

142 FERC ¶ 61,199  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

High Prairie Pipeline, LLC  
Complainant,

Docket No. OR12-17-000

v.

Enbridge Energy, Limited Partnership,  
Respondent

ORDER DISMISSING COMPLAINT

(Issued March 22, 2013)

1. On May 17, 2012, High Prairie Pipeline, LLC (High Prairie) filed a complaint against Enbridge Energy, Limited Partnership (Enbridge Energy) alleging violations of multiple sections of the Interstate Commerce Act (ICA)<sup>1</sup> and sections 341.0 and 341.8 of the Commission's regulations.<sup>2</sup> Specifically, High Prairie alleges that Enbridge Energy has unduly discriminated against High Prairie and its shippers by refusing to grant High Prairie an interconnection at the Clearbrook, Minnesota origin point.<sup>3</sup> For the reasons discussed below, the Commission dismisses the complaint filed by High Prairie.

**Background**

2. According to its complaint, High Prairie intends to construct a 450-mile pipeline system (the HP Pipeline) capable of transporting 150,000 barrels of crude oil per day from the Bakken production area in North Dakota to Clearbrook, Minnesota.<sup>4</sup> High Prairie conducted an open season to solicit capacity commitments from shippers for the

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<sup>1</sup> 49 U.S.C. App. § 4 (1998).

<sup>2</sup> 18 C.F.R. §§ 341.0, 341.8 (2012).

<sup>3</sup> High Prairie Pipeline, LLC May 17, 2012 Complaint at 3 (Complaint).

<sup>4</sup> Complaint at 3.

HP Pipeline from February 14 through April 5, 2012. According to High Prairie, potential shippers committed to a significant portion of capacity on the HP Pipeline, with a number of these commitments contingent on High Prairie establishing an interconnection with Enbridge Energy at Clearbrook.<sup>5</sup>

3. In February of 2012, High Prairie commenced discussions with Enbridge Energy regarding the interconnection of the HP Pipeline to Enbridge Energy's system at the Clearbrook origin point.<sup>6</sup> High Prairie states that it completed a new service request form on March 9, 2012, and has had multiple discussions with Enbridge Energy since that date.<sup>7</sup> High Prairie states that it "made clear" to Enbridge Energy that it was willing to pay for the costs of all facilities needed for the interconnection, including storage facilities.<sup>8</sup> To date, Enbridge Energy has not granted High Prairie's interconnection request.

4. High Prairie alleges that during negotiations regarding the requested interconnection, Enbridge Energy expressed concern that capacity may become constrained on its system due to an increase in volumes entering upstream of Clearbrook.<sup>9</sup> Enbridge Energy therefore, according to High Prairie, set forth certain conditions to the requested interconnection. These conditions include paying approximately \$100 million for facilities necessary for the interconnection, the construction of downstream expansion facilities at an estimated cost of \$1 billion, recovered by a surcharge on High Prairie shippers with shortfalls paid by High Prairie, consent of certain existing shippers on Enbridge Energy's system, and obtaining a declaratory order from the Commission approving Enbridge Energy's cost allocation methodology.<sup>10</sup>

### **High Prairie's Complaint**

5. High Prairie alleges that Enbridge Energy has violated section 3(1) of the ICA by granting undue preferences to both itself and its shippers, as well as to its affiliated pipelines and their shippers, by unduly discriminating against High Prairie and its

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<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 5-6.

shippers.<sup>11</sup> High Prairie asserts that it as well as its shippers is protected from discrimination under section 3(1). By refusing to grant the pipeline an interconnection, argues High Prairie, Enbridge Energy is discriminating against High Prairie and its shippers.<sup>12</sup> High Prairie claims that it and its shippers are similarly situated to entities for whom Enbridge Energy has granted interconnection and, therefore any disparate treatment is a violation of section 3(1).

6. High Prairie also alleges that the conditions it states Enbridge Energy required are also violations of section 3(1) of the ICA. High Prairie states that these conditions were not imposed on other entities seeking or having an interconnection with Enbridge Energy, and therefore imposing these conditions on High Prairie is unduly discriminatory.<sup>13</sup> High Prairie also argues that, under Commission precedent, common carrier pipelines cannot favor affiliated pipelines in the grant of interconnects over other pipelines that are similarly situated.<sup>14</sup>

