

PLATTE PIPELINE'S NEW DESTINATION-BASED PRORATIONING PROCEDURE TRIGGERS VIGOROUS OPPOSITION FROM CRUDE OIL MARKETER-SHIPPERS THAT THE PROPOSAL AIMED TO APPEASE

On 2/4/10 Suncor Energy Marketing Inc.¹ (SEMI) together with Suncor Energy (U.S.A.) Inc.² and Frontier Oil and Refining Co., and other marketer-shippers, protested a tariff modification lodged with FERC that proposes a destination-based prorating procedure for the system of Platte Pipe Line Co. (IS10-108). Platte, an interstate common carrier pipeline that extends from Casper, Wyoming to Wood River, Illinois, transports crude oil from western Canada to the U.S. Rocky Mountain and Midwest regions via affiliated pipelines and connecting pipelines. Platte consists of two major segments, one starting at Casper and going to Guernsey, Wyoming (Casper-Guernsey Segment) and the second starting at Guernsey and continuing on to Wood River (Guernsey-Wood River Segment). Kinder Morgan Canada Inc. is operator of Platte.

Complaints Pending. Both Suncor and Frontier have complaints pending at FERC over alleged discriminatory treatment on Platte's system. Submitted to FERC the very same day that Frontier and Suncor withdrew from the Dispute Resolution Service process,^{3 4} Platte's 1/20/10 tariff filing containing the proposed prorating procedure alleged that the new mechanism precisely addresses the issues raised in the two complaints. Since the relief requested in the complaints will affect all shippers, Platte proposes consolidation of the three proceedings and a technical conference to jointly address the issues in all three dockets.

Frontier (OR9-7) filed its complaint, along with a request for expedited action, on 4/17/09. Frontier alleged Platte was applying its proration policy in a manner that was contrary to the express language of the policy; in violation of the understanding of the parties to Docket No. IS06-259, in which the policy was established; and unduly discriminatory. Frontier also sought damages for the period during which Platte "improperly" applied its proration policy and deprived Frontier of space on the Casper-to-Guernsey Segment.⁵

A similar complaint filed about 4/10/09 by Suncor (OR09-6) alleged that Platte failed to implement and follow the proration procedure contained in a Supplement filed by Platte (IS08-39) with the Commission on 11/13/07. Suncor's complaint explained that Platte allocated capacity in a manner that resulted in severely disproportionate prorating of SEMI's nomination of crude oil volume for "short-haul" shipment from Casper to Guernsey on the "Casper-Guernsey Segment." Suncor alleged that Platte's failure to follow its proration procedure resulted in undue preference and unjust discrimination against shippers of short-haul movements. The Suncor complaint also requested the Commission to award damages.⁶

Prorationing. Platte's current proration procedure, adopted only a few years ago, provides separate methods for allocating capacity on the Casper-Guernsey Segment and on the Guernsey-Wood River

¹ Canada-based Suncor Marketing, a wholly owned, indirect subsidiary of Suncor Energy Inc. (SEI), markets all of SEI's approximately 340,000 bpd of crude oil production from Alberta and purchases approximately 235,000 bpd of third-party crude for SEI's affiliated refineries in Edmonton, Alberta; Sarnia, Ontario; Montreal, Quebec and Commerce City, Colorado. Suncor Marketing relies on both segments of the Platte pipeline system to transport oil destined for its affiliated refining operations and third-party.

² Suncor USA is a wholly owned, indirect subsidiary of SEI that owns and operates a 90,000 bpd refinery in Commerce City, Colorado.

³ FNGR No. 2781, p45.

⁴ FNGR No. 2779, p31.

⁵ FNGR No. 2745, pp38-40.

⁶ FNGR Nos. 2741, pp41-42; 2746, pp27-29.

