

110 FERC ¶61,211
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

Enbridge Energy Company, Inc.

Docket No. OR05-1-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued March 3, 2005)

1. On December 10, 2004, Enbridge Energy Company, Inc. (Enbridge) filed a petition for a declaratory order asking the Commission to confirm the proposed rate structure for Enbridge's planned Spearhead pipeline, which will transport primarily Canadian crude oil from Chicago, Illinois, to Cushing, Oklahoma.
2. As discussed below, the Commission will issue a declaratory order. However, the Commission emphasizes that its rulings here do not address Enbridge's proposal to implement a surcharge applicable to Canadian shippers. That proposed surcharge is subject to the jurisdiction of Canada's National Energy Board (NEB). In addition, the Commission is not approving the proposed uncommitted rate on a cost-of-service basis. Further, this order may not be construed as granting approval of the proposed Transportation Service Agreement (TSA).
3. This order is based on the unique facts of this case. Enbridge has satisfied requirements for advance approval of the oil pipeline's proposed rate structure. This order benefits customers by allowing Enbridge to reverse an idle pipeline system that will provide transportation for an expected significant increase in Western Canadian crude oil production over the next decade. Completion of the project will afford domestic refiners access to a source of refinery feedstock that will help offset dwindling oil supplies from the Mid-Continent area.

I. Background

4. Enbridge explains that the Spearhead project will extend Enbridge's existing pipeline system, which connects the upper Midwestern U.S. and Eastern Canada. Enbridge asserts that new technology for extracting crude oil from the oil sand reserves in Western Canada has led the NEB and others to forecast a sharp increase in Canadian oil

supplies available for export. Enbridge maintains that the significant market interest in greater access to the Canadian crude oil supplies at the Cushing hub justifies the Spearhead project.

5. The Spearhead project will reverse an existing crude oil pipeline system from Cushing to Chicago. According to Enbridge, the pipeline originally was owned and operated as an undivided joint interest pipeline by three major oil companies, although CCPS Transportation, L.L.C. (CCPS), a wholly-owned subsidiary of BP Pipelines (North America) Inc. (BP), eventually assumed sole ownership of the pipeline. Enbridge states that CCPS had terminated operations over most of the pipeline's route by January 2003 and was continuing to provide service only from Cushing to a connection at Caney, Kansas, from which oil was transported to a single refinery at Coffeyville, Kansas. Approximately 85 percent of the physical assets of the line have been completely idle since that time.¹

II. Description of The Proposal

6. Enbridge states that one of its subsidiaries purchased 90 percent of the pipeline system in 2003 for \$115.6 million and acquired an option to purchase the remaining 10 percent interest for \$12.4 million, resulting in a total purchase price of approximately \$128 million. However, continues Enbridge, approximately \$11.9 million of the pipeline's assets will not be used directly to provide Spearhead service; therefore, the net purchase price of the jurisdictional Spearhead assets will be approximately \$116.2 million. In addition, Enbridge estimates that the cost of reversing the pipeline will be \$43.7 million (excluding AFUDC). Thus, Enbridge calculates that the total cost of the Spearhead pipeline facilities in service will be approximately \$159.9 million.

¹ Enbridge states that Plains All American Pipeline L.P. (Plains) plans to construct a new 100-mile, 16-inch pipeline from Cushing to serve the Coffeyville refinery. The new Plains line is expected to be in service in March 2005. At that point, the remaining movements on the CCPS system to Caney will cease, and the CCPS system will be entirely idle. Therefore, Enbridge states that conversion of the CCPS pipeline assets to the Spearhead service will not result in any interruption or degradation in service to the Coffeyville refinery.

7. Enbridge asserts that the pipeline's initial capacity will be approximately 125,000 barrels per day (BPD), at an assumed slate of 50 percent heavy crude oil and 50 percent light crude oil. However, if shippers' volume commitments warrant, Enbridge expects to increase the Spearhead capacity to approximately 160,000 BPD through the addition of incremental pumping capacity.²

8. Enbridge states that it will seek NEB approval for a surcharge on the Enbridge pipelines' Canadian tariff rates that will generate supplemental revenues for Spearhead. Enbridge has negotiated this proposed financial support arrangement with the Canadian Association of Petroleum Producers (CAPP), which represents Canadian oil producers.

9. Enbridge reports that it conducted an open season ending November 26, 2004, asking shippers to make 10-year volume commitments to the new pipeline in return for specified term rate discounts. Enbridge reports that committed shippers have executed TSAs for a total initial minimum volume commitment of 60,000 BPD, escalating to 70,000 BPD in 2008 and 75,000 BPD from 2009 forward (assuming no exercise of specified interim step-up rights). Enbridge submits that this level of volume commitments is sufficient to warrant proceeding with the project.