7. High Prairie also claims that Enbridge Energy is violating sections 1(6) and 6(1) of the ICA, and sections 341.0 and 341.8 of the Commission's regulations, by refusing to grant High Prairie an interconnection on just and reasonable terms and conditions of service.<sup>15</sup> Section 1(6) of the ICA, states High Prairie, requires that terms and conditions of service on oil pipelines, including the terms governing receipt of oil, be just and reasonable.<sup>16</sup> High Prairie argues that section 6(1) of the ICA requires that an oil pipeline's tariff contain all of the terms and conditions of service. High Prairie also argues that section 341.0 of the Commission's regulations, argues High Prairie, requires that each oil pipeline include in its published tariffs all of the rules and regulations governing the rates and charges for service performed in accordance with the tariff.<sup>17</sup>

8. High Prairie also alleges that Enbridge Energy is violating section 1(4) of the ICA by failing to provide transportation upon reasonable request, failing to establish

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<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 8-9.

<sup>13</sup> *Id.* at 10-12.

<sup>14</sup> *Id.* at 14 (citing *Bonito Pipeline Co.*, 61 FERC ¶ 61,050 (1992)).

<sup>15</sup> Complaint at 16.

<sup>16</sup> *Id.* at 16.

<sup>17</sup> *Id.* at 16-17.

reasonable through routes with another carrier, and failing to provide reasonable facilities for operating such through routes.<sup>18</sup>

9. High Prairie also alleges that Enbridge Energy is violating section 6(7) of the ICA by extending to its current shippers, as well as to affiliate pipelines and its shippers, privileges not specified in its tariffs, and is violating section 341.8 of the Commission's regulations by failing to state its interconnection policy in its tariff.<sup>19</sup>

10. High Prairie requests as relief that the Commission require Enbridge Energy to cease its unduly discriminatory and preferential actions and grant the requested interconnection, or in the alternative cease receipts at Clearbrook from all upstream pipelines owned by Enbridge Energy and its affiliated pipelines, or cease all transportation on Enbridge Energy's pipeline extending downstream from Clearbrook.<sup>20</sup>

11. High Prairie also requests the Commission order Enbridge Energy to file a revised tariff setting forth a just, reasonable and not unduly discriminatory interconnection policy.<sup>21</sup> Finally, High Prairie requests the Commission order Enbridge Energy to fully compensate High Prairie for any damages suffered as a result of Enbridge Energy's denial or delay of an interconnection.<sup>22</sup>

**Enbridge Energy's Motion to Dismiss and Answer, High Prairie's Answer, and other Responsive Pleadings**

12. On June 6, 2012, Enbridge Energy filed a Motion to Dismiss and Answer to High Prairie's Complaint. Enbridge Energy states that negotiations remain in a preliminary stage due to changes made by High Prairie in its interconnection request.<sup>23</sup> Enbridge Energy states that it offered High Prairie reasonable alternatives to an interconnection at Clearbrook, and these offers were rejected.<sup>24</sup>

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<sup>18</sup> *Id.* at 19.

<sup>19</sup> *Id.* at 20-21.

<sup>20</sup> *Id.* at 27-28.

<sup>21</sup> *Id.* at 28.

<sup>22</sup> *Id.* at 29.

<sup>23</sup> Enbridge Energy, Ltd. P'Ship June 6, 2012 Motion to Dismiss and Answer at 4 (Motion to Dismiss).

<sup>24</sup> *Id.* at 6.

13. In the Motion to Dismiss, Enbridge Energy argues that the ICA provides no authority to the Commission to mandate an interconnection between common carrier pipelines.<sup>25</sup> Enbridge Energy disputes the allegation that it granted interconnections to any affiliates, and states that it is not preserving capacity for its and its affiliates' upstream shippers.<sup>26</sup>

14. Enbridge Energy disputes High Prairie's claims of discrimination, arguing that High Prairie, a potential connecting pipeline, is not a current or prospective shipper that would be protected by the anti-discrimination provisions of the ICA.<sup>27</sup> Enbridge Energy also states that the conditions it told High Prairie were necessary in order to provide the requested interconnection were both lawful and reasonable, and not discriminatory under the ICA.<sup>28</sup>

15. Enbridge Energy also claims it is not required under either the ICA or Commission regulations to publish a carrier-to-carrier connection policy in its tariff.<sup>29</sup> Finally, Enbridge Energy states there is no legal basis for High Prairie's claims.

16. On June 6, 2012, Motions to Intervene were filed by Tesoro Refining and Marketing Co. and Suncor Energy Marketing Inc. Tesoro states that it believes that transportation on High Prairie would be useful to North Dakota shippers provided that an interconnection to the Enbridge Energy system at Clearbrook, Minnesota could be obtained on reasonable terms and conditions. Suncor states that the interconnection with Enbridge Energy proposed by High Prairie on reasonable terms consistent with the ICA could provide useful transportation service for shippers of crude oil.

