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October 18, 2007

FILED
OFFICE OF THE
SECRETARY
2007 OCT 18 P 4: 49
FEDERAL ENERGY
REGULATORY COMMISSION

BY HAND DELIVERY

The Hon. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Enbridge Energy Company, Inc. and Enbridge Energy, Limited Partnership
Docket No. OR08-1 -000
Petition for Declaratory Order

Dear Secretary Bose:

Enclosed for filing are the original and fourteen (14) copies of the Petition for Declaratory Order of Enbridge Energy Company, Inc. and Enbridge Energy, Limited Partnership, together with a check for the filing fee in the amount of $20,940 made payable to the Treasurer of the United States.

Also enclosed is a form of notice of filing, together with a 3.5" diskette containing an electronic version of the form of notice.

Please date-stamp the enclosed duplicate originals and return them to our messenger for our files.

Sincerely,

Steven Reed

Enclosures

EXPEDITED CONSIDERATION REQUESTED

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Enbridge Energy Company, Inc.	)	
	)	**Docket No. OR08-___**
Enbridge Energy, Limited Partnership	)	

JOINT PETITION FOR DECLARATORY ORDER
OF ENBRIDGE ENERGY COMPANY, INC.
AND ENBRIDGE ENERGY, LIMITED PARTNERSHIP

Pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207(a)(2) (2007), Enbridge Energy Company, Inc. ("EEC") and Enbridge Energy, Limited Partnership ("EELP") (collectively "Petitioners") jointly request that the Commission issue a declaratory order approving the proposed tariff structure for the Southern Access Extension Pipeline (the "Extension Pipeline") described herein. Because of the time-sensitive nature of this project, Petitioners respectfully request that the Commission act on this Petition on or before February 1, 2008.

I. EXECUTIVE SUMMARY

The Southern Access Extension Pipeline has been before the Commission once before. On September 1, 2006, EELP submitted an Offer of Settlement, based on an agreement between EELP and the Canadian Association of Petroleum Producers ("CAPP"),[1] seeking approval for a

[1] CAPP is an association whose producer members account for more than 95 percent of Canada's oil and gas production. Approximately 97 percent of the crude oil and natural gas liquids transported by EELP originates in Canada. Affidavit of Wilfred R. Schrage at ¶ 2 (attached as Exhibit 3 hereto). After their first citation, affidavits are cited as "Schrage Aff. (Exh. 3) at ¶ _") and exhibits attached to affidavits are cited as "Schrage Aff. (Exh. 3) Exhibit WRS-_."

surcharge to recover the costs of the Extension Pipeline from the mainline shippers on EELP's Lakehead System. A number of parties filed comments opposing the proposed settlement, and on December 8, 2006, the Commission rejected the Offer of Settlement. Order on Contested Offer of Settlement, *Enbridge Energy, Limited Partnership*, 117 FERC ¶ 61,279 (2006) ("*2006 Settlement Order*"). In that order, the Commission ruled that EELP had not demonstrated sufficient benefits to its mainline shippers to justify charging "a rate surcharge that would subsidize construction of [an] affiliate's extension pipeline." *Id.* at P 28.

In the wake of the *2006 Settlement Order*, Petitioners and CAPP engaged in lengthy and wide-ranging discussions to develop a revised proposal for the Extension Pipeline that would meet the needs of the shippers on the Lakehead System, while also permitting the Extension Pipeline to be constructed on an economically feasible basis. As a result of those discussions, and extensive consultations within the relevant CAPP committees, Petitioners and CAPP have agreed on a totally different concept regarding the tariff structure for both the Extension Pipeline and an interim "backstop" mechanism on the Lakehead System (the "Tariff Agreement").[2] That Tariff Agreement is the subject of this Petition.[3]

[2] A copy of the Tariff Agreement is attached as Exhibit 1 hereto.

[3] Petitioners concluded that it would be prudent to submit a request for a declaratory order in this instance, rather than an Offer of Settlement as before. First, despite their best efforts to achieve consensus, Petitioners and CAPP anticipate that some opposition may remain to this proposal, suggesting that if offered in settlement form, this could be a contested settlement. Second, the declaratory order mechanism has been used successfully by a number of other pipelines seeking timely guidance on rate terms for new or expanded pipelines. *See Express Pipeline P'ship*, 76 FERC ¶ 61,245 (1996); *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002); *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 (2005); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078 (2006), *reh'g denied*, 119 FERC ¶ 61,183 (2007); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073 (2007). However, Petitioners are seeking approval only for the terms of their Tariff Agreement with CAPP in the unique circumstances of this proposed pipeline.