10. Enbridge contends that the basic TSA terms are similar to those of a throughput-and-deficiency agreement, a standard industry mechanism that allows shippers to provide financial support for a new pipeline investment. Enbridge states that the initial term of the Spearhead TSAs is 10 years and that shippers have the option of extending the term for an additional 10 years if the pipeline does not cease operations at the end of the initial term. According to Enbridge, the minimum committed volume is 5,000 BPD, and commitments can either be fixed (*i.e.*, the same fixed volume over the initial term) or escalating (*i.e.*, the committed volume may be stair-stepped, with a greater commitment in later years). Moreover, adds Enbridge, each committed shipper has the right to increase its minimum volume commitment by an amount (the step-up volume commitment) that varies depending upon the level of the average initial commitment.³

² Enbridge states that expansion beyond 160,000 BPD would require a much greater capital investment, so it is not encompassed within the current project.

³ Enbridge states that the step-up rights are as follows:

- (1) for shippers with an average initial commitment of 5,000-19,999 BPD, the step-up can be up to 100 percent of the weighted average of the minimum volume commitment over the first five years of Spearhead operations;

(continued)

Enbridge also emphasizes that committed shippers will have guaranteed access to Spearhead capacity, but that they will be subject to the proration policy to be established in Spearhead's rules and regulations tariff.

11. Enbridge states that shippers who make substantial long-term throughput commitments will receive substantially discounted rates for the term of the TSAs. Specifically, continues Enbridge, shippers whose volume commitments (including step-up volumes) are less than 10,000 BPD will pay a discounted tariff rate of \$0.85 per barrel, subject to an annual inflation adjustment for the term of the TSA. Further, explains Enbridge, shippers whose volume commitments are 10,000 BPD or greater will pay a discounted rate of \$0.75 per barrel (with the same inflation adjustment).⁴ In addition, continues Enbridge, to the extent a committed shipper is required to make deficiency payments for failure to ship the minimum committed volumes, it can use those payments as prepaid transportation credits for a limited period of time. However, Enbridge points out that, for uncommitted volumes (*i.e.*, volumes tendered by shippers who did not execute TSAs during the open season or volumes tendered by committed shippers in excess of their minimum volume commitment), the tariff rate will be \$1.50 per barrel, subject to the Commission's indexing rules.⁵

(2) for shippers with an average initial commitment of 20,000-29,999 BPD, the step-up can be up to 150 percent of the first five-year weighted average; and

(3) for shippers with an average initial commitment of 30,000 BPD or more, the step-up can be up to 200 percent of the first five-year weighted average.

⁴ Enbridge states that these rates cover service from the origin point of the Spearhead pipeline (initially Griffith, Indiana) to the inlet of the Enbridge Pipelines (Ozark) L.L.C. (Enbridge Ozark) terminal at Cushing. Enbridge further states that shippers will have the option at Cushing of using their own terminal tankage or connecting directly to terminals or pipelines operated by third parties on a commercial or common carrier basis. However, Enbridge explains that committed shippers choosing to use Spearhead terminal tankage at Cushing will be able do so for an added tariff charge of \$0.025 per barrel.

⁵ Enbridge asserts that the rate of \$1.50 per barrel for uncommitted volumes is lower than the initial cost-of-service rate it has calculated for Spearhead of \$1.99 per barrel. However, in order to promote usage of the line for uncommitted volumes, Enbridge intends to maintain the uncommitted rate at no more than \$1.50 per barrel

(continued)

12. Enbridge maintains that Spearhead initially will offer service from a connection with the Lakehead Pipeline system at Griffith, Indiana, to the inlet of the Enbridge Ozark terminal at Cushing. Enbridge anticipates that it eventually will construct a new line (to be known as the Southern Access Pipeline) to provide transportation from the Lakehead terminal at Superior, Wisconsin, to a connection with Spearhead at Flanagan, Illinois, thereby allowing crude oil destined from Canada to Cushing to flow directly through the Flanagan interconnection point. However, states Enbridge, for both committed and uncommitted volumes, the tariff rates on Spearhead will remain the same from Flanagan to Cushing as they were from Griffith to Cushing.

