

152 FERC ¶ 61,047  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

Enbridge Energy, Limited Partnership

Docket No. IS12-236-001

ORDER DENYING REHEARING

(Issued July 16, 2015)

1. On June 8, 2012, High Prairie Pipeline, LLC (High Prairie) filed a request for rehearing of the Commission's Order Accepting Tariff issued May 18, 2012, in this proceeding.<sup>1</sup> High Prairie contends that the Commission erred in the May 18, 2012 Order by imposing a new and unlawful litmus test for a protesting party, i.e., that a protesting party must be a shipper or potential shipper on the pipeline that filed the tariff. High Prairie also challenges (a) the Commission's determination that High Prairie does not have a substantial economic interest in the tariff filing, (b) the Commission's reliance on *Plantation Pipe Line Co. v. Colonial Pipeline Co.*,<sup>2</sup> (c) the Commission's determination that it cannot order Enbridge Energy, Limited Partnership (Enbridge) to file a tariff containing a connection policy, and (d) the Commission's failure to address arguments that FERC Tariff No. 41.2.0 will allow Enbridge to unduly discriminate against new shippers.

2. As discussed below, the Commission denies High Prairie's request for rehearing.

**Background**

**A. Tariff Filing and May 18, 2012 Order**

3. On April 19, 2012, Enbridge filed FERC Tariff No. 41.2.0 proposing changes to its Nomination Verification Procedure. Enbridge explained that the proposed changes described the upstream and downstream verification process that it would undertake after it receives nominations.

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<sup>1</sup> *Enbridge Energy, Limited P'ship*, 139 FERC ¶ 61,134 (2012) (May 18, 2012 Order).

<sup>2</sup> 104 FERC ¶ 61,271 (2003) (*Plantation*).

4. High Prairie protested the filing, arguing that the proposed tariff revision not only would require a shipper to tender the barrels at an origin point specified in the tariff, but also would require the shipper to nominate those barrels on “upstream connecting carriers or facilities,”<sup>3</sup> all of which are owned by Enbridge or its affiliates. Additionally, High Prairie asserted that the proposed new language would allow Enbridge to deny new shippers access to transportation to a specific delivery facility if the shipper had not shipped any volumes to that facility during the 24-month period prior to July 2010.

5. High Prairie explained that it intended to construct a 450-mile pipeline system to transport 150,000 barrels per day (bpd) from the Bakken region to Clearbrook, Minnesota. High Prairie further stated that it was developing significant long-term storage facilities at or near Clearbrook and that it had offered to pay for all reasonable costs of an interconnection with Enbridge at Clearbrook, including any necessary tankage.

6. According to High Prairie, it conducted an open season for its proposed pipeline and obtained commitments from prospective shippers for a significant portion of the proposed capacity; however, High Prairie emphasized that many of those commitments were contingent on the availability of an interconnection with Enbridge at Clearbrook. High Prairie maintained that Enbridge had refused to permit the interconnection, although it had granted similar requests from its affiliates. Thus, argued High Prairie, Enbridge’s refusal to allow the interconnection violated the Interstate Commerce Act (ICA), which requires carriers to grant interconnections on a basis that is just, reasonable, and not unduly discriminatory.<sup>4</sup> High Prairie also cited sections 341.0 and 341.8 of the Commission’s regulations, asserting that they require an oil pipeline to include a connection policy in its published tariff.<sup>5</sup> In part, High Prairie contended that if a carrier’s denial of an interconnection request is unjust, unreasonable, or unduly discriminatory, the Commission can order the pipeline to grant the interconnection, no matter whether the denial is brought to the Commission’s attention by a complaint or by a protest in response to a proposed tariff revision.<sup>6</sup>

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<sup>3</sup> High Point cited Enbridge’s FERC Tariff No. 41.2.0, section 6(c)(1).

<sup>4</sup> High Prairie cited ICA sections 1(3), 1(4), 1(6), 3(1), and 6(7), 49 U.S.C. App. §§ 1(3), 1(4), 1(6), 3(1), and 6(7) (1988).

<sup>5</sup> 18 C.F.R. §§ 341.0 and 341.8 (2014).

<sup>6</sup> High Prairie cited ICA sections 13(2), 15(1), and 15(7), 49 U.S.C. App. §§ 13(2), 15(1), and 15(7) (1988).