Although some of the details of the Tariff Agreement are complex, the basic structure is relatively straightforward. The Lakehead System currently transports crude petroleum from the Canada-U.S. border to various destinations in the upper Midwest and eastern Canada.[4] The vast majority of the oil transported on Lakehead originates in western Canada and is transported to the international border by EELP's Canadian affiliate Enbridge Pipelines, Inc. ("EPI").[5] EELP is currently constructing a new pipeline (Line 61) from Superior, Wisconsin to Flanagan, Illinois, where Line 61 will connect with the Spearhead Pipeline, which extends southwest to Cushing, Oklahoma.[6] The tariff structure for Line 61, which is the primary component of the Southern Access Mainline Expansion, was approved by the Commission on the basis of an uncontested Offer of Settlement on March 16, 2006.[7]

The Extension Pipeline, which is to be built by EEC (a wholly-owned U.S. subsidiary of EPI) will extend approximately 178 miles from Flanagan to Patoka, Illinois, a major pipeline hub in southern Illinois. The Extension Pipeline will have an initial annual average capacity of 400,000 barrels per day ("bpd"), expandable to 800,000 bpd through additional pumping

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[4] A map depicting the Lakehead System and the other pipelines discussed immediately below appears as Exhibit WRS-1 to the Schrage Affidavit.

[5] EPI and EELP (collectively, "Enbridge") together operate the largest, most sophisticated crude oil pipeline system in North America, extending from Edmonton, Alberta to Ontario and upstate New York. Schrage Aff. (Exh. 3) at ¶ 1. EELP is the operating subsidiary of Enbridge Energy Partners, L.P. ("EEP"), a master limited partnership traded on the New York Stock Exchange. EPI is the parent of the general partner of EEP and, through its subsidiaries, owns approximately 15% of EELP. *Id.*

[6] Spearhead is owned by CCPS Transportation, LLC, another subsidiary of EPI. Schrage Aff. (Exh. 3) at ¶ 3. Once Line 61 is completed, the segment of Spearhead between Flanagan and Chicago ("Spearhead North") will be reversed, permitting crude oil from Line 61 to flow to Cushing and to Chicago from Flanagan. *Id.*

[7] *Enbridge Energy, Limited Partnership*, 114 FERC ¶ 61,264 (2006).

capacity. The capital cost of the Extension Pipeline is estimated to be $434 million.[8] *See* Schrage Aff. (Exh. 3) at ¶ 3. Although the Extension Pipeline is to be built by EEC rather than EELP, the Extension Pipeline will be operationally integrated with the Lakehead System. *Id.* at ¶ 4.

Under the Tariff Agreement, EEC will charge a cost of service-based stand alone tariff rate for movements from Flanagan to Patoka, based on rate parameters agreed to between CAPP and Petitioners. As described in the Tariff Agreement, the "long-term objective is to have the Extension operate as a self-sufficient pipeline that has rates set to reflect a stand-alone operation." Tariff Agreement (Exh. 1) at Section 1. However, both Petitioners and CAPP recognize that during the first few years of the operation there is some uncertainty as to when the Extension Pipeline will attain self-sufficiency. Accordingly, the Tariff Agreement provides a "backstop" mechanism in the event the Extension Pipeline does not attract sufficient volume in the early years to recover its cost of service.

The "backstop" consists of an agreement by EELP to recover the annual deficit (if any) on the Extension from the Lakehead mainline shippers and remit that amount to EEC in order to keep the Extension Pipeline whole. In return, EEC is obligated to return to EELP the surpluses recovered by the Extension Pipeline until the cumulative deficit (with interest) is eliminated.[9] EELP must flow those payments back to the mainline shippers in the form of rate credits. Thus, over the 15-year term of the Tariff Agreement, this arrangement should have no significant negative effect on Lakehead mainline shippers. However, through this mechanism, the

[8] All dollar figures in this Petition are in U.S. dollars unless otherwise specified.

[9] The specific terms of the cumulative balancing account for tracking deficits and surpluses are described in more detail below. To the extent any net deficit exists after the expiration of the Tariff Agreement (which Petitioners consider to be a highly unlikely scenario), that deficit would not be repaid.

Lakehead mainline shippers will enjoy benefits, as demonstrated herein, because of the operational flexibility, security and additional mainline volumes made possible by the Extension Pipeline.

