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173 FERC ¶ 61,155
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

White Cliffs Pipeline, L.L.C. Docket No. OR18-9-000

OPINION NO. 573

ORDER ON INITIAL DECISION

(Issued November 19, 2020)

1. This order addresses briefs on and opposing exceptions to an Initial Decision issued on September 12, 2019 concerning the application for market-based rate authority of White Cliffs Pipeline, L.L.C. (White Cliffs).[1] The Initial Decision found that White Cliffs lacks market power in the origin market and recommended that the Commission grant White Cliffs' application.

2. As discussed below, although we modify the Initial Decision's findings regarding the product market, we affirm the Initial Decision's finding that White Cliffs lacks market power in the applicable market and grant White Cliffs' application for market-based rate authority.

I. Background

3. White Cliffs owns and operates a 527-mile common carrier crude oil pipeline system that consists of two parallel 12.75-inch pipelines capable of transporting crude oil from Platteville, Colorado, and Healy, Kansas, to Cushing, Oklahoma (White Cliffs Pipeline).[2] White Cliffs is a joint venture majority-owned by Rose Rock Midstream, L.P., a wholly-owned subsidiary of SemGroup Corporation.[3] At the time White Cliffs filed for market-based rate authority, White Cliffs Pipeline had a capacity of 185,000 barrels per day. During the pendency of this case, White Cliffs converted one of its pipelines from transporting crude oil to transporting natural gas liquids, which reduced

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[1] *White Cliffs Pipeline, L.L.C.*, 168 FERC ¶ 63,033 (2019) (Initial Decision).

[2] *Id.* P 5.

[3] *Id.* P 7.

the capacity of crude oil that White Cliffs Pipeline can transport from 185,000 barrels per day to approximately 95,000 barrels per day.[4]

II. Procedural History

4. On December 22, 2017, White Cliffs filed an application for authorization to charge market-based rates for the transportation of crude oil in its proposed origin market of the Niobrara Shale Region and its proposed destination market of Tulsa-Bartlesville, Oklahoma.[5] The Liquids Shippers Group[6] (LSG) filed a protest to White Cliffs' application.

5. On May 17, 2018, the Commission issued an order finding that White Cliffs lacks market power in the destination market and therefore granting White Cliffs market-based rate authority for the destination market.[7] However, the Commission found that evidence in White Cliffs' application was insufficient to find that White Cliffs lacked market power in the origin market, and the Commission set that issue for hearing.[8]

6. The hearing commenced on March 19, 2019. On September 12, 2019, the Presiding Administrative Law Judge (ALJ) issued an Initial Decision finding that the appropriate origin market is the tight-oil producing portion of the Denver-Julesburg Basin (DJ Basin) and that White Cliffs lacks market power in this origin market. Because the Commission already determined that White Cliffs lacks market power in the destination market, the ALJ recommended that White Cliffs' application be granted.

7. On October 15, 2019, White Cliffs, Trial Staff, and LSG filed briefs on exceptions. On November 4, 2019, those same parties filed briefs opposing exceptions.

III. Discussion

8. As discussed below, we address the exceptions to the Initial Decision's findings regarding: (1) burden of proof, (2) the product market, (3) the geographic origin market,

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[4] Joint Statement of Stipulated Facts at 6.

[5] Initial Decision, 168 FERC ¶ 63,033 at P 8.

[6] In this proceeding, the Liquids Shippers Group comprises ConocoPhillips Company; HighPoint Resources Corporation; Kerr McGee Oil & Gas Onshore, LP; and Noble Energy, Inc.

[7] *White Cliffs Pipeline, L.L.C.*, 163 FERC ¶ 61,120, at P 2 (2018) (Hearing Order).

[8] *Id*. P 25.

(4) the competitive alternatives to White Cliffs in the origin market, and (5) market power measures.

A. Burden of Proof

1. Brief On Exceptions

9. In conducting the market power analysis, the ALJ relied primarily on evidence and analyses proposed by Trial Staff, instead of White Cliffs. LSG argues that by relying upon evidence presented by Trial Staff the Initial Decision failed to place the burden of proof on White Cliffs to support its request for an exemption from the generally applicable indexing methodology in order for White Cliffs to charge market-based rates. LSG claims that this burden is imposed upon the applicant by the Commission's market-based rate application requirements in 18 C.F.R. part 348 and Order No. 572, the Final Rule that adopted those regulations.[9]

2. Brief Opposing Exceptions

10. White Cliffs challenges LSG's claim that White Cliffs failed to satisfy the legal burden to demonstrate that it lacks market power.[10]

3. Commission Determination

11. We reject LSG's argument that by relying on evidence submitted by Trial Staff, the Initial Decision erred by failing to place the burden of proof on White Cliffs. The pipeline has the burden of proof in a market-based rate proceeding. However, the ALJ and the Commission may rely upon the full record when making a market-based rate determination.

12. The Commission's regulations at part 348 contain no requirement that the applicant pipeline, and only the applicant pipeline, may present evidence of a lack of market power. The regulations simply require that a pipeline filing an application for

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[9] LSG Brief on Exceptions at 7-11 & n.22 (citing *Market-Based Ratemaking for Oil Pipelines*, Order No. 572, FERC Stats. & Regs. ¶ 31,007 (1994) (cross-referenced at 69 FERC ¶ 61,103), *aff'd sub nom. Ass'n of Oil Pipelines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996)).