7. High Prairie further argued that the Commission has held that an oil pipeline's procedure for allocating capacity "may not be structured for the purpose of protecting a pipeline's competitive position, nor may it be structured to favor certain shippers or types of shippers over others if all have made 'reasonable requests' for transportation on the pipeline."<sup>7</sup> In addition, High Prairie claimed that while the Commission has not prescribed a uniform methodology for allocating oil pipeline capacity, it has required oil pipelines to set aside a portion of their capacity for new shippers.<sup>8</sup>

8. In its answer to High Prairie's protest, Enbridge argued that High Prairie presented no valid basis for the relief it sought. Enbridge further stated that it had engaged in negotiations with High Prairie regarding its interconnection request since March 9, 2012, but that the negotiations were hampered by a variety of changes to High Prairie's proposed pipeline that made it difficult to determine the operational impact of the potential interconnection.<sup>9</sup>

9. Additionally, Enbridge contended that its proposed tariff changes would not create unlawful discrimination, regardless of whether High Prairie obtained an interconnection, because High Prairie would not be a shipper. Enbridge asserted that the ICA's anti-discrimination provisions apply to service to shippers, but not to carrier-to-carrier interconnection matters. Enbridge also emphasized that the Commission has held that an oil pipeline carrier has no obligation to provide an interconnection on terms dictated by another carrier<sup>10</sup> and that the Commission cannot mandate interconnections if the carriers are unable to agree.<sup>11</sup> Moreover, continued Enbridge, High Prairie's protest failed to

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<sup>7</sup> High Prairie cited *Suncor Energy Marketing Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242, at P 24 (2010); see also *Seaboard Air Line Ry. Co. v. United States*, 254 U.S. 57, 61-63 (1920).

<sup>8</sup> High Prairie cited, e.g., *TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at PP 46-49 (2008); *Enbridge (U.S.) Inc.*, 124 FERC ¶ 61,199, at PP 31-37 (2008); *CCPS Transportation, LLC*, 121 FERC ¶ 61,253 (2007), *reh'g denied*, 122 FERC ¶ 61,123 (2008); *Platte Pipe Line Co.*, 117 FERC ¶ 61,296, at PP 42-48 (2006).

<sup>9</sup> Enbridge stated that High Prairie's estimates of the volumes to be delivered had ranged from 50,000 to 225,000 bpd. According to Enbridge, each revision required a new analysis of the operational issues, such as whether there would be sufficient capacity on existing facilities that already were experiencing prorationing.

<sup>10</sup> Enbridge cited *Plantation Pipe Line Co. v. Colonial Pipeline Co.*, 104 FERC ¶ 61,271 (2003).

<sup>11</sup> Enbridge cited *Plantation Pipe Line Co. v. Colonial Pipeline Co.*, 104 FERC ¶ 61,271, at P 22 (2003).

comply with the Commission's regulations because it did not demonstrate a sufficient economic interest in the tariff to establish standing<sup>12</sup> and because High Prairie also challenged tariff provisions that Enbridge had not proposed to change.

10. Enbridge asserted that section 341.8 of the Commission's regulations requires oil pipeline tariffs to include rules governing certain matters that increase or decrease the value of service to the shipper, but that the requirement does not apply in the case of a connecting carrier.<sup>13</sup> Enbridge cited *ARCO Alaska, Inc. v. FERC*,<sup>14</sup> stating that the court (based in part on section 341.8) had rejected a requirement that an oil pipeline carrier publish in its tariff the terms of its agreement for sharing capacity with other carriers in an undivided interest line, explaining that carriers cannot be compelled to publish information "without some indication it makes a difference to shippers."<sup>15</sup>

11. Finally, Enbridge claimed that High Prairie ignored the statement in *Plantation* that "[g]iven the Commission's lack of authority over abandonment of service by oil pipelines, it would be illogical and inconsistent for the Commission to conclude here that it has the power to compel an interconnection that Colonial does not want and could abandon."<sup>16</sup> Enbridge also asserted that other cases cited by High Prairie related to other statutes not applicable in this proceeding.

12. In the May 18, 2012 Order, the Commission accepted Enbridge's tariff changes, observing that it was not clear that Enbridge had denied a request for an interconnection by High Prairie and that negotiations between Enbridge and High Prairie appeared to be only in preliminary stages.<sup>17</sup> The Commission emphasized that there is no statutory authority or any precedent that would give the Commission jurisdiction to compel

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<sup>12</sup> Enbridge cited, *inter alia*, 18 C.F.R. § 343.3(a) (2014); *Tri-States NGL Pipeline, L.L.C.*, 94 FERC ¶ 61,087, at 61,382, *reh'g denied*, 94 FERC ¶ 61,235 (2001).