Through this Joint Petition, EEC and EELP are asking the Commission to approve the overall tariff structure for the Extension Pipeline (including the "backstop" arrangement with EELP). This request does not extend to the specific rates to be charged in any given year, which will be based on the costs and volumes in each year. Rather, Petitioners seek approval for the overall framework for calculating the Extension Pipeline rates and the related surcharges and surcredits on the Lakehead System. For the reasons set forth herein, in the particular circumstances presented here, Petitioners believe this tariff structure is lawful, reasonable and consistent with Commission policy. Approval of this structure will facilitate construction of the Extension Pipeline, which will broaden the availability of crude petroleum from the Canadian oil sands for use in U.S. refineries and promote the Commission's important infrastructure goals.

II. BACKGROUND

As the Commission is aware, crude oil production from the oil sands resource in western Canada is rapidly increasing. *See Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 at PP 3, 32. Crude oil production in the Williston Basin is also increasing. *See Enbridge Pipelines (North Dakota) LLC*, 117 FERC ¶ 61,131 at P 4 (2006). Projects totaling tens of billions of dollars are currently underway in Alberta, leading to projections that the supply of crude oil from the Canadian oil sands will grow from approximately 1.1 million bpd in 2006 to nearly 4.4 million bpd by 2020. Affidavit of Neil K. Earnest at ¶ 9 (attached as Exhibit 4 hereto). Much of this increased production is expected to flow into the U.S., where refineries are being reconfigured to process increasing volumes of western Canadian crude. Schrage Aff. (Exh. 3) at ¶ 5. Because of the large volumes involved, the traditional markets for Canadian crude in the upper Midwest and

Rockies are becoming saturated, and the increased flows must find new markets further south.

Id.

In response to this predicted tide of new Canadian oil, Enbridge has undertaken a number of pipeline projects to facilitate transportation of these increased volumes to new markets. *See* Schrage Aff. (Exh. 3) Exhibit WRS-1 (map). Among other projects, Enbridge has proposed and obtained rate approval for:

1. Line 17 from Stockbridge, Michigan to Toledo, Ohio, permitting Canadian crude to access Toledo area refineries (*Enbridge Energy, Limited Partnership*, 107 FERC ¶ 61,336 (2004));

2. Line 61 (the main component of the Southern Access Expansion), extending from Superior, Wisconsin to Flanagan, Illinois, and providing an initial increase of 400,000 bpd, expandable up to 1.2 million bpd, in the capacity of Lakehead's mainline system (*Enbridge Energy, Limited Partnership*, 114 FERC ¶ 61,264 (2006));

3. the Spearhead Pipeline, which involved reversal of a crude oil pipeline to flow from Chicago to Cushing, Oklahoma (via Flanagan), providing access initially for up to 125,000 bpd of primarily Canadian crude oil to reach the market trading hub at Cushing (*Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 (2005)); and

4. Phase 5 of the North Dakota Pipeline Expansion, which is increasing the volume on the pipeline from its historical level of 80,000 bpd to approximately 110,000 bpd, transporting crude oil from the Williston Basin area of Montana and North Dakota (*Enbridge Pipelines (North Dakota) LLC*, 117 FERC ¶ 61,131 (2006)).

Enbridge has several additional projects that are either pending before the Commission or in the planning stages:

1. a proposed expansion of the Spearhead Pipeline from 125,000 bpd to 190,000 bpd (*see* Petition filed August 13, 2007 in Docket No. OR07-17-000);

2. a proposed new pipeline (Southern Lights) to transport light hydrocarbons from Chicago to Edmonton for use as a diluent to facilitate transportation of additional bitumen from the oil sands to the U.S. and Ontario (*see* Petition filed July 20, 2007 in Docket No. OR07-15-000);

3. the Alberta Clipper project, which is a planned expansion of the Enbridge mainline system in Canada and the U.S. to provide 450,000 bpd to 800,000 bpd of incremental new capacity between Edmonton and Superior;

4. a planned joint venture between Enbridge and ExxonMobil to provide pipeline transportation between Patoka, Illinois and the Texas Gulf Coast; and

5. a planned Phase 6 expansion of the Enbridge North Dakota Pipeline from approximately 110,000 bpd to approximately 155,000 bpd.

Schrage Aff. (Exh. 3) at ¶ 6. The Extension Pipeline is another key element in the development of infrastructure to bring the expanding Canadian oil production to U.S. markets. The Extension will connect Flanagan, Illinois (which is the intersection point of Line 61 and Spearhead) with Patoka, Illinois.