13. Enbridge seeks the following rulings from the Commission:

- A. That the cost of service underlying the Spearhead uncommitted rate can include a starting rate base reflecting the price paid by Enbridge to acquire the Cushing-to-Chicago pipeline system prior to its reversal;
- B. That Spearhead can use a discounted committed rate structure similar to those approved by the Commission in *Express Pipeline Partnership (Express)*⁶ and *Plantation Pipe Line Co. (Plantation)*;⁷
- C. That Spearhead can post an initial cost-of-service rate of \$1.50 per barrel for uncommitted volumes, subject to application of the Commission's indexing rules in future years; and
- D. That supplemental revenues expected to be generated through a surcharge on the rates of Enbridge's Canadian pipelines should be treated as incidental revenue to Spearhead in assessing whether Spearhead's revenues exceed its jurisdictional revenue.

(plus or minus applicable indexing adjustments). Further, states Enbridge, the TSAs provide that, if the uncommitted rate is reduced in the future to a level that is less than \$0.50 per barrel above the committed rate for the same service (or \$0.40 per barrel in the case of volume commitments below 10,000 BPD), Enbridge will reduce the committed rate by an amount sufficient to preserve the applicable per-barrel discount for committed volumes.

⁶ 76 FERC ¶ 61,245, *reh'g denied*, 77 FERC ¶ 61,188 (1996).

⁷ 98 FERC ¶ 61,219 (2002).

Enbridge maintains that the Commission previously has recognized the value of providing advance rate guidance for projects of this nature through the declaratory order mechanism.⁸ As discussed below, the Commission grants in part the requested rulings.

III. Public Notice, Interventions, and Protest

14. Public notice of Enbridge's petition was issued December 16, 2004, providing for interventions and protests to be filed by January 10, 2005. CAPP and Terasen Pipelines (USA) Inc. (Terasen) filed timely motions to intervene and comments. Flint Hills Resources, LP (Flint Hills) filed a motion to intervene out of time and a protest.

15. CAPP supports the Commission's general policy requiring the use of depreciated original cost as the foundation of rate base in the pipeline ratemaking process. However, contends CAPP, Enbridge's proposal warrants a deviation from that policy in light of the specific facts and circumstances surrounding the proposal, including the efficiency of utilizing inactive facilities, the introduction of new supplies, and the reversal of the transportation route. Further, maintains CAPP, while the cost of service underlying the Spearhead uncommitted rate will include a starting rate base reflecting the purchase price of the facilities, the proposed rate of \$1.50 per barrel is \$0.49 cents per barrel less than the initial rate computed on a cost-of-service basis by Enbridge.

16. Terasen states that, along with its Canadian affiliate, it operates the Express Pipeline LLC (Express) and Platte Pipe Line Company (Platte) pipeline facilities, which deliver crude oil supplies into U.S. markets. According to Terasen, the Canadian

⁸ For example, states Enbridge, in *Express*, which also involved a project to bring Canadian crude oil to U.S. markets, the Commission stated as follows:

It is better to address these issues [term rate structure and validity of proposed rates] in advance of an actual tariff filing than to defer until the rate filing is made, when the decision-making process would be constrained by the deadlines inherent in the statutory filing procedures. The public interest is better served by a review of the issues presented before a filing to put the rates into effect.

Express Pipeline Partnership, 76 FERC ¶ 61,245 at 62,253 (1996). Enbridge points out that the Commission also stated in that proceeding that issuing a declaratory order is procedurally appropriate for a new oil pipeline entrant, which needs to obtain financing so that it can begin construction of the project. *Express Pipeline Partnership*, 77 FERC ¶ 61,188 at 61,755 (1996).

portions of these systems are regulated by the NEB and compete with each other. While Terasen does not oppose the Spearhead project, it raises two issues for the Commission's consideration.

17. First, Terasen asks the Commission to be aware of the implications of the fourth ruling sought by Enbridge, which presupposes an NEB-approved surcharge to recover a shortfall in revenues from the Spearhead project. Terasen argues that the Commission should not provide either express or implicit approval of that surcharge in the declaratory order because the surcharge is exclusively within the NEB's jurisdiction.

18. Second, Terasen asks the Commission to make it clear that it is not approving the TSA provisions, given the potential for certain anti-competitive rate consequences. In particular, Terasen expresses concern about a provision of the TSA, which provides that the existing Spearhead project entity, CCPS, will not

join in the posting of a joint tariff for transporting crude oil into Cushing, Oklahoma, that would result in lower total transportation costs than would be incurred by Shipper for transportation over the same route pursuant to this agreement; provided that CCPS shall be permitted to introduce new services at rates it deems to be acceptable.