Segment. On Casper-Guernsey, capacity is subject to a pro-rata allocation based on all nominations. On Guernsey-Wood River, 90% of capacity is allocated to historical shippers based on a rolling six-month average shipment history, and 10% capacity is reserved for new shippers and allocated on a *pro rata* basis. Platte's new approach would replace this combination of *pro rata* allocation upstream and historical allocation downstream with a destination-based historical procedure. Nine specific destinations identified on the Platte system would be allocated capacity on each segment based on the delivered history of such specific destination, calculated as the average of the five highest monthly deliveries during the previous six months. The amount of capacity available for historical allocation would be the remaining capacity after minimum allocations equal to 5% of monthly capacity are made to destinations with historical allocations lower than 5% of monthly capacity. Shippers would receive a *pro rata* share of each destination's allocation based on nominations.

Platte explains that the central purpose is to restrict the ability of marketers game the system and to obtain capacity on a shorter term basis that they may not need. Shippers with more "need" for capacity are producers, refiners, and other shippers that have long-term contractual commitments. Access of producers and refiners would be restricted to the extent that such shippers are also marketers of oil volumes which exceed their "needs."

Suncor Challenges New Proposal. Suncor describes itself as a producer and refiner which uses Platte to ship crude volumes in excess of its refining requirements for marketing to third parties. Suncor alleges the Platte Pipeline pro-rationing plan would create an unreasonable and unjustified preference against marketers as a class of shippers and an unreasonable and unjustified preference in favor of producers and refiners. The proration procedure would also be unlawful under the Interstate Commerce Act (ICA) because it would violate "Platte's duties as a common carrier to furnish transportation to shippers upon reasonable request and to establish, observe and enforce reasonable regulations and practices." The proposal would leave shippers without open access to Platte's capacity. The pipeline's resulting service would be "dedicated service, not common carrier service."

According to Suncor, the proration procedure (1) is unreasonably vague and unclear; (2) would improperly allow non-shippers to control pipeline capacity; (3) is based on "false and irrelevant competitive considerations" designed to protect Platte from competition; (4) is based on false and irrelevant allegations of consumer impacts; and (5) should be replaced by an alternative proration policy based on shipper history. In this last respect, "the current downstream historical shipper [procedure] is equitable, workable, and transparent."

Suncor criticized Platte's rationale and justifications. "For example, it is not the function of a proration procedure to influence commercial relationships, to protect consumers against price increases, or to protect the pipeline against competition." Rather, the sole purpose of a proration procedure is to provide for a just, reasonable, and non-discriminatory allocation of capacity among shippers. It is shippers (not producers, refiners, consumers, or pipelines) which constitute "the protected class under the ICA."

Platte's request to have its procedure referred to a technical conference should also be denied, Suncor declared. The proposal should be rejected outright or be suspended for the full statutory period of seven months and referred to an administrative law judge for investigation and hearing.

Suncor argues that a tariff which reserves a portion of oil pipeline capacity for a particular class of shippers is unlawful under the ICA. Moreover, the ICA does not permit a carrier to restrict the amount of capacity available to shippers which it considers less worthy or less deserving than other shippers. In this case, Platte "openly and flagrantly acknowledges that the main purpose for its novel destination-based proposal is to restrict the access of marketers to pipeline capacity and to reserve capacity for producers and refiners for self-interested purposes." It is not within the responsibility or authority of Platte as a common carrier to determine which shippers have a legitimate "need" for capacity or to restrict access based on the relative "need" of shippers.

Contrary to Platte's assertions, Suncor insists that participation of marketers makes crude oil markets more competitive. Marketers can provide information and intelligence regarding the market and contribute

to greater pricing transparency. Marketers also provide storage and trucking services, as well as risk management, accounting, and other support services.

The ability of marketers to arrange the supply of oil from a variety of locations provides additional value to the oil that is purchased and resold. Refineries typically are configured to process an optimal mix of different crude oils, which normally do not originate in the same field or area. A marketer that has access to different types and qualities of oil from various sources can help a refiner obtain an optimal slate of different crude oil to meet its particular needs. Thus, Suncor asserts, “marketers can add substantial value by serving as an intermediary between producers and refiners.”

