

INSIGHTS

FERC Punts on Closely Watched Request to Order a Shale Oil Pipeline Interconnection

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In an order issued on March 22, the Federal Energy Regulatory Commission ("FERC") once again declined to require an interstate oil pipeline to grant an interconnection requested by another pipeline. The order, issued in response to a complaint by High Prairie Pipeline, LLC ("High Prairie") against Enbridge Energy, Limited Partnership ("Enbridge"), culminated a closely-watched case in which High Prairie challenged Enbridge's refusal to grant the right to interconnect its planned pipeline with Enbridge's at Clearbrook, Minnesota on the terms requested by High Prairie. The order can be found [here](#). FERC has long held that under the Interstate Commerce Act ("ICA"), it lacks the authority to order an interstate oil pipeline to interconnect with another. High Prairie, whose pipeline would extend east from the North Dakota oil shale production areas, attempted to challenge that long-standing precedent with a complaint alleging that Enbridge was violating the ICA not by simply refusing to interconnect with High Prairie, but by discriminating against High Prairie and its potential shippers by maintaining an interconnection with an Enbridge affiliate at Clearbrook, while demanding terms for an interconnection with High Prairie that were unjust and unreasonable. Many in the oil production and pipeline businesses were watching closely for FERC's order on this complaint, to see whether FERC would find High Prairie's ICA discrimination claims strong enough to overcome its long-standing holding that a common carrier pipeline regulated under the ICA is not required to interconnect with another common carrier pipeline. Hopes for a definitive ruling on the question were dashed, however, when FERC dismissed High Prairie's complaint on the grounds that because negotiations remain ongoing regarding the terms and conditions under which Enbridge would allow the interconnect with High Prairie, it cannot be determined whether those terms are unjust or unreasonable, or whether Enbridge is indeed discriminating against High Prairie in violation of the ICA. FERC did provide two definitive rulings that may lend clarity to the questions surrounding oil pipeline interconnections under the ICA. First, FERC dispensed with High Prairie's claim that Enbridge must have an interconnection policy set forth in its FERC tariff; FERC held that since Enbridge is not offering interconnection services at the present time, and a pipeline is not required under the ICA to have "every adjunct that possibly could apply to transportation service" set forth in its tariff, Enbridge need not set an interconnection policy in its tariff. Second, FERC directly addressed High Prairie's argument that because Enbridge maintains an interconnection with its affiliate at Clearbrook, it is discriminating against High Prairie and its potential shippers by refusing to interconnect with it

except on terms characterized by High Prairie as unreasonable. On this point, FERC agreed with Enbridge that because the affiliate's interconnection was established decades ago "under conditions far removed from those that exist today,"⁷ High Prairie is not similarly situated with the Enbridge affiliate, and therefore that discrimination argument fails. FERC essentially decided to punt on the thorny questions raised by the High Prairie complaint, but nonetheless dismissed that complaint on the grounds that the question of whether Enbridge had refused to interconnect was not yet settled. Even so, in a concurring statement, FERC Commissioner Tony Clark reiterated the view that "the Commission simply does not have the statutory tools to adequately address the issues raised in High Prairie's complaint . . . [since] [w]e do not have explicit jurisdiction over the abandonment and interconnection of oil pipeline facilities."⁸ For the time being, some uncertainty will remain as to whether discrimination claims under the ICA like those raised by High Prairie will one day overcome this longstanding view that FERC lacks authority under the ICA to order pipeline interconnections. The case is High Prairie Pipeline, LLC v. Enbridge Energy, Limited Partnership, Docket No. OR12-17.