19. Terasen points out that the Spearhead line will cross the Platte pipeline near Salisbury, Missouri. Historically, continues Terasen, the Cushing-to-Chicago pipeline system has been interconnected with Platte, which owns extensive tank terminals and other facilities that are physically attached to that pipeline. Terasen acknowledges that the proposed Spearhead pipeline has been idled recently, but emphasizes that Salisbury is a destination on the Express joint tariffs⁹ and the Platte local tariff.¹⁰ According to Terasen, an interconnection between Platte and the Spearhead project would provide a means of transporting Canadian crude oil production to Cushing via the Express, Platte, and Spearhead systems. Terasen believes that shippers would benefit by having the choice of transportation on an all-Enbridge series of pipelines or an alternate pipeline service provided in part by the Terasen pipelines. However, continues Terasen, clause 4.6(b) of the TSA might be construed by Enbridge as precluding tariff arrangements that would permit more competitive transportation of Canadian crude oil to Cushing through the Terasen/Spearhead transportation alternative under joint rates. Terasen argues that

⁹ Terasen cites Express Pipeline LLC FERC Tariff No. 59 (term rate tariff jointly with Platte).

¹⁰ Terasen cites Platte Pipe Line Company FERC Tariff No. 1484.

such a contractual undertaking would raise significant anti-competitive concerns and should not be endorsed, even implicitly, by the Commission. Consequently, Terasen urges the Commission to clarify that it is not addressing the lawfulness or reasonableness of the aspects of the TSA except those provisions required by Enbridge's specific rate requests. In its response to Terasen's comments, Enbridge states that it does not object to either clarification requested by Terasen.

20. Flint Hills does not oppose the Spearhead project, but it challenges the proposed surcharge on Canadian shippers. Flint Hills explains that it owns and operates an oil refinery at Pine Bend, Minnesota, that receives Canadian heavy crude oil via the Enbridge pipeline system. Flint Hills states that it is one of the largest shippers on the Enbridge system, and under the subsidy proposed by Enbridge, would pay approximately an additional \$1 million per year.

21. Flint Hills contends that it asked Enbridge to notify it of any filing with the NEB, which Enbridge failed to do. Flint Hills also states that it has sent a letter to the NEB expressing its concerns with the proposed surcharge. In its protest, Flint Hills asks the Commission to defer action on Enbridge's petition for a declaratory order until after the NEB has acted on Enbridge's request for approval of the surcharge. In addition, Flint Hills asks the Commission to address three issues with respect to the Enbridge petition.

22. First, Flint Hills acknowledges that Enbridge is not asking the Commission to approve the subsidy itself, but Flint Hills maintains that Enbridge clearly is seeking Commission approval of a shipper surcharge on a pipeline in a foreign country for the purpose of subsidizing rates for different shippers on a pipeline within the U.S. Flint Hills maintains that Enbridge is seeking to use a Commission ruling as leverage with the NEB. In fact, argues Flint Hills, it is questionable whether the NEB has jurisdiction to authorize collection of the proposed subsidy, and moreover, Enbridge's NEB application raises serious regulatory policy considerations, such as whether parties who do not obtain service on Spearhead or support the subsidization of Spearhead's revenue requirement should be required to bear costs associated with the proposed pipeline project. Second, continues Flint Hills, the proposed surcharge may be an issue of first impression for this Commission because *Express* and *Plantation* do not address the issue of shippers on one pipeline subsidizing the rates for shippers on another pipeline. Third, Flint Hills contends that it is not in the public interest to have a Minnesota refiner and its customers subsidize Canadian crude oil shipments to the Southwestern U.S.

23. Enbridge filed a response opposing Flint Hills' motion to intervene out of time and protest. Enbridge emphasizes that it is not asking, and the Commission does not have the authority, to require Flint Hills to pay the proposed surcharge. Thus, reasons Enbridge, Flint Hills has no direct and substantial economic interest in this proceeding and merely seeks to delay the proceeding. Enbridge further asserts that the proposed Spearhead rates

will not change even if the proposed surcharge revenues are disregarded or treated in another manner. Enbridge contends that the TSAs obligate it to maintain discounted term rates and an agreed-upon uncommitted rate for the term of the TSAs.

24. The Commission will grant Flint Hills' motion to intervene out of time for good cause. Moreover, granting the motion to intervene at this point does not disrupt or delay the proceeding or create additional burdens for the existing parties.

IV. Discussion

25. As discussed below, the Commission grants in part the rulings requested by Enbridge except insofar as they relate to the proposed surcharge applicable to Canadian shippers. Additionally, the Commission finds that Enbridge has not supported the proposed \$1.50 per barrel rate on a cost-of-service basis; however, the proposed rate can be justified as an agreed-to rate. Further, the Commission expresses no opinion on the effect or legality of the proposed TSA.

A. Rate Base

26. Enbridge first asks the Commission to determine that the cost of service underlying the Spearhead uncommitted rate can include a starting rate base reflecting the price paid by Enbridge to acquire the Cushing-to-Chicago pipeline system prior to its reversal.

