163 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Seaway Crude Pipeline Company LLC — Docket No. OR15-6-000

OPINION NO. 563

ORDER ON INITIAL DECISION

(Issued May 17, 2018)

1. This Order addresses briefs on and opposing exceptions to an Initial Decision[1] issued on December 1, 2016. The Initial Decision addressed Seaway Crude Pipeline Company LLC's (Seaway's) application for market-based rate authority. The Initial Decision found that Seaway lacked market power and recommended that the Commission grant Seaway's application.[2]

2. As discussed below, the Commission affirms the Initial Decision's finding that Seaway lacks market power in the applicable markets.[3] Seaway's application for market-based rate authority is therefore granted.

I. Background

3. The Seaway Pipeline consists of an approximately 665-mile, 30-inch and 36-inch diameter pipeline that provides north-to-south transportation of crude oil from its origin

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

[2] Initial Decision, 157 FERC ¶ 63,024 at P 177.

[3] Although the Commission overturns the Initial Decision's use of rail and barge capacity in Seaway's market power analysis, *see infra* P 61, this did not affect the overall determination that Seaway lacks market power.

at Cushing, Oklahoma to destinations on the U.S. Gulf Coast.[4] The pipeline is jointly owned by Enterprise Products Partners L.P. (Enterprise) and Enbridge Inc. (Enbridge). Until 2012, the pipeline provided south-to-north service from the Gulf Coast to Cushing.[5]

4. On December 2, 2011, prior to the reversal of the pipeline, Enterprise and Enbridge filed an initial application for market-based rate authority on Seaway. The Commission rejected the application, finding that Enterprise and Enbridge had not provided sufficient cost data to support their application.[6]

5. On June 28, 2012, the Commission *sua sponte* granted rehearing of the order rejecting Enterprise and Enbridge's application.[7] The Commission granted rehearing to determine the impact, if any, of the ruling of the U.S. Court of Appeals for the District of Columbia Circuit in *Mobil Pipe Line Co. v. FERC*[8] on the application. On rehearing in *Seaway I*, the Commission determined that *Mobil* had not fundamentally altered the Commission's approach to market-based rate applications of oil pipelines.[9] In *Seaway I*, the Commission determined that Seaway could not apply for market-based rate authority for initial rates. The Commission held that the absence of any operational data on Seaway made the proper determination of Seaway's geographic market impossible.[10] The Commission noted that Seaway could re-apply for market-based rate authority once operational data was available.[11] On rehearing, the Commission affirmed its approach as set out in *Seaway I*.

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[4] *Id*. P 2.

[5] Seaway Brief on Exceptions at 5.

[6] *Enterprise Products Partners L.P. and Enbridge Inc.*, 139 FERC ¶ 61,099 (2012).

[7] *Enterprise Products Partners L.P. and Enbridge Inc.*, 139 FERC ¶ 61,255 (2012).

[8] *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012) (*Mobil*).

[9] *Enterprise Products Partners L.P.*, 146 FERC ¶ 61,115 (2014) (*Seaway I*).

[10] *Seaway I*, 146 FERC ¶ 61,115 at P 80.

[11] *Id*. P 83.

II. Procedural History

6. Seaway filed a second application for market-based rate authority on December 9, 2014. On February 9, 2015, motions to intervene and protests were filed by Suncor Energy Marketing Inc. (Suncor), Phillips 66 Company (Phillips 66), Airlines for America (Airlines), Valero Marketing and Supply Company (Valero), the Canadian Association of Petroleum Producers (CAPP), and the Liquids Shippers Group (LSG), which originally included Anadarko Petroleum Corporation, Apache Corporation, ConocoPhillips Company, Marathon Oil Company, and Noble Energy, Inc.[12] Seaway's December 9, 2014 filing resulted in the initiation of a hearing on September 15, 2015.[13] The Hearing Order granted the motions to intervene of Suncor, Phillips 66, CAPP, and the members of the LSG, but denied the motions to intervene of the Airlines and Valero.[14]

7. A hearing was held on Seaway's application from July 7, 2016 to July 11, 2016. On December 1, 2016, the Presiding Administrative Law Judge issued the Initial Decision. The Initial Decision found that Seaway lacked market power in its origin and destination markets, and granted Seaway's application for market-based rate authority.[15] Briefs on exceptions were filed on February 1, 2017 by LSG and CAPP. Briefs opposing exceptions were filed on March 14, 2017 by Seaway and Commission Trial Staff (Trial Staff).

