Pipelines (Southern Lights) LLC*, 131 FERC ¶ 61,288 (2010). The hearing was held in abeyance pending the outcome of settlement judge procedures. On January 18, 2011, the Presiding Administrative Law Judge (ALJ) issued a report determining that further attempts at settlement would be futile, and on January 19, 2011, the Chief ALJ terminated the settlement procedures and established hearing procedures in Docket No. IS10-399-003.

further transportation on the Canadian portion of Southern Lights. Indicated Shippers submit that Imperial Oil is directly affected by the tariff filing because it will be required to pay the actual costs of transportation to ExxonMobil.

5. Indicated Shippers argue that there are a number of questionable assumptions and conclusions in the cost-of-service filing that are unsupported by any testimony or other evidence and have not been subject to any formal discovery. Indicated Shippers contend that Southern Lights proposes a 9 percent increase to underlying rates that are already unjust and unreasonable in Indicated Shippers' view. Indicated Shippers also submit that the underlying unjust and unreasonable rates, which would be increased by the December 28, 2010 tariff filing here, are presently subject to investigation by the Commission in the IS10-399 proceeding that now has been set for hearing after termination of settlement judge procedures. Accordingly, Indicated Shippers contend that the proposed rates should not be approved without further investigation by the Commission. Indicated Shippers submit that given that there is an ongoing proceeding that will address the appropriate rates for the Southern Lights pipeline, administrative efficiency calls for consolidation and making the outcome of this proceeding subject to the outcome of the prior proceeding in Docket No. IS10-399.

6. In an abundance of caution, therefore, Indicated Shippers filed a conditional protest on the same grounds as their June 11, 2010, protest in Docket No. IS10-399, to ensure that the increased rates Southern Lights proposes to become effective February 1, 2011, will retain the current status of the rates they will supersede, i.e., will be subject to suspension, investigation, refund, and the outcome of the hearing in Docket No. IS10-399.

Southern Lights' Response

7. Southern Lights filed a response asserting that the Indicated Shippers failed to show the "substantial economic interest" necessary to have standing to protest the tariff filing. Southern Lights states that the Commission, in Docket No. IS10-399-000, previously denied Imperial Oil's standing to protest and intervene. Southern Lights argues that based on the circumstances since the suspension order in Docket No. IS10-399-000, there is no longer a basis to determine that ExxonMobil has a substantial economic interest in the tariff rates on Southern Lights' pipeline such that it has standing to protest the tariff. Southern Lights contends that ExxonMobil has not alleged that it is either a current shipper or is imminently about to become a current shipper. Southern Lights submits that although it has been in operation for more than six months neither Imperial Oil nor ExxonMobil have made any nominations for transportation on the system. Southern Lights argues that if the Commission nevertheless determines that one or both of the Indicated Shippers do have standing to protest, then Southern Lights does not oppose consolidation with the ongoing proceeding in Docket No. IS10-399-000.

Answer of Indicated Shippers to Response of Southern Lights

8. Indicated Shippers dispute Southern Lights' argument with respect to the issue of standing. Indicated Shippers asserts that it knows of no Commission precedent, nor is any cited, for a requirement that one must qualify as a shipper on a month by month basis for purposes of standing. Indicated Shippers submit that the test for standing for purposes of a protest does not turn on whether a party actually ships on the pipeline, but whether a party has a "substantial economic interest" in the rates on the pipeline. Indicted Shippers state that Southern Lights focuses solely on the shipper aspect, not on whether either of the Indicated Shippers has an economic interest in the rates for transportation on the Southern Lights system sufficient for purposes of a protest. Indicated Shippers argue that while Southern Lights would have the Commission focus only on six months of time, in the long term, tens of millions of dollars are at stake here, as well as the ability of uncommitted shippers to compete with the advantage conferred upon the largest committed shipper by virtue of the pipeline's rate structure.

9. Indicated Shippers state that Southern Lights asserts in its response that Indicated Shippers have not "made any nominations" for transportation on Southern Lights system. Indicated Shipper state that this is correct. In fact, Indicated Shippers submit that not a single uncommitted shipper has shipped any volumes of diluent on the pipeline in the first six months of service. Moreover, Indicated Shippers assert that data from Southern Lights shows that even the committed shippers have not to date shipped their volume commitment, much less anything beyond. Indicated Shippers state that Southern Lights simply asserts that Indicated Shippers' plan to ship is not "imminent." Indicated Shippers argue that Southern Lights has not shown that Indicated Shippers have no intention to ship, nor that Indicated Shippers cannot use the tariffs to ship.