27. The assets of a pipeline typically are valued for rate base purposes at their original cost, which is the cost of construction or acquisition of the assets at the time they were first placed into regulated service, less accumulated depreciation.¹¹ However, the Commission has recognized an exception to this general policy in the case of an arm's-length transaction where (1) the purchased asset will be devoted to a new use and (2) the transaction as a whole clearly has demonstrable benefits to customers.¹² Enbridge contends that such an exception is warranted in this case. Accordingly, Enbridge seeks

¹¹ *Longhorn Partners Pipeline*, 73 FERC ¶ 61,355 at 62,112 (1995) (*Longhorn*) (“The general rule on write-up of jurisdictional facilities acquired by one company from another is that such facilities must be included in the acquiring company's rate base at no more than their depreciated original cost....”).

¹² *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533 (D.C. Cir. 1999) (*Rio Grande*).

Commission confirmation that it may use the purchase price of CCPS as a component of the rate base for Spearhead, rather than the rate base value of the pipeline system in the hands of the selling party.

28. The Commission applies a two-prong test that must be satisfied before it will allow use of the purchase price in rate base.¹³ The first prong requires that the acquired asset be put to a new use so that the same customers are not required to pay more than once for the original cost of the asset in question. The second prong of the test requires that the applicant must demonstrate by clear and convincing evidence that the transaction, including the recovery of the purchase price adjustment, will confer substantial benefits on the ratepayers. Enbridge argues that shippers are better off with the acquisition and re-use of the purchased asset than they would be if an entirely new facility was constructed and the original cost of the new facility included in the rate base.

29. The Commission agrees with Enbridge's analysis that the reversal of the Spearhead pipeline qualifies as a new use for three reasons. First, the original Chicago-to-Cushing pipeline provided service in a northeasterly direction from Cushing to the Chicago area, while the project Enbridge proposes will reverse the pipeline so that it can provide service in a southwesterly direction from Chicago to Cushing. Thus, Spearhead will provide a new service unrelated to the transportation historically provided by the former owners of CCPS. Second, the new configuration of the pipeline will allow transportation of a fundamentally different range of products than those originally transported.¹⁴

30. Moreover, the Spearhead service will be utilized by a fundamentally different group of customers for different purposes than the original Cushing-to-Chicago system, and the new shippers will be reaching entirely different markets. To the extent there is any minor overlap between the customers served by Spearhead and those formerly served

¹³ *Natural Gas Pipeline Company of America*, 29 FERC ¶ 61,073 at 61,150 (1984); *see also Rio Grande Pipeline Co.*, 78 FERC ¶ 61,020 at 61,082(1997); *Longhorn Partners Pipeline*, 73 FERC ¶ 61,355 at 61,111 (1995).

¹⁴ Enbridge states that the system originally transported mostly light grades of crude oil produced in Oklahoma and West Texas to Chicago refineries, while the reconfigured system is expected to transport various Canadian grades of crude with substantially different physical characteristics. Enbridge maintains that these grades of Canadian crude oil are expected to be attractive to refineries in Kansas, Oklahoma, and Texas.

by CCPS, the overlap is purely coincidental, and the shippers who executed TSAs for Spearhead expressly acknowledge their support for this project and the proposed rate structure.

31. The Commission also finds that Enbridge meets the second prong of the test because Spearhead will provide benefits to shippers that far outweigh the amount of the purchase price adjustment. By converting an existing asset rather than constructing an entirely new system, the pipeline will be able to provide service at a greatly reduced price. A new “greenfield” pipeline traversing the same route would cost approximately \$179 million more than the purchase and conversion of the Spearhead line. This benefit supports use of the purchase price in calculating the Spearhead rate base.¹⁵

32. Moreover, shippers and the public would accrue other benefits from the conversion of the Spearhead pipeline, as Spearhead will provide Mid-Continent refineries with more efficient and cost-effective access to Western Canadian crude oil. The Canadian crude transported to Cushing is likely to displace imports from other countries and transported from the Gulf Coast rather than local Mid-Continent production, and, by enhancing supply diversification, the Spearhead project will benefit the public interest by increasing refiners’ security of supply. Permitting the efficient re-use of a currently underutilized infrastructure asset also reduces environmental impacts that would result from the construction of a new pipeline.