8. LSG filed seven exceptions to the Initial Decision.[16] LSG argues that the Initial Decision erred in finding that Seaway lacks significant market power in its origin market. LSG states that the Initial Decision erred in adopting an interpretation of the "used alternative" test for identifying good alternatives that is overly broad and inconsistent with Commission precedent. LSG claims that the Initial Decision erred in ruling that market participants have used rail and barge to transport crude out of Oklahoma. LSG also claims that the Initial Decision erred by including Seaway's affiliate as a good

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[12] Encana Marketing (USA) Inc. joined LSG by order of the Presiding Judge on October 16, 2015. Phillips 66 and Marathon Oil Co. subsequently withdrew their interventions.

[13] *Seaway Crude Pipeline Co. LLC*, 152 FERC ¶ 61,204 (2015) (Hearing Order).

[14] The Airlines filed a request for rehearing on October 15, 2015. On November 16, 2015, in Docket No. OR15-6-001, the Commission denied the request. *See Seaway Crude Pipeline Co. LLC*, 153 FERC ¶ 61,171 (2015).

[15] Initial Decision, 157 FERC ¶ 63,024 at P 1.

[16] LNG Brief on Exceptions at 7.

alternative to Seaway. Further, LSG argues that the Initial Decision relied on flawed market share, market concentration and excess capacity figures. Finally, LSG argues that the Initial Decision erred by disregarding Commission precedent when analyzing potential competition in Seaway's origin market.

9. CAPP filed two exceptions to the Initial Decision.[17] CAPP first excepted to the Initial Decision's definition of the origin market. CAPP argues that Seaway's origin market should be limited to the Cushing Hub. CAPP also excepted to the segregation of Seaway from Enbridge for purposes of the Herfindahl-Hirschman Index of market concentration (HHI).

10. In its Brief Opposing Exceptions, Seaway opposed both exceptions taken by CAPP and all of the exceptions taken by LSG.[18] Trial Staff opposed all of the exceptions filed by LSG and CAPP, including all of their subparts.[19]

III. Discussion

11. The findings of the Initial Decision subject to exception are (1) what constitutes the geographic origin market of the Seaway Pipeline; (2) what are the good alternatives to the Seaway Pipeline within the origin market; (3) how should capacity be allocated among the participants in the origin market; and (4) what are the HHI and other market power measures for the Seaway Pipeline. Within these exceptions, LSG raised the issue of the role of potential competition in the market power analysis.

A. Policy Consideration

12. LSG argues that affirming the Initial Decision would erase the lower rates that resulted from the shippers' and Trial Staff's successful efforts in the cost-of-service litigation in Docket No. IS12-226-000.[20] Seaway counters that its cost-of-service rates are irrelevant for purposes of determining whether Seaway should be allowed to charge market-based rates.[21]

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[17] CAPP Brief on Exceptions at 5-6.

[18] Seaway Brief Opposing Exceptions at 10.

[19] Trial Staff Brief Opposing Exceptions at 6.

[20] LSG Brief on Exceptions at 8.

[21] Seaway Brief Opposing Exceptions at 11.