[10] White Cliffs Brief Opposing Exceptions at 10.

market-based rate authority provide certain information.[11] White Cliffs provided this information in its filing, but the Commission determined that the evidence was "insufficient to permit a determination that White Cliffs lacks market power in the origin market."[12]

13. Once the issue is set for hearing, the ALJ and the Commission can use all evidence submitted by all parties to support their findings. As noted by the ALJ, the Commission has previously considered and relied upon evidence submitted by parties other than the applicant pipeline, including evidence submitted by Trial Staff.[13] We see no difference in the proceeding here. Accordingly, we find that the Initial Decision did not fail to place the burden on White Cliffs by considering evidence presented by participants other than the pipeline.

B. Product Market Definition

1. Initial Decision

14. The Initial Decision found that the relevant product market for White Cliffs is the transportation or absorption of light crude oil.[14] In making this determination, the ALJ explained that almost all of the crude produced in the production fields served by White Cliffs, including the Wattenberg Field and tight-oil portion of the DJ Basin, is light crude.[15] Additionally, the ALJ found that all the non-light crude produced in these

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[11] The information includes: (1) the geographic market in which applicant carrier seeks authority, (2) the product market in which the applicant carrier seeks authority, (3) the applicant carrier's facilities and services, (4) competitive alternatives to the applicant carrier's facilities in the relevant geographic and product markets, (5) potential competition, (6) maps, (7) market power measures, (8) other factors, and (9) prepared testimony in support of the application. *See* 18 C.F.R. § 348.1(c) (2020).

[12] Hearing Order, 163 FERC ¶ 61,120 at P 25.

[13] Initial Decision, 168 FERC ¶ 63,033 at P 25 (citing *Seaway Crude Pipeline Co. LLC*, Opinion No. 563, 163 FERC ¶ 61,127, at P 24 (2018); *Williams Pipe Line Co.,* Opinion No. 391-A, 71 FERC ¶ 61,291, at 62,148 (1995); *Guttman Energy, Inc. v. Buckeye Pipe Line Co., L.P.*, Opinion No. 558, 161 FERC ¶ 61,180, at PP 214, 221, 279-281, 303 (2017) *(Guttman)*).

[14] Initial Decision, 168 FERC ¶ 63,033 at P 34.

[15] *Id*. P 63.

geographic areas is aggregated with light crude and then shipped as light crude.[16] Because light crude so predominates in the DJ Basin, the ALJ therefore concluded that cross-elasticity (i.e., the consideration of other alternative products that could limit White Cliffs' ability to exercise market power)[17] is not a relevant factor.[18] Relying upon Seaway I, the ALJ stated that only products produced in the relevant production fields can be considered under Commission policy.[19]

15. However, the ALJ went on to consider cross-elasticity "out of an abundance of caution."[20] Based upon this analysis, the ALJ determined that "the weight of the evidence does not show cross-elasticity of demand between the transportation . . . of light and heavy crude in [the] origin market."[21] In conducting this analysis, the ALJ noted that White Cliffs only offers a tariff rate to transport light crude oil and that White Cliffs has never shipped a dedicated batch of heavy crude.[22] The ALJ noted that although White Cliffs could modify its pipeline system to allow for transport of heavier grades of crude, there is no evidence that White Cliffs plans to modify its system at this time.[23]

2. **Briefs On Exceptions**

16. White Cliffs and Trial Staff argue that the Initial Decision erred in defining the product market as the transportation of only light crude oil, rather than all grades of crude oil.[24] White Cliffs claims that the Initial Decision's conclusion ignores the fact that refineries located in both the origin and destination markets can process both light and heavy crude. Therefore, White Cliffs argues, all types of crude can be used to discipline

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[16] *Id*.

[17] *Id*. P 50.

[18] *Id*. P 64.

[19] *Id.* PP 63-64 (citing *Enterprise Prod. Partners L.P.*, 146 FERC ¶ 61,115, at P 43 (2014) (Seaway I)).

[20] *Id*. P 64.

[21] *Id*. P 67.

[22] *Id*. P 55.

[23] *Id*. P 56.

[24] White Cliffs Brief on Exceptions at 7; Trial Staff Brief on Exceptions at 9-12.

the exercise of market power in the relevant market, even if White Cliffs and the other pipelines ship predominately light crude.[25]

17. White Cliffs argues that the ALJ's determination is also inconsistent with Commission precedent, which would support consideration of the fact that refineries in both the origin and destination markets have the ability to process both light and heavy crude.[26]

18. White Cliffs and Trial Staff argue that although the ALJ recognized that the test for a product market consists of (1) the products transported by the pipeline and (2) any other product that could discipline the exercise of market power over those products, the ALJ applied only the first part of that test and disregarded the second part.[27] Specifically, White Cliffs and Trial Staff contend that the Initial Decision misreads and misapplies Seaway I. White Cliffs argues that when Seaway I is read in context with Opinion No. 360,[28] Order No. 572, and the *Seaway* Initial Decision,[29] it is clear that the Commission did not intend to limit the product market analysis in this manner. White Cliffs also points to Order No. 572 to support its challenge to the Initial Decision's finding. There the Commission explained that a product market analysis should also consider "non-transportation factors, such as competition from refiners."[30]

3. **Briefs Opposing Exceptions**

19. In its brief opposing exceptions, LSG challenges White Cliffs' and Trial Staff's exceptions that the ALJ erred in limiting the product market to the transportation of light crude oil.[31] LSG supports its position by noting that White Cliffs is only capable of

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[25] White Cliffs Brief on Exceptions at 7-8, 20-21.

[26] *Id*. at 6-9, 14.

[27] White Cliffs Brief on Exceptions at 8-9 (citing Initial Decision, 168 FERC ¶ 63,033 at P 45; Seaway I, 146 FERC ¶ 61,115 at P 44), Trial Staff Brief on Exceptions at 9-12.