33. In two prior cases involving oil pipelines, *Rio Grande* and *Longhorn*, the Commission also considered whether a purchase price adjustment was permissible where the seller retained a part interest in the pipeline after the sale. Because *Rio Grande* and *Longhorn* subsequently were resolved on other grounds, the Commission has not determined the standard to apply in determining when and to what extent the benefits exception applies in the face of a retained ownership interest by the selling party. However, in the instant case, it is not necessary for the Commission to resolve that issue because Enbridge has the right to purchase the remaining 10 percent of CCPS at an agreed-upon price and is asking the Commission to assume that it will own 100 percent

¹⁵ See *Longhorn Partners Pipeline*, 73 FERC ¶ 61,355 at 62,113 (1995). This benefit was not considered as a factor in *Longhorn* or *Rio Grande*, but the Court of Appeals emphasized it as a significant consideration in *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 536-37 (D.C. Cir. 1999). The court stated as follows: “Under this “benefits exception,” purchased facilities may be included in the rate base at the full purchase price if the purchaser can demonstrate that: (1) the acquired facility is being put to a new use, and (2) the purchase price is less than the cost of constructing a comparable facility.”

of the pipeline at the time it commences service. Enbridge agrees that any declaratory order issued in this proceeding can be conditioned on its exercise of the purchase option to acquire the remaining 10 percent of BP's interest. Accordingly, the Commission conditions this order on the requirement that the seller will not hold any equity or other interest in the new pipeline at the time service commences. Should BP remain an equity owner of Spearhead, its proper valuation shall be subject to further review.

B. Committed Rates

34. Enbridge also asks the Commission to determine that Spearhead can use a discounted committed rate structure similar to those approved by the Commission in *Express*¹⁶ and *Plantation*.¹⁷

35. Enbridge emphasizes that prospective shippers required significant rate discounts in return for their commitments. Enbridge maintains that such an arrangement is entirely consistent with the non-discrimination provisions of the Interstate Commerce Act (ICA) so long as the TSAs and the opportunity to participate in the discounted rates are openly available to all interested parties. Enbridge conducted an elaborate, two-phase open season process in which all potentially interested parties had an equal and ample opportunity to participate.

36. The Commission has accepted similar discounted term rate structures through declaratory orders it has issued for other proposed oil pipeline projects. *Express* was the first company to request a declaratory order that its proposed rates and rate structure were lawful and would be accepted when *Express* filed its tariffs upon commencing service.¹⁸ *Express* held an open season offering discounted rates to shippers who executed throughput commitments for various specified terms.¹⁹ The Commission found in that case that term shippers and uncommitted shippers were not similarly situated. Specifically, continues Enbridge, committed shippers were obligated to ship (or pay for the minimum committed volume) each month during the term of the contract, thus providing the assured revenues necessary to permit financing of the pipeline. However,

¹⁶ 76 FERC ¶ 61,245, *reh'g denied*, 77 FERC ¶ 61,188 (1996).

¹⁷ *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002).

¹⁸ Enbridge cites *Express Pipeline Partnership*, 76 FERC ¶ 61,245, *order on reh'g*, 77 FERC ¶ 61,188 (1996).

¹⁹ Enbridge cites *Express Pipeline Partnership*, 76 FERC ¶ 61,245 at 62,249 (1996).

uncommitted shippers could choose whether to ship on the Express line each month, did not provide revenue or planning assurances, and did not provide the basis for constructing the pipeline that term shippers did.²⁰ The Commission issued a similar declaratory order to Plantation.²¹

37. Enbridge maintains that it held a non-discriminatory and widely-publicized open season after which any interested shipper could execute a TSA. Enbridge also points out that it proposes to offer different rates to committed and uncommitted shippers, who are not similarly situated with respect to each other. Therefore, reasons Enbridge, the Commission should confirm that the discounted term rate structure for Spearhead is lawful and will be accepted at the time Spearhead service commences. As stated above, neither Terasen nor Flint Hills opposes Enbridge's petition as it relates to this issue.

38. The Commission finds that Enbridge conducted a transparent open season for the Spearhead capacity from October 13, 2004, through November 26, 2004, during which all potential shippers had an equal opportunity to become committed shippers by signing TSAs, which commit them to ship or to pay for their minimum volume commitment over the term of the agreement. The Commission further finds that Spearhead's committed rates are similar to discounted term rates proposed by Express, which the Commission found to be lawful.²² The Commission found that the proposed rate structure of Express did not violate the undue discrimination or undue preference provisions of the ICA because such rates were made available to all interested shippers and reflected relevant differences among term shippers, and between term and uncommitted shippers.²³ On rehearing, the Commission affirmed its approval of the proposed term rate structure.²⁴ Because the Express rates were "reasonable and generally in the range of those used in other oil pipeline proceedings, and were consistent with Commission policy," the Commission found them not to be unduly discriminatory.²⁵ For the same reasons articulated in *Express*, the Commission concludes that Spearhead's proposed committed rates will be lawful.