<sup>13</sup> Enbridge cited *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs., Regs. Preambles 1991-1996 ¶ 31,000 (1994).

<sup>14</sup> 89 F.3d 878 (D.C. Cir. 1996).

<sup>15</sup> *ARCO Alaska, Inc. v. FERC*, 89 F.3d 878, 886 (D.C. Cir. 1996).

<sup>16</sup> *Plantation*, 104 FERC ¶ 61,271 at P 28.

<sup>17</sup> The Commission observed that Enbridge had stated that discussions regarding the requested interconnection had occurred as recently as May 1, 2012, three days before High Prairie filed its protest. *Enbridge Energy, Limited P'ship*, 139 FERC ¶ 61,134, at P 18, n.21 (2012).

Enbridge to interconnect with High Prairie, and in fact, that the Commission had decided exactly the opposite.

13. The Commission cited *Plantation*, in which it reviewed the history of the ICA and concluded with a lengthy explanation that it cannot order an oil pipeline carrier to provide an interconnection with another carrier.<sup>18</sup> The Commission emphasized that the ICA does not allow it to order pipelines to establish such interconnections with other carriers, which the pipelines could choose to abandon at any time.

14. Finally, the Commission pointed out that High Prairie (as a potential connecting pipeline), is not a current or prospective shipper that would be protected by the anti-discrimination provisions of the ICA. Accordingly, the Commission found it unnecessary to address other arguments raised by High Prairie.

**B. Commission Orders in Docket No. OR12-17-000**

15. On May 17, 2012, one day before the Commission issued the May 18, 2012 Order, High Prairie filed a complaint against Enbridge in Docket No. OR12-17-000. High Prairie stated that it had engaged in discussions with Enbridge concerning the possible interconnection at Clearbrook and that Enbridge established certain conditions that High Prairie must meet before the proposed interconnection could be granted. High Prairie alleged that Enbridge had discriminated against it and its shippers in violation of ICA section 3(1) because it and its shippers are similarly situated with respect to entities for which Enbridge has granted interconnections, including Enbridge's own affiliates. Further, stated High Prairie, Enbridge's refusal to grant it an interconnection on just and reasonable terms violated ICA sections 1(6) and 6(1), as well as sections 341.0 and 341.8 of the Commission's regulations. Additionally, High Prairie argued that Enbridge violated ICA section 1(4) by failing to provide transportation upon reasonable request, failing to establish reasonable through routes with another carrier, and failing to provide reasonable facilities for operating such through routes. High Prairie further contended that Enbridge violated ICA section 6(7) by extending to its affiliates and its shippers privileges not specified in its tariff. High Prairie asked the Commission to require Enbridge to grant the requested interconnection and to compensate High Prairie for damages suffered as a result of Enbridge's denial or delay of an interconnection.

16. Enbridge filed a motion to dismiss and an answer to the complaint. In part, Enbridge maintained that its negotiations with High Prairie were in a preliminary stage because of the changes made by High Prairie. Enbridge further stated that it had offered High Prairie reasonable alternatives to an interconnection at Clearbrook, which High Prairie rejected. Enbridge emphasized that the Commission does not have the power to

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<sup>18</sup> *Plantation*, 104 FERC ¶ 61,271 at PP 21-28.

compel it to establish an interconnection with another common carrier pipeline and that it has not granted interconnections to affiliates. In response, High Prairie reiterated the allegations contained in its complaint.

17. In an order issued March 22, 2013, the Commission found High Prairie's complaint to be premature.<sup>19</sup> The Commission pointed out that Enbridge was not offering an interconnection service and that negotiations between the parties were ongoing. Accordingly, the Commission rejected the allegations made by High Prairie and dismissed the complaint.

18. High Prairie filed a request for rehearing of the March 22, 2013 Order. High Prairie alleged that: (a) the Commission acted contrary to law by denying its answer to Enbridge's Motion to Dismiss; (b) the Commission erred in not viewing facts in a light most favorable to High Prairie when it dismissed the complaint; (c) the Commission erred in finding that interconnection service was not offered by Enbridge and that High Prairie's request for interconnection service had not been denied; (d) the Commission erred in finding the complaint premature; (e) the Commission erred in determining that only existing interconnection policies must be published, which was inconsistent with the ICA and the Commission's regulations; (f) the Commission erred in ruling that discrimination requires disparate offers of service; (g) the Commission acted arbitrarily and capriciously by ruling that it could not yet determine disparate treatment; (h) the Commission abused its discretion by rejecting High Prairie's attempts to lodge documents from other proceedings; and (i) the Commission failed to address High Prairie's claims of violations of ICA sections 1(6), 6(1), 1(4) and 6(7). In an order issued October 1, 2014, the Commission denied rehearing on each of the issues raised by High Prairie.<sup>20</sup> To the extent that the Commission's determinations in that order apply to High Prairie's request for rehearing of the May 18, 2012 Order, they are discussed in this order.