[28] *Buckeye Pipe Line Co., L.P.*, Opinion No. 360, 53 FERC ¶ 61,473 (1990).

[29] *Seaway Crude Pipeline Co. LLC*, 157 FERC ¶ 63,024 (2016) (*Seaway* Initial Decision).

[30] White Cliffs Brief on Exceptions at 11 (citing Order No. 572, FERC Stats & Regs. ¶ 31,007 at 31,190).

[31] LSG Brief Opposing Exceptions at 2.

transporting light crude oil due to storage limitations and that no other pipelines serving the Wattenberg Field area can transport anything other than light crude.[32] LSG also challenges the claim that there is sufficient evidence to demonstrate that cross-elasticity of demand supports a finding that the product market includes heavy crude.[33] Additionally, LSG disputes White Cliffs' claims that the ability of refineries to process heavy crude is relevant.[34]

4. **Commission Determination**

20. We modify the Initial Decision's findings regarding the product market. We find that the appropriate product market definition should be the transportation or absorption of all grades of crude oil, instead of the transportation or absorption of light crude only.

21. The appropriate product market in a market-power analysis includes: (1) those services for which the applicant seeks to charge market-based rates, and (2) any product (including transportation services) that could discipline the pipeline's exercise of market power.[35]

22. We acknowledge that White Cliffs presently transports only light crude. However, alternatives in the origin market that can move or process both light and heavy crude could increase their consumption of light crude to discipline an exercise of market power by White Cliffs.[36] Accordingly, the product market should be defined to include the transportation or absorption of all crude oil.[37]

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[32] *Id*. at 5-7.

[33] *Id*. at 8-9.

[34] *Id*. at 11-14.

[35] Seaway I, 146 FERC ¶ 61,115 at P 44.

[36] *See* Initial Decision, 168 FERC ¶ 63,033 at P 57 (rail facilities located in the Wattenberg Field and DJ Basin are capable of transporting all grades of crude oil); *id.* PP 59-60 (pipelines with access to the DJ Basin transport heavy crude oil); *id.* PP 61-62 (refineries in the DJ Basin can process heavy crude). The ALJ acknowledged that some refiners can switch between light and heavy crude. *Id.* PP 58-62.

[37] In concluding that heavy crude transportation (or absorption) should be included in the product market definition, we note that the product market definition is separate from the identification of good competitive alternatives to be included in the market power analysis, discussed below in section III.D.

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23. Notwithstanding the statement in Seaway I relied upon by the ALJ,[38] we clarify that the Commission does not restrict the product market definition for crude oil pipelines to solely the transportation of products produced in the production fields in the origin market. For example, even if heavy crude is not produced in the relevant production fields, pipelines or railroads currently moving both light and heavy crude may move through the origin market and, as discussed above, could increase their volumes of light crude to discipline an exercise of market power by a pipeline that moves only light crude. Thus, the absence of heavy crude production in the production fields in the origin market does not necessarily preclude consideration of the transportation or absorption of heavy crude in defining the product market.

C. Geographic Market Definition

1. Initial Decision

24. The Initial Decision found that the appropriate geographic origin market in this case is the DJ Basin as defined by Trial Staff.[39]

25. White Cliffs proposed an origin market of the Niobrara Shale Region as defined by the U.S. Energy Information Administration, which is comprised of thirty-seven counties in Colorado, Wyoming, Kansas, and Nebraska.[40] LSG proposed an origin market of the Wattenberg Field production area as encompassed by the following six counties in Colorado: Adams, Boulder, Broomfield, Denver, Larimer, and Weld.[41] Trial Staff argued that the appropriate geographic origin market should be the eighteen counties that encompass the tight-oil production portion of the DJ Basin.[42] This would include the production area proposed by LSG and twelve surrounding counties in northeast Colorado, southwest Wyoming, and southwest Nebraska.[43]

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[38] 146 FERC ¶ 61,115 at P 44 (stating "In the context of a crude oil origin market, only transportation of those products available from the production fields (i.e., the geographic market) is to be included in the product market.").

[39] Initial Decision, 168 FERC ¶ 63,033 at P 77.

[40] Ex. WCP-0009 at 30:17-18 (Webb).

[41] Joint Statement of Stipulated Facts at 43.

[42] *Id*. at 44.

[43] Initial Decision, 168 FERC ¶ 63,033 at P 82.

26. Trial Staff performed a hypothetical monopolist test that included a netback analysis to identify the marginal supplier and define the origin market.[44] Based on Trial Staff's demonstration that shippers could use alternatives within the DJ Basin to discipline a significant increase in price by White Cliffs, the Initial Decision adopted Trial Staff's geographic market definition. The Initial Decision rejected LSG's proposal as too narrow[45] and White Cliffs' proposal as too broad.[46]

2. Briefs On Exceptions

27. LSG filed exceptions to the Initial Decision's finding on the appropriate geographic origin market on the basis that trucking does not serve as a reasonable alternative to pipeline transportation in evaluating the expanded origin market beyond the LSG-proposed Wattenberg Field.[47] LSG argues that there is no evidence that shippers would or could use trucking as an alternative in the event of a supra-competitive price increase by White Cliffs.[48]

28. LSG also argues that the Initial Decision erred by misapplying the hypothetical monopolist test which led to the adoption of an erroneous geographic origin market and resulted in certain possible alternatives erroneously being found to be competitive alternatives.[49] LSG concludes that if the ALJ had properly applied the hypothetical monopolist test, the Initial Decision would have determined that the Wattenberg Field is the appropriate geographic origin market.[50]

3. Briefs Opposing Exceptions

29. Trial Staff and White Cliffs responded to LSG's assertion that the Initial Decision improperly considered trucking. They argue that the Commission has previously held that trucking serves as a viable alternative to pipelines and should be included in any analysis of potential alternatives in determining the proper geographic market for a

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[44] *Id.* P 83.