17. On June 20, 2012, High Prairie filed its Answer to Enbridge Energy's Motion to Dismiss, in which it reiterated the factual and legal claims set forth in its Complaint.

18. On July 5, 2012, Enbridge Energy filed a Motion for Leave to Reply and Reply of Enbridge Energy, Limited Partnership, to Answer of High Prairie Pipeline, LLC. This

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<sup>25</sup> Motion to Dismiss at 2 (citing *Plantation Pipe Line Co. v. Colonial Pipeline Co.*, 104 FERC ¶ 61,271 (2003); *Enbridge Energy, Ltd. P'Ship*, 139 FERC ¶ 61,134 (2012)).

<sup>26</sup> Motion to Dismiss at 9-10.

<sup>27</sup> *Id.* at 13-15.

<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.* at 16.

was followed, on July 13, 2012, with the Motion for Leave to Answer and Answer of High Prairie Pipeline, LLC.

19. On August 28, 2012, High Prairie filed a motion to lodge a filing that Enbridge Energy made with the Minnesota Public Utilities Commission in June of 2012, describing a project to increase its Line 67 capacity. On September 12, 2012, Enbridge Energy filed an answer to High Prairie's motion, arguing that the Line 67 station upgrade project has no significance with respect to the threshold issue whether High Prairie has shown reasonable grounds for its complaint. On November 27, 2012, High Prairie filed in the subject OR12-17-000 complaint docket, the protest it made to Enbridge North Dakota's petition for declaratory order in Docket No. OR13-6-000, where Enbridge North Dakota seeks certain declarations and approvals for its Sandpiper project. On December 21, 2012, Enbridge Energy filed a motion to strike High Prairie's November 27, 2012 protest as inappropriately filed in a docket unrelated to the subject complaint. Then, on December 27, 2012, High Prairie similarly filed its motion to answer and answer to Enbridge North Dakota's reply comments in the Sandpiper OR13-6-000 proceeding in this OR12-17-000 complaint proceeding as well. On January 7, 2013, High Prairie filed in opposition to Enbridge Energy's motion to strike, and on January 14, 2013, filed an answer in the Enbridge North Dakota Sandpiper proceeding, in the subject complaint proceeding as well, as it had with its earlier duplicative submission of filings pertaining to the Sandpiper declaratory order matter. Also on January 14, 2013, High Prairie filed a motion to lodge a Form 8-K that Enbridge Energy made with the Securities and Exchange Commission, which mentions certain expansion plans. On January 24, 2013, Enbridge Energy filed for leave to reply and an answer to High Prairie's January 7, 2013 motion to strike, arguing that High Prairie has not shown any undue discrimination in its various pleadings.

20. The Commission denies and rejects the pleadings subsequent to Enbridge Energy's initial answer, and the responses to those subsequent pleadings, as these are either not permitted under the Commission's procedural rules barring answers to answers, or are misfiled in this proceeding, since they only pertain to the Sandpiper declaratory order docket, and will be addressed there. The pleadings styled as motions to lodge are effectively continuing answers and surrebuttals, and provide material only tangentially related to the central issues of alleged undue discrimination and legal obligations of Enbridge Energy. In any event, acceptance of a motion not otherwise ordered is at the discretion of the agency, and this proliferation of multiple pleadings and motions adds little new for the central issue under consideration, which is whether any statutory or regulatory basis exists for the Commission to interject itself into the negotiations between the parties over the interconnection sought by High Prairie.

## Discussion

21. Pursuant to Rule 214,<sup>30</sup> all timely filed motions to intervene and any unopposed motions to intervene out of time filed before the issuance date of this order are granted. Pursuant to Rule 213,<sup>31</sup> the Commission denies the July 5, 2012 Motion for Leave filed by Enbridge Energy and the July 13, 2012 Motion for Leave filed by High Prairie.

22. In its complaint, High Prairie alleges Enbridge Energy violated sections 3(6), 1(6), 6(1), 1(4) and 6(7) of the ICA and sections 341.0 and 341.8 of the Commission's regulations by refusing to grant High Prairie an interconnection at Clearbrook.<sup>32</sup> High Prairie's argument contains three primary elements: (1) Enbridge Energy's terms offered to High Prairie to interconnect at Clearbrook are unjust and unreasonable; (2) Enbridge Energy's refusal to grant an interconnection at Clearbrook on just and reasonable terms violates the anti-discrimination provisions of the ICA; and (3) Enbridge Energy's failure to set forth an interconnection policy in its tariff is a violation of the ICA and Commission rules. To remedy the alleged violations, High Prairie requests that the Commission order Enbridge Energy to offer an interconnection at Clearbrook on just and reasonable terms, or order Enbridge Energy to cease transportation that is unduly discriminatory and preferential. For the reasons discussed below, we deny the Complaint.