13. As a general matter, Seaway's cost-based rates are not relevant in determining whether the pipeline possesses significant market power. As stated in Order No. 572, the Commission assumes that market-based rates will be higher than indexed rates, because an oil pipeline is free to file for rates under the index without justification. A market-based rate application thus is a request for waiver of the maximum rate allowed under indexing in which the applicant must show that it is entitled to charge more than indexing would permit.[22] This is also true for cost-of-service rates arising from litigation. The fundamental fact is that a just and reasonable market-based rate may diverge, at times substantially, from the individual regulated rate of a market participant, including a pipeline seeking market-based rate authority.[23] Seaway is correct when it states that "[t]he assumption that the regulated cost-of-service rate can be presumed to be equal to the competitive rate level is entirely without basis and has been rejected by the Commission and the D.C. Circuit."[24]

14. The remainder of the policy considerations raised by LSG and CAPP are addressed in the market power analysis discussed below.

B. Geographic Market

15. The Initial Decision found that a preponderance of evidence showed that the relevant geographic origin market for the Seaway Pipeline consists of the entirety of the State of Oklahoma.[25]

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[22] *Market-Based Ratemaking for Oil Pipelines*, Order No. 572, FERC Stats. & Regs. ¶ 31,007, at 31,181 (1994), *aff'd sub nom. Assoc. of Oil Pipe Lines v. FERC,* 83 F.3d 1424 (D.C. Cir. 1996); *see also Southwest Airlines Co. v. Colonial Pipeline Co.*, 147 FERC ¶ 61,024, at P 33 (2014) (Commission orders on market-based rates have explicitly stated the expectation that market-based rates will exceed cost-of-service rates.).

[23] *Seaway I*, 146 FERC ¶ 61,115 at P 50; *see also Enterprise TE*, 146 FERC ¶ 61,157, at P 18 (2014) (*Enterprise TE*) ("[A] pipeline's regulated tariff rate can be below, even far below, the competitive rate for a particular market.").

[24] Seaway Brief Opposing Exceptions at 21 (citing *Mobil*, 676 F.3d at 1103-1104; *Seaway I*, 146 FERC ¶ 61,115 at P 50; *Enterprise TE*, 146 FERC ¶ 61,157 at P 18).

[25] Initial Decision, 157 FERC ¶ 63,024 at P 72.

16. On exception, CAPP argues that the relevant origin market is instead the Cushing Hub Market.[26] The boundaries of the geographic origin market identified by CAPP encompass the origin points of all outbound pipelines comprising the Cushing Hub, including points of interconnection with crude oil storage facilities at the Hub.[27] CAPP states that the Cushing Hub is the location where shipping decisions are made to ultimately dispose of crude oil.[28] CAPP argues that a commercial decision to transport crude barrels to Cushing – whether from local production fields or those more remote - is distinct from the choices that are made regarding those same barrels at Cushing.[29]

17. CAPP states that it does not except to the proposition that certain refineries in Oklahoma could and do furnish a good alternative to Seaway.[30] However, CAPP argues that in order to make use of an available refinery alternative, a shipper would need to transport the barrel(s) to the refineries *from Cushing*.[31] CAPP states that its Cushing Hub origin market encompasses the refining capacity in Oklahoma, to the extent that they can be economically reached from Cushing.[32] CAPP also takes exception to the use of refinery capacities that incorporate crude stocks from sources unrelated to Cushing.[33]

18. In addition, CAPP criticizes the fact that the capacity figures of the Holly Frontier and Valero refineries used in the market analysis utilize the refineries' actual capacity and not the capacity of the pipelines that serve them.[34] CAPP argues that the relevant quantitative measure of a refinery is the ability to access the refinery from Cushing and not the capacity of the refinery itself.[35] CAPP argues that the relevant capacities for

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[26] CAPP Brief on Exceptions at 7.

[27] *Id.* P 20.

[28] *Id.* P 16.

[29] *Id.* P 22.

[30] *Id.* P 7.

[31] *Id.* P 9 (emphasis in original).

[32] *Id.* P 10.

[33] *Id.* P 8.