[45] *Id.* PP 107-108, 116.

[46] *Id.* PP 111-112.

[47] LSG Brief on Exceptions at 11, 13.

[48] *Id*.

[49] *Id.* at 14.

[50] *Id*. at 19.

pipeline. Trial Staff and White Cliffs rebut LSG's argument that considering trucking as an alternative does not take into account the "real world" circumstances by arguing that the distance from the producing wells for trucking transport was found to be relatively short. They further argue that White Cliffs' Platteville origin point currently receives crude oil delivered by truck and therefore these volumes could be transported by truck to other locations as well.[51]

30. Trial Staff and White Cliffs also argue that the ALJ's reliance on and application of the hypothetical monopolist test is consistent with Commission precedent.[52]

4. Commission Determination

31. We find that the Initial Decision correctly defined the geographic origin market in this case, as identified by Trial Staff.[53]

32. Under Commission policy, the appropriate geographic origin market for an oil pipeline is "the production field where the crude oil being shipped . . . is derived."[54] Additionally, in markets where inbound pipelines also provide crude oil from other production fields that is then shipped on the pipeline, those additional production fields can be included in the geographic origin market.[55] The Commission has also stated that

[51] Trial Staff Brief Opposing Exceptions at 28; White Cliffs Brief Opposing Exceptions at 21-23.

[52] Trial Staff Brief Opposing Exceptions at 34 (citing Opinion No. 563, 163 FERC ¶ 61,127 at PP 27-29; *Guttman*, 161 FERC ¶ 61,180 at P 183); White Cliffs Brief Opposing Exceptions at 21.

[53] White Cliffs "agrees that the DJ Basin origin market is a reasonable geographic market for this proceeding" and that "Trial Staff's application of the hypothetical monopolist test to define the geographic origin market is also reasonable." White Cliffs Brief on Exceptions at 23. Although White Cliffs states it "is not challenging the [Initial Decision's] findings and conclusions in this regard," White Cliffs states that "to the extent the [Initial Decision] may be read as rejecting the method used by White Cliffs to define the geographic origin market, White Cliffs excepts to the [Initial Decision's] findings in this regard." *Id.* Because we find that the Initial Decision properly defined the geographic market as the DJ Basin and White Cliffs does not challenge that determination, we need not address whether the Initial Decision erred in rejecting White Cliffs' proposed method for defining the geographic origin market.

[54] Seaway I, 146 FERC ¶ 61,115 at P 39.

[55] *Id*.

the geographic market can further expand to include alternatives to the pipeline that are available to shippers in the event the applicant pipeline raises rates above competitive levels.[56] This evaluation of alternatives includes both the possible alternatives that are currently being used and the possible alternatives that are available but not currently being used.[57] One method to identify these alternatives is a hypothetical monopolist test. A hypothetical monopolist test asks if a pipeline could profitably impose a small but significant and non-transitory increase in price (SSNIP) in a defined market. If the pipeline could profitably impose a SSNIP in the proposed market, the market is properly defined, and if a SSNIP would be unprofitable because shippers would respond by purchasing the product from outside the proposed market, the proposed market definition is too narrow.[58]

33. We find unpersuasive LSG's argument that the ALJ inappropriately adopted a hypothetical monopolist test to expand the geographic market beyond the Wattenberg Field.[59] As discussed above, Commission precedent has previously permitted the expansion of a geographic market to include alternatives that are available to shippers in the event a pipeline were to impose a supra-competitive price increase.[60]

34. Contrary to LSG's assertions, Commission precedent supports including trucking and other feeder pipelines in a market power analysis.[61] The ALJ's finding that the distances used for trucking as an alternative were relatively short appropriately responded to arguments that trucking was too costly to be a reasonable alternative.[62] Although this

[56] Opinion No. 563, 163 FERC ¶ 61,127 at P 27; Seaway I, 146 FERC ¶ 61,115 at P 27; *see also Guttman*, 161 FERC ¶ 61,180 at P 112.

[57] Opinion No. 563, 163 FERC ¶ 61,127 at P 27.

[58] *Guttman*, 161 FERC ¶ 61,180 at P 218; 2010 DOJ-FTC Horizontal Merger Guidelines § 4.1.1 (2010).

[59] LSG Brief on Exceptions at 17.

[60] Opinion No. 563, 163 FERC ¶ 61,127 at P 27; *Guttman*, 161 FERC ¶ 61,180 at P 112, 183; *see also Seaway* Initial Decision, 157 FERC ¶ 63,024 at P 66.

[61] Opinion No. 563, 163 FERC ¶ 61,127 at PP 27-29.

[62] Initial Decision, 168 FERC ¶ 63,033 at P 115.

may be true over long distances, such concerns do not apply to the relatively short distances at issue here.[63]

D. Identification of Competitive Alternatives

1. Initial Decision

35. The ALJ identified several competitive alternatives to White Cliffs in the geographic origin market.[64] The ALJ's analysis included an examination both of alternatives that are currently used and alternatives that are not currently used but are potentially available as alternatives.[65]

36. Specifically, the ALJ found that a preponderance of the evidence demonstrates that the following five alternatives are "used alternatives": Pony Express Pipeline Northeast Colorado Lateral (NECL), Grand Mesa Pipeline, Saddlehorn Pipeline, the Plains Tampa Rail Terminal, and the Suncor Refinery.[66] In determining that the three pipelines (Pony Express NECL, Grand Mesa, and Saddlehorn) were not only used alternatives but also good alternatives, the ALJ specifically addressed the question of how to evaluate as competitive alternatives pipelines that have negotiated rates. In response to LSG's argument that negotiated rates are not "regulated rates," the ALJ found that Commission regulations clearly indicate that negotiated rates are, in fact, regulated rates.[67] Based on this finding, coupled with the Commission precedent that used alternatives are considered good alternatives, the ALJ concluded that the weight of the evidence supports a finding that the used pipeline alternatives can be assumed to be good alternatives in terms of price.[68]

37. The ALJ also analyzed what unused alternatives can be considered good alternatives. The ALJ reviewed a netback analysis presented by Trial Staff that determined eight unused alternatives were competitive in terms of price.[69] The ALJ

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[63] *See* Opinion No. 563, 163 FERC ¶ 61,127 at PP 27-29.