### **Commission Analysis**

19. High Prairie's arguments on rehearing essentially relate to two issues: whether Enbridge has violated the ICA by discriminating against High Prairie or prospective shippers and whether High Prairie has standing to challenge the tariff at issue in this proceeding. As discussed below, the Commission denies High Prairie's request for rehearing of the May 18, 2012 Order.

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<sup>19</sup> *High Prairie Pipeline, LLC v. Enbridge Energy, Limited P'ship*, 142 FERC ¶ 61,199 (2013) (March 22, 2013 Order).

<sup>20</sup> *High Prairie Pipeline, LLC v. Enbridge Energy, Limited P'ship*, 149 FERC ¶ 61,004 (2014) (October 1, 2014 Order).

**A. Application of the Anti-Discrimination Provisions of the ICA**

20. High Prairie argues that the ICA is intended to address undue discrimination in its many forms perpetrated by common carriers and to protect all persons, companies, and localities victimized by discrimination, not just shippers.<sup>21</sup> High Prairie maintains that the May 18, 2012 Order erroneously determined that it was unnecessary for the Commission to address High Prairie's claims because High Prairie "is not a current or prospective shipper that would be protected by the anti-discrimination provisions of the ICA."<sup>22</sup> Instead, High Prairie primarily relies on ICA section 3(1), contending that it prohibits any common carrier oil pipeline from unduly discriminating against or in favor of shippers or any other person or entity in any respect whatsoever. High Prairie also asserts that the Supreme Court has further clarified that the concluding language in section 3(1) ("this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description") may not be interpreted as giving carriers license to discriminate against volumes tendered to a carrier by another carrier.<sup>23</sup> Additionally, High Prairie cites ICA sections 15(1) and 15(7), arguing that they allow the Commission to require a pipeline such as Enbridge to cease unduly discriminatory or preferential practices.

21. High Prairie's claims of discrimination have been reviewed and rejected, not only in the May 18, 2012 Order, but also in the March 22, 2013 and the October 1, 2014 Orders. As noted by High Prairie, in the May 18, 2012 Order, the Commission found that High Prairie is not a current or prospective shipper that would be protected by the anti-discrimination provisions of the ICA.<sup>24</sup> High Prairie has presented no evidence or a change in circumstance to persuade us that this finding was in error.

22. As noted in the March 22, 2013 Order, 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>25</sup> Here, we find section 3(1) of the ICA to be inapplicable. 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

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<sup>21</sup> High Prairie Rehearing Request at 8.

<sup>22</sup> *Id.* at 9 (citing *Enbridge Energy, Limited P'ship*, 139 FERC ¶ 61,134, at P 20 (2012)).

<sup>23</sup> *Id.* at 9 (citing *American Trucking v. A.T. & S.F.R. Co.*, 387 U.S. 397 (1967)).

<sup>24</sup> May 18, 2012 Order, 139 FERC ¶ 61,134 at P 20.

<sup>25</sup> March 22, 2013 Order, 142 FERC ¶ 61,199 at P 25.

pipeline is offered substantially different terms for a similar interconnection, it cannot yet be established whether or not High Prairie faces disparate treatment. As we noted in the October 1, 2014 Order, “it would be far too speculative to compare potential rates, terms and conditions raised in negotiations for purposes of determining whether discrimination occurred.”<sup>26</sup> Thus, we reaffirm our finding in the May 18, 2012 Order that High Prairie is not a current or prospective shipper that would be protected by the anti-discrimination provisions of the ICA, including section 3(1) of the act.

23. In response to High Prairie’s argument that sections 15(1) and 15(7) of the ICA allow the Commission to require a pipeline such as Enbridge to cease unduly discriminatory or preference practices, we note that these sections allow the Commission to determine and prescribe rates and classifications through a hearing or investigation. In the instant case, there was no basis for establishing a hearing or investigation given High Prairie’s status as neither a current or prospective shipper. Thus, we likewise find High Prairie’s reference to these provisions of the ICA to be inapplicable.