[34] *Id.*

[35] *Id.* P 9.

inclusion in the origin market are the capacities of outbound feeder pipelines, and not the capacities of the refineries these pipelines feed.[36] CAPP argues that if a barrel of outbound pipeline transportation capacity from Cushing is included in the geographic origin market, and the destination of that pipeline is a refiner, it would be double counting to include the refinery capacity in addition to the outbound pipeline capacity.[37]

19. Concerning trucking, CAPP states that merely listing distance to an alternative in miles, and referring to these distances as "reasonable trucking distance," without any cost analysis or evidence of actual usage of trucks to move crude from Cushing to local refineries, fails to meet the evidentiary burden necessary to show that an alternative should be included in the geographic market.[38]

20. Seaway states that CAPP's Cushing Hub origin market does not contain *any* crude oil production area that supplies the Seaway Pipeline and therefore that origin market is inconsistent with Commission precedent.[39] Seaway admits that a hub could be an origin market in an appropriate case (perhaps where the hub was not located in the middle of a crude oil production area); however, in the present case Seaway notes that Cushing is located within a significant crude oil production region.[40]

21. Seaway argues that in defining the origin market, it is important to consider where the crude oil shipped on the pipeline is produced in order to properly assess the options available to producers (*e.g.*, local refineries and other transportation alternatives) in the event the pipeline were to attempt to raise its rates above competitive levels.[41]

22. Seaway argues that the ability of a shipper to use trucking to transport oil to a refinery from Cushing is only relevant if you accept CAPP's argument that the Cushing Hub is the appropriate origin market.[42] Seaway states that Oklahoma refineries are appropriate competitive alternatives to Seaway not because they can be accessed from

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[36] *Id*. P 15.

[37] *Id*. P 9.

[38] *Id*. P 12.

[39] Seaway Brief Opposing Exceptions at 16.

[40] *Id*.

[41] *Id*. P 17.

[42] *Id*. P 18.

Cushing, but because they are located in the production area that is also served by Seaway and have been demonstrated to use that production, thus providing an option for producers to sell their crude oil directly to the refinery without necessarily first delivering it to Cushing.[43]

23. Trial Staff argues that the Cushing Hub cannot be the proper origin market because there are simply too many alternatives in the production basin and within close distance to the narrowly prescribed City of Cushing available to (and used by) shippers to avoid an uncompetitive price increase by Seaway.[44] Trial Staff notes that the methodology used to define a geographic market asks what is the geographic area where alternatives are available to shippers to avoid an applicant's potential uncompetitive increase in price.[45] Trial Staff states that "CAPP would like the Commission to simply ignore the alternatives within the production basin that are available to shippers to avoid an uncompetitive increase in price by Seaway."[46] Trial Staff states that crude oil shippers can avoid a potential uncompetitive price increase by Seaway by avoiding Cushing, Oklahoma altogether through the multitude of options that are used within the production basin and within very close distance to Cushing.[47]

Commission Determination

24. The Commission affirms the Initial Decision's definition of the geographic origin market. The Commission requires an oil pipeline seeking market-based rate authority to describe the geographic markets in which it seeks to show that it lacks market power.[48] The Commission does not require an oil pipeline to file pursuant to any particular geographic market definition, but believes that the appropriate geographic market should be determined in each proceeding based on its facts.[49]

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[43] Seaway Brief Opposing Exceptions at 18.

[44] Trial Staff Brief Opposing Exceptions at 11.

[45] *Id*. P 8.

[46] *Id*. P 9.

[47] *Id*. P 10.

[48] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,187.

[49] *Seaway I*, 146 FERC ¶ 61,115 at P 35 (citing Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,188).