[64] Initial Decision, 168 FERC ¶ 63,033 at P 119.

[65] *Id*. P 130.

[66] *Id.* P 136.

[67] *Id.* P 148.

[68] *Id.* P 154.

[69] *Id.* P 159.

determined that Trial Staff's methodology for determining a competitive price proxy, which included a sensitivity analysis, was reasonable and consistent with Commission precedent.[70]

38. The ALJ was not persuaded by LSG's expert, Dr. Arthur. The ALJ found Dr. Arthur's proposed estimates of long-run marginal cost, which LSG claimed showed that none of the eight potentially usable alternatives identified by Trial Staff were good alternatives in terms of price,[71] to be sensitive to data inputs and prone to errors.[72] Additionally, Dr. Arthur's long-run marginal cost analysis used cost data from White Cliffs' various FERC Form Nos. 6 and 6-Q reports, which included data that the ALJ found difficult to rely upon due to the aggregation of data required for such financial reports.[73]

39. The ALJ concluded that the preponderance of the evidence supported the use of Trial Staff's analysis.[74] Based upon that finding, the Initial Decision found the following competitive unused alternatives to nevertheless be usable: (1) Pony Express Pipeline Mainline (accessible through the Sinclair Logistics, LLC Pipeline), (2) Platte Pipeline, (3) HollyFrontier Refinery, (4) Hudson Rail Terminal, (5) Musket Rail Terminal, (6) Niobrara Crude Rail Terminal, (7) Cheyenne Crude Rail Terminal, and (8) Cheyenne Logistics Hub Rail Terminal.[75]

2. Briefs On Exceptions

40. LSG challenges the Initial Decision's findings regarding the competitive alternatives to White Cliffs in the geographic origin market. First, LSG argues the Initial Decision erred by concluding that a used alternative is a good alternative in terms of price where the applicant pipeline and alleged pipeline alternatives have negotiated rates, as opposed to cost-based rates.[76] LSG argues that rates for all pipelines in the origin market

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[70] *Id*. P 166.

[71] *Id.* P 160.

[72] *Id*. P 169.

[73] *Id*.

[74] *Id*. P 173.

[75] *Id*. P 244.

[76] LSG Brief on Exceptions at 21.

were set by negotiation and cannot therefore be presumed to reflect competitive levels.[77] As part of this assertion, LSG argues that contracts between committed shippers and the pipeline for committed service that serve as the basis for the negotiated rates often include duty-to-support clauses that prevent parties from challenging the contract negotiated rate.[78]

41. Second, LSG argues that the Initial Decision erred by adopting Trial Staff's netback analysis on the basis that negotiated rates are competitive rates, which led the ALJ to erroneously find certain unused alternatives to be competitive in terms of price. LSG further argues that: (1) the results of Trial Staff's netback analysis are not consistent with what is actually occurring in the market,[79] (2) the analysis did not account for whether there is a market for volumes produced in the Wattenberg Field area at certain alternatives,[80] and (3) the analysis used a non-representative inflated price differential between the Louisiana Light Sweet (LLS) price and the West Texas Intermediate (WTI) price.[81]

42. Third, LSG argues that the ALJ incorrectly dismissed Dr. Arthur's estimate of long-run marginal costs.[82]

43. Finally, LSG challenges the ALJ's finding that the Suncor Refinery, Pony Express Pipeline NECL, Platte Pipeline, and HollyFrontier Refinery are available alternatives to White Cliffs Pipeline.[83] LSG argues that the mere possibility that new shippers can obtain capacity on a constrained pipeline via the prorationing policy does not discipline a rate increase above a competitive level.[84]

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[77] *Id*. at 23.

[78] *Id*. at 24-25.

[79] *Id*. at 41.

[80] *Id.* at 41-42.

[81] *Id.* at 42.

[82] *Id.* at 30.

[83] *Id*. at 43.

[84] *Id*. at 44.

3. Briefs Opposing Exceptions

44. White Cliffs and Trial Staff rebut LSG's exception to the Initial Decision's finding that pipelines in the origin market should be considered good alternatives even though their rates are negotiated contract rates and related uncommitted rates.[85] They argue that this finding is consistent with both Commission precedent and economic theory and that LSG misstates Commission precedent in its claim that such a negotiated rate is not a regulated rate.[86] White Cliffs and Trial Staff also dispute LSG's assertion that the ALJ erroneously adopted the competitive price proxy by accepting Trial Staff's netback analysis.[87] Finally, they contend that the Initial Decision correctly concluded that specific alternatives in the origin market are good alternatives in terms of price, including the Suncor Refinery, the HollyFrontier Refinery, the Pony Express Pipeline NECL, and the Platte Pipeline.[88]

45. White Cliffs further challenges LSG's calculation of the competitive price based on estimates of long-run marginal cost and asserts that LSG's analysis is error-prone and produces a result that is inconsistent with market behavior.[89]

4. Commission Determination

46. We find that the Initial Decision properly found the following to be competitive alternatives to White Cliffs Pipeline in the geographic origin market: (1) Saddlehorn Pipeline, (2) Grand Mesa Pipeline, (3) Pony Express Pipeline NECL, (4) Pony Express Pipeline Mainline (accessible through the Sinclair Logistics, LLC Pipeline), (5) Platte Pipeline, (6) Suncor Refinery, (7) HollyFrontier Refinery, (8) Plains Tampa Rail Terminal, (9) Hudson Rail Terminal, (10) Musket Rail Terminal, (11) Niobrara Crude Rail Terminal, (12) Cheyenne Crude Rail Terminal, and (13) Cheyenne Logistics Hub Rail Terminal.