24. High Prairie also contends that the Commission erred in holding that it has no power to compel an interconnection. High Prairie states that it did not ask the Commission to order an interconnection, but rather it asked the Commission to reject Enbridge’s tariff filing in this case and order Enbridge to file a connection policy in accordance with High Prairie’s understanding of the Commission’s regulations.

25. Moreover, High Prairie challenges the Commission’s reliance on *Plantation* in the May 18, 2012 Order, asserting that the Commission denied a complaint alleging that Colonial Pipeline Company had violated ICA section 3(4), although High Prairie emphasizes that it has not relied on section 3(4) in the instant case. High Prairie further contends that it did not claim that the Commission has the general authority to compel oil pipeline interconnections. Instead, alleges High Prairie, in this case, Enbridge is seeking the ability to grant or deny access to shippers based on whether their volumes come to the pipeline’s origin point of the carrier’s choosing, specifically, Enbridge Pipelines (North Dakota) LLC.

26. As with High Prairie’s claims of discrimination, we find that the Commission has reviewed and rejected High Prairie’s arguments that the Commission should require Enbridge to file an interconnection policy, and we accordingly deny rehearing in this case. In the March 22, 2013 order, the Commission denied High Prairie’s complaint alleging that Enbridge violated the ICA and the Commission’s regulations by refusing to grant High Prairie an interconnection at its requested origin point.<sup>27</sup> The Commission

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<sup>26</sup> October 1, 2014 Order, 149 FERC ¶ 61,004 at P 32.

<sup>27</sup> March 22, 2013 Order, 142 FERC ¶ 61,199.

found, and affirmed on rehearing, that the requirement to publish an interconnection policy only applies when interconnection service already exists or is offered by the pipeline.<sup>28</sup> High Prairie has not demonstrated that Enbridge offers interconnection service and we therefore deny High Prairie's rehearing request. Similarly, we find that the Commission's reliance on *Plantation* in the May 18, 2012 order was appropriate. While the complaint dismissed in *Plantation* was filed pursuant to Section 3(4) of the ICA, the Commission's analysis was not limited to that section and generally addressed the same issue raised by High Prairie in this proceeding: whether the Commission has authority under the ICA to compel an interconnection between oil pipelines.<sup>29</sup>

**B. Whether High Prairie Has Standing to Protest the Enbridge Tariff**

27. High Prairie contends that it demonstrated its substantial economic interest in the Enbridge tariff in its protest, but the Commission rejected that argument because it found that High Prairie was not a current or prospective shipper that would be protected by the anti-discrimination provisions of the ICA. High Prairie argues that under section 343.2(b) of the Commission's regulations,<sup>30</sup> a person's standing to protest an oil pipeline tariff filing is determined based on whether the person has a substantial economic interest in the tariff filing.

28. The Commission also denies rehearing on this issue. In the May 18, 2012 Order, the Commission found that High Prairie was not a current or prospective shipper that would be protected by various provisions of the ICA. Moreover, High Prairie has never claimed that it will be a current or prospective shipper. Rather, it is a pipeline carrier seeking an interconnection with another pipeline carrier, and as the Commission determined in *Plantation*, an oil pipeline carrier is not obligated to grant an interconnection to another pipeline carrier. Moreover, the Commission does not have the power to order such a connection.

29. Additionally, High Prairie speculates that it will face an immediate financial burden if the interconnection is denied, but it has not demonstrated the concrete adverse impact of its inability to establish an interconnection with Enbridge at Clearbrook. Further, High Prairie's claim that shippers in general will be harmed if the tariff revisions become effective but the requested interconnection is not established is likewise speculative and unsupported.

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<sup>28</sup> *Id.* P 27; October 1, 2014 Order, 149 FERC ¶ 61,004 at PP 23-27.

<sup>29</sup> *Plantation*, 104 FERC ¶ 61,271 at PP 21-28.

<sup>30</sup> 18 C.F.R. § 343.2(b) (2014).

30. Finally, High Prairie has no direct interest in the tariff at issue in this proceeding. That tariff does not relate to potential carrier-to-carrier interconnections, but rather merely clarifies Enbridge's previously-established Nomination Verification Procedure to clarify the upstream and downstream verification process to be used by Enbridge after it receives nominations from shippers for transportation service. However, High Prairie, a non-shipper on the Enbridge line, characterizes the tariff filing adversely affecting High Prairie to provide a vehicle for raising again its interconnection arguments that the Commission previously rejected. Accordingly, the Commission finds that High Prairie lacks standing to protest Enbridge's tariff filing in this proceeding and denies High Prairie's request for rehearing.

The Commission orders:

Rehearing of the May 18, 2012 Order is denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.