23. Pursuant to section 13(1) of the ICA, as well as Rule 206 of the Commission's regulations,<sup>33</sup> High Prairie's complaint must establish a contravention of the ICA in order for the Commission to pursue a remedy. While High Prairie identifies several potential violations of the ICA, the Commission finds its complaint to be premature.

24. Once a carrier voluntarily offers interconnection service, it must publish that service in its tariff, as well as provide the service both upon reasonable request and in a non-discriminatory manner, as required by the ICA.<sup>34</sup> The causes of action raised by

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<sup>30</sup> 18 C.F.R. § 385.214 (2012).

<sup>31</sup> 18 C.F.R. § 385.213(a)(2) (2012).

<sup>32</sup> High Prairie claims that Enbridge Energy violated section 3(6) of the ICA; however, such section does not exist in the ICA.

<sup>33</sup> 18 C.F.R. § 385.206 (2012).

<sup>34</sup> As the Commission states in Order No. 561-A, the primary purpose of a tariff is to set forth terms and conditions under which service is offered so as to mitigate against discrimination and preferential treatment. *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561-A, FERC Stats. and Regs.

High Prairie in its complaint all require or presuppose that Enbridge Energy is offering interconnection service. However, neither that requisite offering of interconnection service, nor a denial of such service, has occurred. Our review of both High Prairie's complaint and Enbridge Energy's answer indicates that negotiations between Enbridge Energy and High Prairie are ongoing and that Enbridge Energy has not denied High Prairie the interconnection service it requested. The Commission, in a contemporaneous order, has denied a petition for declaratory order of Enbridge Pipeline (North Dakota) LLC (Enbridge North Dakota) concerning the proposed Sandpiper Project which would have affected the interconnection service currently provided at Clearbrook.<sup>35</sup> Because negotiations remain ongoing any terms and conditions that might be agreed upon are undetermined. Thus, we cannot conclude that the terms and conditions that Enbridge Energy has offered to High Prairie thus far in the negotiations are unjust and unreasonable. In this regard, we encourage the parties to continue negotiating in good faith and expect any resulting interconnection agreement to be on terms that could be adjudged just and reasonable if presented to the Commission as an issue that falls under the statutory requirements of the ICA.

25. Concerning High Prairie's claim of discrimination, to establish a violation of section 3(1) of the ICA, a complainant must demonstrate that disparate treatment by a carrier occurred in comparison to a similarly-situated party.<sup>36</sup> Without yet knowing if High Prairie will or will not interconnect with Enbridge Energy, the agreed to terms of such an interconnection, or whether another pipeline is offered substantially different terms for a similar interconnection, it cannot yet be established that whether or not High Prairie faces disparate treatment. Absent such a showing, the Commission cannot determine whether a carrier will face undue discrimination in violation of section 3(1).

26. High Prairie points out that Enbridge Energy currently has an interconnection with its affiliate, Enbridge North Dakota, and that Enbridge Energy thus has no problem with accepting volumes at Clearbrook. However, as Enbridge Energy explains in its answer that interconnection was established decades ago under conditions far removed from

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¶ 31,000, at 31,110 (1994), *affirmed*, *Assoc. of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

<sup>35</sup> See *Enbridge Pipelines (North Dakota) LLC*, Docket No. OR13-6-000, Order on Petition for Declaratory Order.

<sup>36</sup> *Chicago & Eastern Illinois R.R. Co. v. United States*, 384 F.Supp. 298, 300 (N.D. Illinois 1974), cited in *New York v. United States*, 568 F.2d 887, 897 (2<sup>nd</sup> Cir. 1974). See also *Harborlite Corp. v. S. Pac. Transp. Co., et al.*, 364 I.C.C. 585 (1981), remanded, *Harborlite v. ICC*, 613 F.2d 1088 (D.C. Cir. 1979).

those that exist today.<sup>37</sup> Consequently, Enbridge North Dakota should not be considered as similarly situated with High Prairie.