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[85] White Cliffs Brief Opposing Exceptions at 29, 47-49; Trial Staff Brief Opposing Exceptions at 39, 46-52.

[86] White Cliffs Brief Opposing Exceptions at 46-52; Trial Staff Brief Opposing Exceptions at 40-45.

[87] White Cliffs Brief Opposing Exceptions at 36; Trial Staff Brief Opposing Exceptions at 45.

[88] White Cliffs Brief Opposing Exceptions at 52-61; Trial Staff Brief Opposing Exceptions at 53-62.

[89] White Cliffs Brief Opposing Exceptions at 40.

47. Under Commission policy, potential competitive alternatives to a pipeline may include other pipelines, rail transport facilities, trucking facilities, refineries, and local consumption.[90] A competitive alternative "must possess the ability to discipline, or prevent, a potential increase in price above the competitive levels [and] . . . be available to receive product diverted from the applicant in response to a price increase, and must be of the same quality as the applicant."[91] There are several methods for determining whether an alternative is a good alternative in terms of price, including a detailed price analysis such as a netback analysis.[92] A netback analysis can identify used alternatives and unused alternatives that are available and considered good alternatives.[93] The Commission has routinely affirmed that an alternative that is currently being used by a shipper or producer is presumed to be a good alternative.[94]

48. First, regarding the used alternatives adopted by the Initial Decision, we reject LSG's argument that pipelines with negotiated rates should not be considered as good alternatives. LSG incorrectly claims that the Commission concluded in *Guttman* that the presumption that a used alternative is a good alternative in terms of price does not apply unless the market contains alternatives with rates set on a cost-of-service basis.[95] In *Guttman*, the Commission addressed a complaint against a pipeline that had existing market-based rate authority and found that because the markets contained alternatives with existing market-based rates, the Commission could not assume that a used alternative is a good alternative in terms of price.[96] The Commission reasoned that in

[90] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,191; Seaway I, 146 FERC ¶ 61,115 at P 45.

[91] Seaway I, 146 FERC ¶ 61,115 at P 45 (citing *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385 (1994)).

[92] *Guttman*, 161 FERC ¶ 61,180 at PP 112-113.

[93] Seaway I, 146 FERC ¶ 61,115 at P 65.

[94] *See* Opinion No. 563, 163 FERC ¶ 61,127 at PP 42-44; *Enterprise Prods. Partners L.P.*, 152 FERC ¶ 61,203, at P 34 (2015); Seaway I, 146 FERC ¶ 61,115 at PP 55-56.

[95] *See* LSG Brief on Exceptions at 22.

[96] *Guttman*, 161 FERC ¶ 61,180 at PP 125-127; *order on reh'g*, Opinion No. 558-A, 164 FERC ¶ 61,025 at PP 25-27 (2018).

those circumstances, the Commission could fall into the "cellophane trap"[97] if it ignored the possibility that the presence of a monopolistic price could result in the improper inclusion of alternatives in its market-power analysis.[98] Contrary to LSG's assertions, the Commission did not hold that the presumption that a used alternative is a good alternative in terms of price can only apply where the alternatives in the market have cost-of-service rates, as opposed to other regulated rates such as negotiated rates.

49. Here, unlike in *Guttman*, it is appropriate to rely on evidence of shipper behavior in the market to implicitly demonstrate that an alternative is economic or profitable to that shipper.[99] We find that it is reasonable to conclude that the negotiated rates in the market do not reflect an exercise of market power. The contract rates in the market were freely negotiated between the pipelines and the shippers using an open season process pursuant to the Commission's committed rate policy.[100] As the ALJ found, "the parties contracting for negotiated rates are sophisticated business people."[101] The Commission has explained that "[i]t would simply not be rational for a shipper, who engages in transactions at 'arms-length,' to use an alternative that was not profitable in that it produced a negative netback."[102] Likewise, because the contracts were freely negotiated, we find no reason to believe that any duty-to-support clauses in these freely negotiated contracts inhibited competition. The same reasoning also applies to rates set under section 342.2 of the Commission's regulations based upon the agreement of a non-

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[97] The cellophane trap or cellophane fallacy describes a type of incorrect reasoning used in market power analyses. The term arose in *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). The fallacy arises where a firm sells a product with few substitutes, which in turn allows the firm to increase the price of that product. The decision has been invoked when referring to a potential flaw in market analyses that fail to evaluate whether demand elasticity is a result of a company already charging a monopoly price, which would increase the likelihood that consumers would switch from one product to another but would not be indicative of a competitive market. *Guttman*, 161 FERC ¶ 61,180 at P 125 n.313 (citing *Enterprise Prod. Partners L.P.*, 152 FERC ¶ 61,203, at P 22 (citing *U.S. v. Eastman Kodak Co.*, 63 F.3d 95, 105 (2d Cir. 1995)).