²⁰ *Id.* at 62,254.

²¹ *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002).

²² *Express Pipeline Partnership*, 76 FERC ¶ 61,245 (1996).

²³ *Id.* at 62,259.

²⁴ *Express Pipeline Partnership*, 77 FERC ¶ 61,188 (1996).

²⁵ *Id.* at 61,756.

C. Uncommitted Rate

39. Enbridge also requests confirmation that Spearhead can post an initial cost-of-service rate of \$1.50 per barrel for uncommitted volumes, subject to application of the Commission's indexing rules in future years.

40. Enbridge asserts that the test year cost of service for Spearhead would support an initial rate of \$1.99 per barrel on an average-cost basis. Although Enbridge is confident that this would be a cost-justified rate under existing Commission precedent, it believes that the \$1.99 per barrel rate would be too high to attract uncommitted volumes to Spearhead. Accordingly, states Enbridge, the TSA provides that the initial Spearhead uncommitted rate will be \$1.50 per barrel, subject to the Commission's indexing rule.

41. Enbridge seeks approval of two specific aspects of the cost-of-service calculation supporting the uncommitted rate: (1) as discussed above, the use of an initial rate base that reflects the purchase price paid by Enbridge for the acquisition of CCPS, and (2) the application of the Commission's Opinion No. 154-B rate methodology, using projected costs and throughput for the test year, to calculate the initial cost-of-service rate for Spearhead. In addition, Enbridge proposes that the supplemental revenue generated by the proposed surcharge on the Canadian rates of Enbridge's pipelines be treated as incidental revenue to Spearhead. Enbridge submits that, when the incidental revenue is added to the projected test year revenue from transportation provided by Spearhead, the total revenue is less than Spearhead's test year cost of service.

42. Enbridge states that its filing details the calculation of Spearhead's initial uncommitted cost-of-service rate, which is based on projected cost and throughput data representing the best current estimate of the costs anticipated to be incurred during Spearhead's initial 12 months of operations. Enbridge further states that the calculation applies the Opinion No. 154-B methodology and utilizes the purchase price adjustment for which it seeks approval in this proceeding. In addition, Enbridge maintains that the capital structure, debt cost, and equity rate of return and inflation rate used in the calculation are calculated in accordance with Opinion No. 154-B and the Commission's prevailing guidelines for rate of return computations.

43. Enbridge asks the Commission to accept its cost-of-service calculation as consistent with Opinion No. 154-B and the Commission's cost-of-service regulations. Enbridge states that the \$1.50 per barrel rate, which would constitute the base rate for the first year of service, would subsequently be subject to the Commission's indexing rules.

44. Commission precedent generally dictates the use of actual design capacity for initial rates on a new pipeline, and a pipeline is placed at risk for the costs of unsubscribed capacity based on actual capacity.²⁶ The Commission made an exception to this policy in the case of *Crossroads Pipeline Co. (Crossroads)*,²⁷ in which the pipeline filed an application to acquire an oil pipeline and convert it to a gas pipeline for transportation of gas in the interstate market. The Commission concluded it was appropriate to use projected throughput in light of safeguards against over recovery implemented by Crossroads.²⁸

45. The Commission finds that Spearhead's initial cost-of-service rate of \$1.50 per barrel for uncommitted volumes is unsupported by the data Enbridge presents. The Commission, however, will accept the \$1.50 per barrel rate as a non-protested, agreed-upon rate. Enbridge seeks to justify the \$1.50 per barrel uncommitted rate on the basis that it is less than the cost-of-service supported rate of \$1.99 per barrel computed on a projected 60,000 BPD throughput. This projected throughput represents volumes that shippers have already committed to ship on Spearhead. Enbridge makes no projections for additional volumes that may be shipped at the committed rate or the uncommitted rate.

46. The Commission's policy for designing rates on new pipelines is clear. It requires Enbridge to use the 125,000 BPD design capacity figure.²⁹ This throughput volume and Enbridge's proposed total cost of service of \$43,520,000 would yield a rate of \$0.95/bbl.³⁰ However, Enbridge proposes no safeguards that would prevent the over recoveries that could result from using projected rather than design volumes. Consequently, the Commission finds that Enbridge's cost-of-service submission does not justify its proposed rate of \$1.50 per barrel.

²⁶ See, e.g., *Great Lakes Gas Transmission Limited Partnership*, 66 FERC ¶ 61,118 (1994); *Equitrans, Inc.*, 63 FERC ¶ 61,070 (1993).

²⁷ 73 FERC ¶ 61,138 (1995).