Discussion

10. The Commission finds that because of a pending rehearing of the Indicated Shippers in Docket No. IS10-399-001 and certain issues raised by Southern Lights in its response to Indicated Shippers' protest, as a threshold matter, it is necessary to clarify the procedural status of ExxonMobil and Imperial Oil. In its suspension order in Docket No. IS10-399-000, the Commission accepted the protest of ExxonMobil but denied Imperial Oil's intervention. The Indicated Shippers sought rehearing with respect to Imperial Oil's status. Further, in this proceeding Southern Lights questions whether ExxonMobil has standing to protest. The Commission finds that ExxonMobil has standing to protest the tariff filing here and its motion to intervene is granted. ExxonMobil indicated that it has a substantial economic interest in the rates at issues because it is a potential uncommitted shipper on Southern Light's system. The fact that ExxonMobil indicated an intention and ability to be a future shipper on the newly operating Southern Lights' system is enough to convey standing for purposes of filing a protest as well as for party status by means of an intervention. Contrary to Southern Lights' assertion, there is no requirement that a future shipper's plan to ship must be imminent.

11. With respect to Imperial Oil, the Commission finds that it has standing to intervene and protest in this proceeding, and upon further consideration, the Commission will grant rehearing in Docket No. IS10-399-001 and finds that Imperial Oil has standing to intervene and protest in that proceeding as well. While it may be the case that Imperial Oil will not be a shipper on the U.S. segment of the Southern Lights' pipeline, it does have a substantial economic interest that would allow it to file a protest. Whether an entity is a current or future shipper is relevant for purposes of determining substantial economic interest but it is not the only consideration. There is not a bright line test. As the Commission has stated, the "'substantial economic interest' standard is intended to assure that parties protesting a filing have sufficient interest in the matter to warrant the commitment of agency and pipeline resources to a review of the merits."⁴ Such standing is therefore based on all the facts and circumstances of the particular proceeding. The Commission finds that the fact that Imperial Oil will make direct payments to ExxonMobil, which could amount to tens of millions of dollars in the long run, certainly represents a sufficient interest to warrant a commitment of the agency's resources. Even if Imperial Oil were to be found to lack standing to protest the filing pursuant to substantial economic interest standard of section 343.3(a) of the Commission's regulation, it certainly has an interest which is directly affected pursuant to the less stringent standard for interventions contained in section 385.214 of the Commission's regulations.

12. The substantive issue presented in this proceeding as well as the related proceeding in Docket No. IS10-399-000 is whether the rates for uncommitted shipments on Southern Lights' pipeline are just and reasonable. In Docket No. IS10-399-000 the Indicated Shippers argued that there were significant questions with respect to a number of rate elements including return on equity, capital structure and depreciation. Since the proposed rates are a 9 percent increase over the underlying rates, the same issues concerning whether the rates are just and reasonable apply here. As the Commission found in its suspension order in Docket No. IS10-399-000 the fact that the initial rates are set for hearing does not undermine the rate structure approved by the declaratory order because the committed rate, which is 50 percent of the uncommitted rate, can be derived when a just and reasonable uncommitted rate is determined.⁵ Given the fact that the Commission suspended the rates in Docket No. IS10-399-000 and set them for hearing, it follows that the rates here, which are directly related to the rates in Docket No. IS10-399-000, should also be suspended and set for hearing. Indicated Shippers' request for consolidation of Docket No. IS11-146-000 with the ongoing proceeding in Docket No. IS10-399-000 will promote administrative efficiency. Because of the commonality of issues, the Commission will consolidate the two dockets. Since hearing procedures were

⁴ *Shell Pipeline Company, LP*, 104 FERC ¶ 61,021, at 61,052 (2003).

⁵ *Enbridge Pipelines (Southern Lights) LLC*, 131 FERC ¶ 61,288, at P 16 (2010).

just established in Docket No. IS10-399-000 and a prehearing conference is scheduled for February 10, 2011, consolidation of the two dockets will not result in any undue delays.

Suspension

13. Based upon a review of the filing, the Commission finds that Southern Lights' tariff filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, pursuant to section 15(7) of the Interstate Commerce Act (ICA), the Commission will accept FERC Tariff 4.3.0 for filing and suspend it, to be effective February 1, 2011, subject to refund and subject to the conditions set forth in the body of this order and in the ordering paragraphs below.

The Commission orders:

(A) Pursuant to the authority contained in the ICA, particularly section 15(7) thereof, Southern Lights' FERC Tariff 4.3.0 is accepted for filing and suspended, to become effective February 1, 2011, subject to refund.

(B) Pursuant to the authority contained in the ICA, particularly sections 15(1) and 15(7) thereof, and the Commission's regulations, a hearing is established to address the issues raised by Southern Lights' filing.

(C) The instant proceeding, Docket No. IS11-146-000, is consolidated with the ongoing proceeding in Docket Nos. IS10-399-000 and IS10-399-003.

(D) Indicated Shippers' request for rehearing in Docket No. IS10-399-001 is granted.

.By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.