[98] *Id.*

[99] *See Enterprise Prods. Partners* L.P., 152 FERC ¶ 61,203 at P 27.

[100] *See Express Pipeline P'ship*, 76 FERC ¶ 61,245 (1996); *Seaway Crude Pipeline Co. LLC*, 146 FERC ¶ 61,151 (2014) (*Seaway*).

[101] Initial Decision, 168 FERC ¶ 63,033 at P 153.

[102] *Enterprise Prods. Partners L.P.*, 152 FERC ¶ 61,203 at P 34.

affiliated shipper.[103] Such rates are presumed competitive because they are freely negotiated between the pipelines and shippers. Further, the Commission has established protections to address the concern that a pipeline exercising market power could dictate the rate it will charge in filing a negotiated rate: a rate set under section 342.2 of the Commission's regulations must be agreed to by a non-affiliated shipper that intends to use the service and any protest to such rates triggers the requirement of a cost-of-service filing.[104] Thus, the presence of negotiated committed and uncommitted rates in the market does not undermine the application of the presumption that a used alternative is a good alternative.[105]

50. Second, regarding the "unused" alternatives adopted by the ALJ, we disagree with LSG's assertion that the Initial Decision erroneously adopted Trial Staff's netback analysis and thereby incorrectly concluded that certain unused alternatives are competitive in terms of price. We find the ALJ's analysis of competitive alternatives using Trial Staff's netback analysis consistent with Commission precedent.[106] Regarding LSG's arguments that Trial Staff's netback analysis is flawed, we find that the ALJ properly addressed and rejected LSG's challenges to Trial Staff's netback analysis. The ALJ correctly found that other, non-price factors can influence a shipper's choice of

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[103] 18 C.F.R. § 342.2 (2020).

[104] *Id.*; Initial Decision, 168 FERC ¶ 63,033 at P 151; *see also Revisions to Oil Pipeline Reguls. Pursuant to the Energy Pol'y Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985 (1993) (cross-referenced at 65 FERC ¶ 61,109), *order on reh'g,* Order No. 561-A, FERC Stats. & Regs. ¶ 31,090 (1994) (cross-referenced at 68 FERC ¶ 61,138), *aff'd sub nom. AOPL v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996); *Seaway*, 146 FERC ¶ 61,151 at PP 29-30.

[105] For the same reasons, we reject LSG's argument that Trial Staff's netback incorrectly identified the marginal supplier because a negotiated uncommitted rate cannot be a reasonable proxy for a competitive rate. *See* Seaway I, 146 FERC ¶ 61,115 at P 50 n.56 ("While prior cases have used the applicant's tariff rate as a proxy, there has been no requirement that the tariff rate be cost based. Tariff rates that are negotiated rates or settlement rates have been used as proxies.").

[106] *Seaway*, 146 FERC ¶ 61,151 at P 67 ("A traditional netback analysis can . . . be introduced by a pipeline applicant or any other participant to demonstrate the existence of, or lack of, market power."); *Guttman*, 161 FERC ¶ 61,180 at PP 111-113.

alternatives.[107] The ALJ also found that Trial Staff's use of the Wyoming Sweet benchmark was an appropriate proxy for a price producers would receive for sales to local refineries.[108] Finally, the ALJ recognized that Trial Staff's use of the average differential between the LLS price and WTI price for the year ending August 2018 is both "consistent with the Commission preference for using recent information in market evaluations,"[109] and provides for "consistent time periods for all the inputs" whereas LSG's proposed five-year period would be inconsistent with the other inputs that use a one-year period.[110] Therefore, we are unpersuaded by LSG's argument that the netback analysis the ALJ relied upon is flawed.

51. Third, the ALJ properly declined to rely upon Dr. Arthur's high-level estimates of marginal costs based on information from FERC Form No. 6 annual reports rather than observed marginal netback or marginal delivered price.[111] An analysis such as Dr. Arthur's does not produce a sufficiently reliable calculation. As the ALJ noted, the Commission has explained that "while the data required to determine actual marginal cost of every market participant (or potential market participant) may be difficult to acquire . . . identifying the marginal netback or marginal delivered price does not raise the same evidentiary hurdles."[112] The Commission has recognized that data reported on FERC Form No. 6 annual reports can be difficult to rely upon for purposes of evaluating market power because of the aggregated nature of such data.[113] We agree with the Initial

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[107] Initial Decision, 168 FERC ¶ 63,033 at P 175; *see also Guttman*, 161 FERC ¶ 61,180 at P 142 ("[T]he requirement that non-price factors be taken into account merely reflects the common sense notion that market participants do not look solely at transportation rates and commodity prices when making purchasing decisions."). The ALJ found that Trial Staff's netback analysis included a sensitivity analysis that allowed for consideration of non-price factors. Initial Decision, 168 FERC ¶ 63,033 at P 166.

[108] Initial Decision, 168 FERC ¶ 63,033 at P 177.

[109] *Id.* P 178 (citing *SFPP*, L.P., 84 FERC ¶ 61,338 at 62,498 & n.24 (citing *1992 DOJ-FTC Merger Guidelines* § 3.2)); *see also Guttman*, 161 FERC ¶ 61,180 at P 241 ("[T]he determination of whether a pipeline has market power is a fact-specific inquiry that should be determined on a case-by-case basis with the most current information available.").

[110] *Id.*

[111] *Id.* PP 168-170 (citing *Guttman*, 161 FERC ¶ 61,180 at P 114).

[112] *Guttman*, 161 FERC ¶ 61,180 at P 114.

[113] *See Guttman*, 161 FERC ¶ 61,180 at P 118.