²⁸ Crossroads agreed to file a major section 4 rate proceeding if its annual firm demand level exceeded its rate design level. *Id.* at 61,396.

²⁹ See, e.g., *Great Lakes Gas Transmission Limited Partnership*, 66 FERC ¶ 61,118 (1994); *Equitrans, Inc.*, 63 FERC ¶ 61,070, (1993); *Arkansas Western Pipeline Co.*, 63 FERC ¶ 61,006 (1993).

³⁰ $\$43,520,000 / (125,000 \text{ BPD} \times 365 \text{ Days Per Year}) = \$0.9539/\text{bbl}$.

47. The Commission concludes, however, that it can accept the proposed initial uncommitted rate under an alternative method. Section 342.2(b) of the regulations provides that a carrier may justify an initial rate for new service by filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question and that the initial rate is not protested.³¹ Enbridge's petition is fully supported by CAPP, which represents the Canadian producers who have committed to ship on Spearhead, and no one has protested the proposed uncommitted rate. Thus, the support of CAPP for Enbridge's proposed \$1.50 rate is sufficient, in the absence of protests, for the Commission's acceptance of the rate.³²

E. Surcharge Rate

48. Enbridge asks the Commission to rule that supplemental revenues expected to be generated through a surcharge on the rates of Enbridge's Canadian pipelines should be treated as incidental revenue to Spearhead in assessing whether Spearhead's revenues exceed its jurisdictional revenue.

49. Enbridge states that a key element of the Spearhead project is the support to be provided for the project by Canadian oil producers who expect to benefit substantially by the opening of a new market for their production. Enbridge emphasizes that it is seeking NEB approval for a tariff surcharge on the tariff rates of Enbridge's Canadian pipelines that would generate approximately \$10 million per year in incremental revenue for the first five years of the Spearhead project. Enbridge does not ask the Commission to approve the rate surcharge itself, as it agrees this is a matter solely within the jurisdiction of the NEB. However, Enbridge asserts that the appropriate method for reflecting the supplemental revenue in Spearhead's income is a proper issue for this Commission to consider, and Enbridge requests the Commission's approval of the method it has proposed for taking the "incidental revenue" into account.

50. Terasen concurs with Enbridge's position that the proposed surcharge is a matter falling within the jurisdiction of the NEB. However, Terasen requests that the Commission ensure that any declaratory order does not provide implicit or explicit

³¹ 18 C.F.R. § 342.2(b) (2004).

³² If it considers it necessary, Enbridge can pursue its cost-of-service-based rate, and elect to support that rate through an evidentiary hearing. *See, e.g., Rio Grande Pipeline Co.*, 100 FERC ¶ 61,022 (2002).

approval of a surcharge that will be subject to NEB jurisdiction. As discussed above, Flint Hills protests the proposed surcharge to Canadian shippers, which it claims would subsidize tariff rates for U.S. shippers on Spearhead.

51. The Commission will not address in this order any aspect of the proposed surcharge.

F. TSA

52. Although Enbridge does not ask the Commission to approve the TSA, Terasen states that an interconnection between Platte and the Spearhead project, if implemented, would provide a mechanism to transport Canadian crude oil production to Cushing via the Express, Platte and Spearhead systems. Terasen claims that clause 4.6(b) of the TSA might be construed by Enbridge as precluding tariff arrangements that would permit more competitive transportation of Canadian crude oil to Cushing through the Terasen/Spearhead transportation alternative under joint rates. Terasen urges the Commission to clarify that it is not addressing the lawfulness or reasonableness of the aspects of the TSA, except those provisions required by Enbridge's specific rate requests.

53. In response, Enbridge states that Terasen appears to have misconstrued the provision in question (section 4.6(b)), which is not intended to affect Spearhead's ability to offer "new services at rates it deems to be acceptable." Further, Enbridge confirms that it is not requesting Commission approval of the TSA except with respect to the rate structure under which committed shippers pay lower rates than uncommitted shippers.

54. The Commission's policy has been that a joint rate is just and reasonable if it is less than or equal to the sum of the individual tariff rates for that movement currently on file with the Commission.³³ However, the Commission has never required a pipeline to enter into a joint rate that would be less than the sum of the individual rates on file. Therefore, the Commission finds that the TSA language in question is consistent with the Commission's joint rate policy. Further, the Commission emphasizes that it is not ruling on the lawfulness or reasonableness of aspects of the TSA except to the extent necessary to rule on the other issues discussed above.

³³ See *Texaco Pipeline, Inc.*, 72 FERC ¶ 61,313 (1995).

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The Commission orders:

Enbridge's petition for a declaratory order is granted to the extent discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.