As described in the Schrage Affidavit, the current capacity of Spearhead to transport oil out of Flanagan is 125,000 bpd, which is expected to grow to 190,000 bpd by the first quarter of 2009, assuming that the Spearhead Petition in Docket No. OR07-17-000 is approved and construction is completed on a timely basis. Schrage Aff. (Exh. 3) at ¶ 7. In addition, when Line 61 goes into service, EELP will take over operation of the segment of the Spearhead line between Flanagan and Chicago ("Spearhead North"), re-reversing that segment to permit oil transported on Line 61 to flow northeast to Chicago refineries. The capacity to flow from Flanagan to Chicago on Spearhead North will be approximately 131,000 bpd. Thus, without a new outlet, the take-away capacity at Flanagan will be no more than about 321,000 bpd until another outlet is constructed. The Extension Pipeline will help to unleash the full benefit of Line 61, by permitting additional volumes to move through that line. *Id.*

As demonstrated in the attached Affidavits, increased volume on the Lakehead System made possible by a new outlet such as the Extension Pipeline directly benefits Lakehead upstream shippers. By providing an additional outlet for crude oil leaving Line 61 at Flanagan, the Extension will facilitate more efficient utilization of that line and therefore of the whole system. It will also provide improved access for Canadian oil to Patoka, which is a major pipeline hub in southern Illinois.[10] The general public benefits from enhanced oil supply security. Schrage Aff. (Exh. 3) at ¶ 21.

As discussed more fully below, the Extension will also increase volumes on the Lakehead System, and these increases will produce quantifiable benefits for upstream shippers. These include: reduction in batch pigging costs; crude oil quality improvements; cost reduction from reduced transit time; increased system security; and rate benefits due to reductions in approved Lakehead surcharges. *See generally* Schrage Aff. (Exh. 3) at ¶¶ 24-36.

To achieve these benefits, Petitioners need a workable tariff structure that makes construction and operation of the Extension Pipeline economically feasible. As described in the Executive Summary, EELP originally negotiated an agreement with CAPP that was submitted to the Commission in 2006 as an Offer of Settlement. The principal features of that 2006 Offer of Settlement were:

- Most of the costs of the Extension Pipeline were to be recovered through a surcharge to be added to the mainline rates of EELP's Lakehead System;
- The rates for services from the Canada-U.S. border to Patoka were to be established through a joint tariff between EELP and the Extension Pipeline;
- The through rate to Patoka under the joint tariff would have been set at a percentage of the border-to-Flanagan rate, reflecting the ratio of the distance from the border-to-Patoka to the distance from the border-to-Flanagan;
- The implicit incremental revenue from Flanagan to Patoka (*i.e.*, the distance-based percentage of the border-to-Flanagan rate) was to be credited to the

[10] Access to Patoka is currently available via the Lakehead System to Lockport, Illinois (the Chicago area) and Mustang Pipeline from Lockport to Patoka. However, the Mustang Pipeline has a current capacity of only 96,000 bpd, and has been in proration since December 2005. Schrage Aff. (Exh. 3) at ¶ 8. By 2011, it is expected that the Mustang pipeline will be converted to light crude service with a nominal crude capacity of 140,000 bpd. *Id.* The other alternative is via Express Pipeline to Casper, Wyoming, Platte Pipeline from Casper to Wood River, Illinois, and the Woodpat Pipeline from Wood River to Patoka. Again, the capacity of Platte and Woodpat is limited, and Platte has experienced serious prorationing problems for some time. *See Platte Pipe Line Co.*, 115 FERC ¶ 61,215 at P 7 (2006).

Extension cost of service, thus leaving the Lakehead surcharge to cover the full Extension cost of service minus that implicit incremental revenue.

A number of comments were filed by intervenors opposing the 2006 proposed settlement. The predominant ground for opposition was that the upstream shippers on the Lakehead System were being asked to subsidize the service to be provided by EELP's affiliate (Extension Pipeline) from Flanagan to Patoka, even if those shippers did not transport oil to Patoka. As the Commission described their arguments: "According to the commenters, the Settlement provides no valid basis for imposing 50-69 percent of the cost of installing and operating the proposed extension on all the users of the Lakehead Pipeline System." *2006 Settlement Order*, 117 FERC ¶ 61,279 at P 16. The intervenors also argued that "the calculations of the expected monetary value of improvements in crude oil distribution, quality and transit time claimed by Enbridge are highly speculative, and there is little indication that shippers at specific destination points would enjoy these benefits." *Id.* In the *2006 Settlement Order*, the Commission accepted the intervenors' comments and rejected the proposed settlement terms. Specifically, the Commission determined that it lacked "adequate evidence" of the system-wide benefits that would justify recovering most of the costs of the Extension from Lakehead shippers. *Id.* at P 28. It therefore concluded that the settling parties had not demonstrated "that it would be just and reasonable to charge [the upstream] shippers a rate surcharge that would subsidize construction of the Enbridge affiliate's extension pipeline." *Id.*[11]