Unlike the producers and refiners and others who generally rely on fixed deals, Suncor stresses that marketers require flexibility. By restricting pipeline capacity allocations to specific destinations, the proposed proration procedure would lock in supply patterns between producers and refiners and create a barrier to the participation of marketers in the pertinent markets.

Suncor also told FERC that Platte creates the false impression that marketers are currently engaging in arbitrage by selling or transferring “tradable” capacity rights. In fact, Suncor returned, the current procedures provide that pipeline capacity allocated to a shipper on the Guernsey-Wood River segment may not be assigned to another shipper. Thus, marketers must actually use their allocated capacity. “In a conspicuous omission,” Platte did not include the prohibition against assignment of allocations in the marked-up version of its current procedure attached to the filing.

In a negation of its duties, continues Suncor, Platte would violate its common carrier obligations by restricting the ability of shippers to select destinations or to change destinations. Platte would be providing a form of dedicated service under which portions of its capacity would be dedicated to specific destinations or receiving parties. Shippers could obtain allocations of the various portions of dedicated capacity, but shippers would not have open access to capacity in order to meet commercial needs or to accommodate changes in those needs.

There are also many unresolved questions, according to Suncor. The nomination verification required “is vague and cryptic” and “makes no mention” of take-away capacity. Moreover, the tariff filing does not indicate what the destination parties will be required to provide with respect to the required “take-away capacity.” Only four of the nine defined “destinations” are refiners that actually use crude oil. The other five destinations are connecting pipelines or terminals that do not use oil; they presumably serve multiple customers who either use or resell crude oil. While customers of the connecting pipelines and terminals may be shippers on Platte, it does not appear that the pipelines or terminals themselves would be shippers. Thus, “to the extent that the connecting pipelines and terminals themselves receive historical allocations of capacity and are in a position to provide ‘take-away capacity,’ the result would be improper control of capacity on Platte by non-shippers.”

In Suncor’s view, one obvious area for arbitrary action by Platte is the “loose” procedure for adding new “destinations.” Rather, it appears the mechanism for approving new destinations would be an informal process subject only to the discretion of Platte without governing criteria or Commission oversight. While shippers would have an opportunity to comment on requests for new destinations, the only formal recourse available to objecting shippers would be a protest.

Next, Suncor declares there is no basis for Platte’s claim that the activity of marketers inhibits the ability of Platte to compete with Keystone Pipeline. “If the additional Keystone capacity eliminates the current shortage of pipeline capacity, the price differential and opportunity for arbitrage should be reduced or eliminated for both pipelines.” There is also no basis for Platte’s claim that consumer prices for petroleum products may rise if refiners are able to pass on the “premium” realized by shippers with capacity allocations.

Frontier’s Objections. Frontier Oil and Refining Co., in its protest, asked the Commission to deny Platte’s motion for consolidation. The proceedings do not share common issues, as Frontier sees it. The Commission has held that similarity of issues does not justify consolidation where the proceedings are

significantly different such that consolidation would not produce sufficient procedural efficiency. “The new policy proposed by Platte has absolutely no bearing on Platte’s actions in 2009. It is an entirely new policy that will apply going forward.” The better course for the Commission, in Frontier’s opinion, would be to resolve Frontier’s complaint immediately, thus establishing an ICA-compliant proration process on the Platte pipeline.

Cenovus and Other Shippers. Among other parties vigorously protesting Platte’s proposal is Cenovus Marketing (USA) Inc., which perceives the Platte destination-based policy proposal to be “unprecedented.” In 2009, EnCana Corp. split into two companies: (1) EnCana Corp. and (2) Cenovus Energy Inc., a new integrated oil company focused on enhanced oil projects and its established natural gas and crude oil production in Alberta and Saskatchewan. EnCana Marketing (USA) Inc., an indirect subsidiary of EnCana Corp., historically has been a long-term shipper of crude oil on the Platte pipeline. Certain of EnCana Marketing’s assets, including transportation contracts on Platte, were assigned to Cenovus Marketing.