27. Lastly, High Prairie alleges Enbridge Energy is in violation of section 6(1) of the ICA, as well as sections 341.0 and 341.8 of the Commission's regulations, by failing to set forth an interconnection policy in its tariff. High Prairie further alleges that Enbridge Energy's conditions for interconnection, or refusal thereof, violates section 6(7) of the ICA by granting privileges to current shippers and affiliated pipelines not set forth in Enbridge Energy's tariff. The publication requirement, however also presupposes that an interconnection already exists. As already discussed, there is not, as yet, an interconnection of High Prairie and Enbridge Energy, and thus Enbridge Energy is not providing interconnected transportation service with High Prairie.<sup>38</sup> A pipeline is not required to provide, and consequently set forth in its tariff, every adjunct that possibly could apply to transportation service. To require Enbridge Energy to publish a policy on interconnection when it is not currently providing the service thus is beyond the requirements set forth in section 341.8.

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<sup>37</sup> Enbridge explains in its Answer that Enbridge North Dakota did not interconnect with an affiliate but that "IPL Energy Inc. (the predecessor company of Enbridge Inc.) purchased Portal Pipeline Co - a preexisting carrier unaffiliated with any Enbridge entity - in 1995 earlier under very different crude oil transportation market conditions." *See Portal Pipeline Co.*, 328 I.C.C. 262 (1966) (explaining that Portal Pipeline operates trunklines transporting crude oil from various points in North Dakota to "Clearbrook, Minn., where it connects with the Minnesota and Lakehead Pipe Line Companies"). Enbridge further explains the "Enbridge North Dakota connection at Clearbrook was *not* granted to an affiliate; it was granted to an unaffiliated carrier, Portal Pipeline." Consequently, the interconnection "was already in place when Portal was acquired by Enbridge many years later." *See Portal Pipeline Co.*, 328 I.C.C. 262 (1966). "Motion to Dismiss and Answer of Enbridge Energy, Limited Partnership to Complaint of High Prairie Pipeline, LLC at 9, 20 (June 6, 2012). *See also Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167, at P 4 (2010).

<sup>38</sup> As noted, the decades-old interconnection with Enbridge North Dakota arose under dissimilar circumstances and should not be considered as similar to High Prairie's situation.

The Commission orders:

High Prairie's complaint is dismissed.

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

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

High Prairie Pipeline, LLC  
Complainant,

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Enbridge Energy, Limited Partnership,  
Respondent

(Issued March 22, 2013)

CLARK, Commissioner, *concurring*:

The outcome of this case strikes me as rather unsatisfactory as a matter of public policy. Nevertheless, I believe the order is correct as a matter of law and precedent.

High Prairie alleges Enbridge Energy, Limited Partnership has unduly discriminated against it and its shippers by refusing to grant an interconnection at the Clearbrook, Minnesota origin point. Today's order finds that negotiations are ongoing and that, without knowing whether High Prairie will interconnect, we cannot yet establish whether High Prairie faces disparate treatment. This outcome admittedly results in a "Catch 22" for High Prairie.

However, the Commission simply does not have the statutory tools to adequately address the issues raised in High Prairie's complaint. We do not have explicit jurisdiction over the abandonment and interconnection of oil pipeline facilities.<sup>1</sup> Without this authority, we cannot render effectual decisions regarding the justness and reasonableness of interconnection negotiations. As a matter of course, it is possible that the outcome of this regulatory gap could be inefficient pipeline construction or, perhaps worse, no investment at all. While today's order offers no consolation to High Prairie, it is the reality that arises under the existing statutory construct.

Going forward, I strongly encourage High Prairie and Enbridge to continue negotiating *in good faith* in an attempt to arrive at just and reasonable rates and terms for this interconnection. I also encourage High Prairie and Enbridge to keep an open mind

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<sup>1</sup> See *Farmers Union Central Exchange v. FERC*, 584 F. 2d 408, 413 (D.C. Cir. 1978); see also *Williams Pipe Co.*, Opinion No. 154, 21 FERC ¶ 61,260, at 61,690 n.217 (1982), *reh'g denied*, Opinion No. 154-A, 22 FERC ¶ 61,087 (1983); see also *Plantation Pipe Line Co. v. Colonial Pipeline Co.*, 104 FERC ¶ 61,271 (2003).

during these negotiations. Additional investment is clearly needed in the Bakken region and I would be remiss if I did not express a sincere hope that competing entities like High Prairie and Enbridge could come to a mutually beneficial agreement resulting in the installation of much needed infrastructure in this region.

For these reasons, I respectfully concur with this order.

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Tony Clark, Commissioner