In the wake of the Commission order, Petitioners and CAPP renewed discussions aimed at arriving at a tariff structure that was more compatible with the interests of upstream shippers,

[11] Although EELP did not agree with the Commission's *2006 Settlement Order*, it chose not to request rehearing or judicial review of that order because doing so would likely have delayed resolution of the tariff structure for the Extension Pipeline indefinitely, to the detriment of the overriding goal of having the Extension Pipeline available for service as soon as possible.

while still permitting Petitioners to proceed with the project. As described in the Schrage Affidavit, the central issue in these discussions was the desire of some upstream shippers to impose more of the costs of the Extension Pipeline on users of that pipeline, balanced against the desire of other shippers for a mechanism to stabilize the Extension Pipeline's rates (particularly in the early years). Schrage Aff. (Exh. 3) at ¶ 12.

The result of these intensive discussions, which occurred over a period of many months following the *2006 Settlement Order*, is the Tariff Agreement that is the subject of this Joint Petition.[12] In contrast to the prior Offer of Settlement, the primary emphasis in the Tariff Agreement is creating a stand alone tariff structure for the Extension Pipeline, rather than one in which costs of the Extension are rolled into Lakehead's mainline rates. Thus, when sufficient volumes are attained on the Extension Pipeline, it will operate with no assistance from Lakehead upstream shippers (notwithstanding that those upstream shippers will benefit from the increased volumes and enhanced operational flexibility made possible by the Extension).

The scenario in which the Tariff Agreement contemplates assistance from EELP for the Extension Pipeline during the early years of operation is one in which the Extension fails to attract enough volume at the stand alone rates to be self-sufficient from the outset. In that event, the annual deficits on the Extension Pipeline would be captured in a balancing account established between EEC and EELP. Lakehead shippers would be required to backstop the initial deficits through a temporary surcharge, subject to being repaid (with interest) when the Extension begins to achieve surpluses as a result of increased throughput.[13]

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[12] CAPP has also provided a letter, Exhibit 2 hereto, supporting the Joint Petition and stating that all but one of its members approved the Tariff Agreement.

[13] The precise mechanism for the balancing account and the resulting rate charges and credits is described in more detail below and in the attached Schrage (Exh. 3) and Douvris (Exh. 5) Affidavits.

Petitioners submit that this structure is more than fair to the upstream shippers and avoids the perceived flaws that led the Commission to reject the prior settlement. In particular, as shown in detail in the attached affidavits, the upstream shippers receive a number of benefits from the Extension. To the extent they do pay any amounts through the Lakehead surcharge, upstream shippers will be repaid (with interest) in accordance with the terms of the Tariff Agreement.

By contrast, if the Extension Pipeline were required to be tariffed on a purely stand alone basis, with no support from the mainline system, EEC would be exposed to the full brunt of the throughput risk (*i.e.*, the risk that it could not achieve full utilization of the new pipeline in every year at the stand alone rate). In those circumstances, EEC would not be able to justify investing in the pipeline at a rate of return commensurate with its risk profile as a regulated pipeline company. Thus, despite its clear shipper and public interest benefits, the Extension Pipeline might well not be built (and at a minimum may be significantly delayed) unless it is adequately "backstopped" during its initial years of operation. Schrage Aff. (Exh. 3) at ¶ 19.

III. DESCRIPTION OF TARIFF AGREEMENT

The terms of the Tariff Agreement between Petitioners and CAPP are discussed in the Affidavit of Wilf Schrage. Schrage Aff. (Exh. 3) at ¶¶ 13-20. The parties agreed that their "long-term objective" was to have the Extension function as a stand alone pipeline, but that "interim rate arrangements" are needed until it can operate in such a fashion. Tariff Agreement (Exh. 1) at Section 1. The parties provided those interim arrangements by agreeing to a rate structure that adapts to changing circumstances throughout the course of the 15-year term of the agreement (*id.* at Section 7).

The rate structure established in the Tariff Agreement has four main components.

The first component provides the method of calculating the revenue requirement of the Extension. Prior to putting the Extension in service, EEC will calculate the initial rate using the Commission's Opinion No. 154-B methodology, estimated capital and operating costs, and the following inputs:

- 55% equity; 45% debt;
- An annual depreciation rate of 3.33%;
- Cost of equity of 9% real;
- Cost of debt equal to the weighted long term average cost of debt of Enbridge Energy Partners, L.P.;
- Inflation rates in accordance with Opinion No. 154-B;
- Tax allowance per the Commission policy in effect for that year; and
- Throughput assumed to be 340,000 bpd.