Cenovus Marketing argues in its protest that Platte’s proposed changes to its prorating procedure may restrict access and detrimentally impact Cenovus Marketing. First and foremost, Cenovus Marketing questions whether it is judicious to revise Platte’s policy to address the concerns of Suncor and Frontier when the Commission has not yet acted on their complaints. Without a decision on the merits, it is unclear whether the concerns raised in the complaints are legitimate. It is also unclear whether the relatively modest constraints experienced on the Platte system and reported last March and April 2009 were harbingers of things to come. Platte’s own filings “suggest that the prorating that was required in March and April 2009 was an anomaly.” Furthermore, the claims of “arbitrage” by shippers are reminiscent of the “gamesmanship” alleged by Platte the last time that it proposed to revise its prorating policy. “It will be interesting to see how many of the shippers Platte claims to be helping with this tariff filing actually support it.”

In Cenovus Marketing’s view, rather than deterring behavior that Platte alleges is harmful to producers, consumers and Platte’s competitiveness, Platte’s procedure “would itself have a harmful effect, by, among other things, imposing artificial restraints on the ability of shippers to deliver crude oil to multiple destinations on the Platte system, thereby undermining a well-functioning market. It does not appear that Platte has clearly thought through the unintended consequences.”

In its own case, Cenovus Marketing explains that as a producer-shipper that historically shipped crude oil to multiple locations along the Platte system it should have the ability to nominate delivery of its oil to other points on the system, in cases of outage, without increased exposure to prorating. Cenovus Marketing “should be considered in such circumstances as having earned the right of access to the Platte system in general, as an outlet for its crude oil, and it would be inappropriate to allow Platte to arbitrarily hand that right over to the Destination as proposed in its revised Prorating Procedure.”

Rather, Platte’s procedure appears designed less to apportion capacity equitably among shippers than an attempt by Platte to insulate itself from competitive pressures from other, newer crude oil pipelines (e.g., Keystone Pipeline). For instance, if Platte is the low-cost pipeline, as it claims, then there is no reason why the market will not react accordingly by electing to transport crude oil on Platte rather than its higher priced competitors.

Another unforeseen outcome, it seems to Cenovus Marketing, is that the new procedure would effectively place control of the capacity in the hands of the operators at the destinations (e.g., refiners, terminals) over which the Commission has no direct jurisdiction. This point, as indicated above, was made by all the protesters so far.

Cenovus would support suspension of the tariff filing subject to the outcome of a technical conference, and does not oppose Platte’s request that the Commission consolidate the filing with the pending complaints.

At least two additional protests in this case were filed. One, by Nexen Marketing U.S.A. Inc., suggested that the proposal here is substantially changing the way crude oil is being transported and would disrupt

established business relationships between shippers and their customers, and deprive shippers of the value of the investments they made. Nexen, too, argued that the allocation proposal accords shipping rights “not to shippers, but to destinations.” Also, by freezing the delivery of oil products on the basis of past consumption patterns, the new allocation system can seriously stifle economic growth.

According to Tidal Energy Marketing (U.S.) LLC, the proposed procedure violates Platte’s common carrier obligation in at least two significant respects. First, it denies Tidal and other shippers access to common carriage by allocating essentially all the capacity of the pipeline to destinations, as opposed to shippers. Second, the procedure places undue and unnecessary restrictions on the freedom of shippers to use the pipeline for their own commercial interests and those of their customers. Specifically, shipments designated to the destination cannot be redirected to other destinations to meet customer requirements or to react to market conditions.

A formal protest was also lodged by Flint Hills Resources LP.