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Decision's finding that Dr. Arthur's analysis based on high-level estimates of marginal costs is flawed.

52. Finally, we reject LSG's arguments that the ALJ erred in finding that certain alternatives were available. As the ALJ notes, the Commission has found that inclusion of used alternatives is permitted even if such alternatives are being used to their full capacity,[114] and the Commission has found that the Herfindahl-Hirschman Index (HHI)[115] "calculates market concentration by summing the squares of individual market shares of all firms in the market . . . not by summing the squares of each seller's unused capacity."[116] By this reasoning, the market share of an alternative also should not be excluded if it is at full capacity.

E. Market Power Measures

1. Initial Decision

53. The Initial Decision found that White Cliffs' HHI for the DJ Basin origin market is 1,556 and White Cliffs' market share is 10.9%.[117] The Initial Decision adopted the market statistics sponsored by Trial Staff, noting they would not vary if LSG's narrower product market of light crude were used instead of Trial Staff's broader product market definition.[118] The Initial Decision concluded that the weight of the evidence and the current market statistics demonstrate that White Cliffs does not possess market power in the origin market.[119]

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[114] Initial Decision, 168 FERC ¶ 63,033 at P 225 (citing *Guttman*, 161 FERC ¶ 61,180 at PP 211, 214; *Enterprise Prods. Partners L.P.*, 152 FERC ¶ 61,203 at App.) (including pipelines that were at capacity).

[115] HHI measures the likelihood of a pipeline exerting market power in concert with other sources of supply. HHI equals the sum of the squared market shares of all competitors in the market. The HHI can range from just above zero, where there are a very large number of competitors in the market, to 10,000, where the market is served by a monopolist.

[116] *Id*. (citing Seaway I, 146 FERC ¶ 61,115 at P 74 n.98).

[117] Initial Decision, 168 FERC ¶ 63,033 at P 279.

[118] *Id.* P 280.

[119] *Id*. PP 281-282, 294.

54. Because the HHI and market share percentages did not present a close case, the ALJ found that it was not necessary to consider secondary market statistics.[120] Nonetheless, the ALJ found that the excess capacity figures supported the conclusion that White Cliffs does not possess market power.[121] The ALJ found that LSG's allegations that future production would surpass capacity in the origin market were speculative and unpersuasive. She concluded that the evidence shows that production in the region has been increasing but also indicates that capacity is increasing as well.[122]

2. Briefs On and Opposing Exceptions

55. LSG argues that when the ALJ's market power analysis is adjusted to correct for the geographic market and competitive alternative errors, the resulting HHI is well above the threshold level of concern of 2,500.[123] LSG argues for an HHI of 3,392 based on limiting the alternatives according to its long-run marginal cost analysis.[124] Aside from the market statistics, LSG argues that production in the Wattenberg Field is increasing and that higher production may soon cause capacity constraints and affect the market power measures.[125]

56. Trial Staff and White Cliffs argue that LSG's challenges to the market statistics are based on LSG's improper geographic market and exclusion of competitive alternatives.[126] Trial Staff and White Cliffs also argue that the ALJ correctly declined to consider LSG's speculative allegation that production will surpass capacity in the origin market.[127]

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[120] *Id*. P 284.

[121] *Id.* P 288.

[122] *Id.* P 292.

[123] LSG Brief on Exceptions at 59-60.

[124] *Id*.

[125] *Id*. at 61.

[126] Trial Staff Brief Opposing Exceptions at 64-65; White Cliffs Brief Opposing Exceptions at 61-62.

[127] Trial Staff Brief Opposing Exceptions at 66-67; White Cliffs Brief Opposing Exceptions at 62-63.

3. **Commission Determination**

57. We reject LSG's arguments that the Initial Decision adopted erroneous market power figures. Those arguments hinge on LSG's arguments challenging the geographic market and competitive alternatives that we reject above. Because we agree with the ALJ's findings regarding the geographic market and competitive alternatives as discussed above, we find that the ALJ appropriately adopted Trial Staff's market statistics.[128] Trial Staff's HHI of 1,556 and market share of 10.9% show that the market is not highly concentrated and that White Cliffs does not possess significant market power.[129]

58. In response to LSG's argument that the market power analysis fails to take into account changes in the market in the coming years, we find such argument to be based on speculation and unsupported by evidence.[130]

IV. **Conclusion**

59. For the forgoing reasons, we find that the appropriate product market in this case is the transportation of all grades of crude and the appropriate geographic origin market is the tight-oil producing portion of the DJ Basin. Based on the market power analysis in this case, we find that White Cliffs does not possess significant market power, and we therefore approve White Cliffs' application for market-based rate authority in the origin market.

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[128] As discussed above, Trial Staff also correctly applied a product market of all crude oil, but the product market determination did not affect the market statistics. Initial Decision, 168 FERC ¶ 63,033 at P 280.

[129] Commission precedent supports the granting of an application for market-based rate authority in each case where the HHI is 1,800 or less and in most cases where the HHI is less than 2,500. *See, e.g.*, *Marketlink, LLC*, 169 FERC ¶ 61,194, at P 25 (2019); *Guttman*, 161 FERC ¶ 61,180 at P 298; Opinion No. 563, 163 FERC ¶ 61,127 at PP 80-81; *Colonial Pipeline Co.*, 92 FERC ¶ 61,144, at 61,535-36 (2000); Opinion No. 391-A, 71 FERC ¶ 61,291, at 62,134-35, and 62,143-45; *see also Seaway Initial Decision*, 157 FERC ¶ 63,024 at P 157.

[130] Initial Decision, 168 FERC ¶ 63,033 at P 292.

The Commission orders:

White Cliffs' application for market-based rate authority is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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