Id. at Section 3(a) & Attachment C. At the beginning of each subsequent calendar year, EEC will recalculate the Extension rates, using the same inputs and truing-up prior estimates to actual costs. *Id.* at Section 3(b).

The second component of the Tariff Agreement provides that, at the beginning of each year following the initial year, EEC will calculate the difference between the revenue actually calculated and the revenue requirement based on the preceding parameters. *Id.* at Section 4(a). If the actual revenue is less than the revenue requirement, there is deemed to be a deficit; if the actual revenue exceeds the revenue requirement, there is deemed to be a surplus. *Id.* at Section 4(a).

The third component of the Tariff Agreement involves the Lakehead System and its shippers. If, prior to becoming self-sufficient, EEC incurs a deficit, then EELP will impose a surcharge on Lakehead shippers to recover that deficit in the subsequent year. If EEC runs a surplus, then it will pay that surplus to EELP, which will apply it as a surcredit to Lakehead shippers until accumulated deficits (with interest) have been repaid in accordance with the terms of the Tariff Agreement. Tariff Agreement (Exh. 1) at Section 5(a), 5(b).

Finally, the fourth component of the Tariff Agreement provides that EEC will track the cumulative deficits and surpluses in a balancing account, which will be debited or credited for interest. *Id.* at Section 6(a). Deficits recovered through the Lakehead rates (with interest) will be debited to the account. Surpluses are credited to the account until the cumulative deficit is reduced to zero. Once the Extension reaches "self-sufficiency" (defined as three consecutive years of surpluses), *id.* at Section 2 (definition of "Self-Sufficiency Date") no more deficits can be recovered from Lakehead. Thereafter, once the cumulative deficit reaches zero, any further surpluses must be used to reduce the Extension rates for the remaining term of the Tariff Agreement.

In certain narrow circumstances, a portion of the deficit charged to Lakehead shippers is not debited to the balancing account. When Qualifying Volume on Lakehead is less than 400,000 bpd,[14] the balancing account will be debited with 100% of the deficit. When Qualifying Volume on Lakehead is above that amount, in order to recognize the benefits from such increased volumes, the account will be debited a pro rata portion of the annual deficit. *Id.* at Section 6(c).

[14] The term "Qualifying Volume" is defined in the Offer of Settlement regarding Line 61 approved by the Commission on March 16, 2005, as follows: it is the difference between the actual throughput ex-Superior (on EELP's Lines 6A, 14 and 61) and the pre-Southern Access Expansion Capacity ex-Superior (on EELP's lines 6A and 14) assuming the same crude slate. In simple terms, Qualifying Volume is a measure of the incremental volume resulting from Line 61.

In order to understand how these four components work together, it is helpful to view the expected chronology of the pipeline. The parties essentially divided the 15-year term into three sequential periods.

In the first period, which begins at start-up, the Extension rates are calculated pursuant to Attachment C to the Tariff Agreement. After each year, EEC will determine whether its revenues exceeded or fell short of the revenue requirement. Any deficits or surpluses are tracked in the balancing account, and they are recovered from or paid to Lakehead shippers pursuant to the backstopping mechanism described above.

The second period (referred to as the "Self-Sufficiency Period") begins when the Extension has three successive years of surpluses. Tariff Agreement (Exh. 1) at Section 2 (definition of "Self-Sufficiency Date"). Once the Extension enters the Self-Sufficiency Period, it will no longer be able to seek to recover any deficits from Lakehead. *Id.* at Section 5(c), Section 6(b)(i). Therefore, when EEC calculates the Extension rates during the Self-Sufficiency Period, it will make up for any deficits by adjusting the Extension rates. *Id.* at Section 3(b).[15] Any surpluses will be credited against the cumulative deficit existing in the balancing account, to be returned to Lakehead shippers in the form of a surcredit. *Id.* at Section 6(b)(ii).

Once the cumulative deficit in the balancing account has been paid off, the pipeline enters the third stage, the "Zero Balance Period." The method for calculating the stand alone Extension rate changes, because there is no longer any need to pay back the Lakehead shippers (Section 5(d)) and any revenue above the revenue requirement is then used to reduce the Extension rate for the following year. *Id.* at Section 3(b). At the end of the Tariff Agreement,

[15] The Tariff Agreement provides that a sustained period of shortfalls will permit Enbridge to reduce rates or implement ship or pay requirements or "take such other actions or measures as Enbridge shall select to enhance the long term viability and continued operation of the Southern Access Extension." Tariff Agreement (Exh. 1) at Section 3(c).

EEC is permitted to set rates going forward based on the Commission ratemaking standards then in effect (subject to carrying forward a credit for any surplus from the last year). *Id.* at Section 3(d) & Section 4(b)-(c).

IV. DISCUSSION

This Petition seeks Commission approval for the tariff structure relating to the Extension Pipeline as set forth in the Tariff Agreement between Petitioners and CAPP. In particular, there are five aspects of the Tariff Agreement for which specific prior assurances are sought:

1. That the stand alone rates for the Extension Pipeline will be set annually for the term of the Tariff Agreement using the cost of service and throughput parameters agreed to by Petitioners and CAPP;

2. That any deficits incurred by EEC as defined in the Tariff Agreement can be recovered through a surcharge added to the Lakehead mainline rates, as set forth in the Tariff Agreement, and that those deficits will appear as costs to Lakehead for purposes of reporting on Page 700 of the EELP Form 6;

3. That any surpluses earned by EEC as defined in the Tariff Agreement will be applied first to repay (with interest) the prior deficits recovered from Lakehead in accordance with the Tariff Agreement (with the surpluses credited to costs on EELP's Page 700) and then used to reduce the Extension Pipeline's stand alone rates;

4. That upon the Extension Pipeline attaining "self-sufficiency" as defined in the Tariff Agreement, no further deficit recovery from Lakehead will occur; and

5. That upon expiration of the Tariff Agreement, subject to the final year adjustments contained in the Agreement, EEC will be free to set its forward-looking rates in accordance with applicable law and policy at that time.[16]

Petitioners submit that the Tariff Agreement is a lawful, reasonable means of reconciling the goals of promoting the development of this needed infrastructure project while avoiding cross-subsidization by existing mainline shippers. As shown below, in all but the most extreme

[16] Because these elements of the Tariff Agreement were negotiated and agreed to as a package, neither Petitioners nor CAPP would necessarily be willing to implement individual elements of the Agreement in isolation from the overall package.

circumstances, the tariff terms proposed here result in net benefits to upstream shippers. The "backstopping" provided by those shippers in the early years of the project is a small price to pay in return for the improved transit times, reduced product batching costs, quality enhancements, rate surcharge reductions and other benefits resulting from the Extension volumes. Indeed, as discussed in the attached Affidavit of Dr. William B. Tye (Exhibit 6 hereto), a prominent economist and regulatory expert, this proposal essentially creates a stand alone Extension pipeline, and the limited costs expected for upstream shippers are outweighed by the benefits they receive from the Extension. Thus, the Tariff Agreement responds to the concerns expressed by the Commission in the *2006 Settlement Order*. Tye Aff. (Exh. 6) at ¶¶ 4-6.

The Commission has shown itself to be flexible in accepting rates to support a needed project.

> The Commission has neither considered nor treated its rate methodologies as limiting its ratemaking approach or constraining it from exploring and adopting other rate approaches that are more fitting in particular circumstances to ensure that a just and reasonable rate results. The Commission has, in fact, used approaches outside its defined methodologies when circumstances have warranted.

Colonial Pipeline Co., 119 FERC ¶ 61,183 at P 23 (2007) (citing *Express Pipeline P'ship*, 76 FERC ¶ 61,245 (1996), *reh'g denied*, 77 FERC ¶ 61,188 (1996), and *Enbridge Energy Company, Inc.*, 110 FERC ¶ 61,211 (2005)). Given the unique circumstances of this project, the benefits to upstream shippers are sufficient grounds to justify approval of the carefully tailored tariff structure agreed to between Petitioners and CAPP.

A. Petitioners Request on Expeditious Declaratory Order to Resolve Regulatory Uncertainty and Justify Proceeding with the Extension Pipeline

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, authorizes federal agencies, including the Commission, to "issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); *see also* 18 C.F.R. § 385.207(a)(2). Here, regulatory uncertainty clearly exists in light of the *2006 Settlement Order*, which has hindered Petitioners' ability to construct the Extension Pipeline. Petitioners need to clarify the tariff structure that will govern the Extension in order to proceed on a schedule that will have the Extension in place in the first quarter of 2009 as currently projected.

The Commission has recognized in past cases the appropriateness of providing advance rate guidance for projects of this kind through the declaratory order mechanism. For example, in the case of the Express Pipeline System, the Commission issued a declaratory order over the objection of parties who argued the issues should be deferred until the pipeline was actually built. The Commission noted there:

> [I]t is better to address these issues 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 P'ship, 76 FERC ¶ 61,245 at 62,253 (1996). This Petition is similar to *Express* and other recent declaratory order proceedings in that Petitioners need advance Commission guidance to justify a major capital expenditure. *See also Colonial Pipeline Co.*, 116 FERC ¶ 61,078 (2006), *reh'g denied*, 119 FERC ¶ 61,183 (2007); *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 (2005).

Petitioners respectfully request that the Commission act on this Petition by no later than February 1, 2008. In order to meet the service needs of its shippers, EEC is targeting an in-service date for the Extension Pipeline of the first quarter of 2009. As described in the Schrage Affidavit, Petitioners have kept the Extension Pipeline project alive pending resolution of an acceptable tariff structure by preserving the option of diverting the pipe ordered for the

Extension to other projects for which the pipe order has not yet become final. However, the window in which this project can be continued on that basis is finite, and if this issue is not resolved formally by February 1, 2008, Petitioners may be compelled to divert the pipe to other projects. Schrage Aff. (Exh. 3) at ¶ 37. In that event, the timing of the Extension will be pushed back, thereby delaying the benefits both to shippers seeking access to Patoka and to upstream shippers. Petitioners also expect to receive a decision regarding this project from the Illinois Commerce Commission on approximately the same timeline. *Id.* Accordingly, Petitioners respectfully request action on this Petition as soon as possible, but in any event not later than February 1, 2008.

B. The Commission Should Approve the Rate Parameters for the Extension Pipeline As Set Forth in the Tariff Agreement

In the circumstances presented here, the rate structure for the Extension Pipeline as set forth in the Tariff Agreement is reasonable, fully consistent with Commission policy and beneficial to all affected shippers.

As described above, for the 15-year term of the Tariff Agreement, EEC will set the rate from Flanagan to Patoka annually based on a cost of service calculation under Opinion 154-B, using stipulated inputs as shown in Attachment C to the Tariff Agreement. These stipulated inputs are all quite consistent with existing Commission policy (and in fact are in some respects more favorable to shippers than those Petitioners would seek in the absence of the Tariff Agreement).[17] Notably, these are the same cost of service inputs that were presented in the prior

[17] *E.g., Laclede Pipeline Co.*, 114 FERC ¶ 61,335 (2006) (accepting tariff with return on equity greater than 12 percent nominal / 9 percent real); *Northern Natural Gas Co.*, 119 FERC ¶ 61,035 at P 36 (2007) ("the Commission has traditionally provided returns of 14 percent [nominal] to new greenfield pipeline projects"); *SFPP, L.P.*, 86 FERC ¶ 61,022 at 61,102 (1999) (approving nominal return on equity of 14.27 percent, subject to adjustment for weighing) (subsequent history omitted); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078 at P 62 (2006)

Offer of Settlement. In that case, although a number of parties opposed the settlement, none questioned the propriety of the stipulated cost of service parameters set forth above. The Commission should therefore approve the overall structure for calculating the annual rates for the Extension Pipeline.

The other significant factor in computing the annual Extension rates is the throughput assumption used to calculate the rate, which is fixed at 340,000 bpd (*i.e.,* 85 percent of the initial annual average capacity of the Extension line). The stipulated 340,000 bpd figure constitutes an exception to the Commission's overall cost of service rules, which generally require use of a 12-month base period of actual volumes, adjusted for known and measurable changes. *See* 18 C.F.R. § 346.2(a)(ii). In this case, the 340,000 bpd stipulated volume figure is a key linchpin in the overall arrangement, since it is the standard against which deficits and surpluses are measured.

Use of the 340,000 bpd figure results in a stand alone rate that should recover exactly the cost of service of the Extension Pipeline as estimated at the beginning of each year if the pipeline transports 340,000 bpd over the course of the year. If the pipeline transports more than 340,000 bpd in a given year during the term of the Tariff Agreement, EEC is required to credit any surplus revenue either to Lakehead or to the following year's Extension rate, so that there is no possibility of an over-recovery by EEC relative to the agreed-upon cost of service. If the pipeline transports less than 340,000 bpd and therefore incurs a deficit, the deficit is included in the balancing account maintained between EEC and EELP, to be recovered in Lakehead's mainline rates. Any such deficit is required to be repaid later (with interest) out of surpluses

(indicating that 71 percent equity and 29 percent debt capital structure, although at "extreme" end, is not beyond "what we have approved in the past").