25. The proper geographic origin market for crude oil pipelines is normally the production field in which the pipeline is physically located.[50] However, participants may present evidence that the proper geographic market is a Bureau of Economic Analysis Economic Area (BEA), or a hub.[51] The primary focus is on the origin of crude actually shipped on the applicant pipeline.[52]

26. No participant challenges the inclusion of the Cushing Hub in the geographic origin market. The question is whether the market should be expanded beyond the Cushing Hub.[53]

27. The Initial Decision held that shippers could avoid an anti-competitive price increase by Seaway by accessing multiple alternatives not only within the Cushing Hub but within the entire State of Oklahoma.[54] The Initial Decision correctly found that the ready availability in Cushing of feeder pipelines and truck routes to refineries within Oklahoma are resources that suppliers may use if a theoretical monopolist were to raise prices on a pipeline emanating from Cushing, and therefore should be included in the origin market.[55] Many of these alternatives are located outside the twenty-one square mile region around Cushing that CAPP identifies as the geographic market.[56]

28. The Commission also affirms the Initial Decision's finding that an alternative's capacity should include not only the capacity of the feeder pipeline(s) but also the capacity that could be utilized when incorporating trucking.[57] CAPP's argument concerning what capacity of an alternative should be used is not truly a geographic market issue. Whether an alternative is available, and the extent of that availability,

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

[51] *Id.*

[52] *Id.*

[53] Initial Decision, 157 FERC ¶ 63,024 at P 65.

[54] *Id.* P 66.

[55] *Id.* P 69.

[56] *Id.* PP 60-66.

[57] *Id.* P 69.

is a question of identifying competitive alternatives. Further, the capacity of the alternative is a matter for the market metrics, discussed below.

29. Concerning trucking, the Commission affirms the Initial Decision's acceptance of trucking as a means to reach potential alternatives within a reasonable distance from the applicant.[58] There is a distinction between whether trucking itself is a competitive transportation alternative, and whether trucking can serve to expand the geographic market to include the location of additional competitive alternatives. Although trucking itself may not serve as a competitive alternative to pipelines, trucking is still relevant if trucking over a relatively short distance to another alternative provides a cost-effective means of avoiding an anti-competitive price increase in the origin market.[59]

C. Competitive Alternatives

30. The Commission's used alternative test posits that a used alternative (a) provides a positive netback (i.e. is profitable to the shipper) and (b) provides a higher netback than available but unused alternatives that provide a lower profit to shippers, and therefore is a competitive alternative in terms of price to the applicant.[60] The Initial Decision found that by presenting evidence of used alternatives in the Oklahoma origin market, Seaway has sufficiently met its burden of providing evidence of good alternatives to its services in that market that are competitive in terms of price and availability.[61] Concerning rail alternatives, the Initial Decision found that there was no evidence that rail facilities were currently used by suppliers at Cushing,[62] but included the rail terminal at Sayre, Oklahoma in some of the market power calculations based on prior usage.[63] Addressing barge transport, the Initial Decision determined that barge transport had previously been used when pipeline capacity was constrained and the price spread for crude oil between Cushing and the Gulf was wide enough to justify its use.[64] Therefore, the Initial Decision held that shipper behavior suggested that waterborne crude oil transport is a good

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[58] *Id*. P 68.

[59] *See id*.

[60] *Id*.

[61] *Id*. P 106.

[62] *Id*. P 113.

[63] *Id*. PP 110-111.

[64] *Id*. P 116.

alternative in terms of price and availability when economic conditions in the crude oil market, i.e. netbacks, justify it.[65]

31. On exception, LSG states that the most important issue in this case concerns the interpretation and application of the Commission's used alternative test for identifying good alternatives.[66] LSG first argues as a general matter that because the rates that Seaway charged from 2012-2016 were higher than the rates established by litigation in Docket No. IS12-226-000, market forces have not and will not constrain Seaway's rates to a just and reasonable level.[67] LSG claim that this divergence between cost-based rates and the actual rates Seaway charged is direct evidence that Seaway possesses significant market power.

32. Concerning the Commission's "used alternative" test, LSG argues that the Initial Decision's interpretation of the test should be reversed because it (1) is overly broad; (2) fails to reflect the principles of cross-elasticity of demand that inform the Commission's market power analysis; and (3) is inconsistent with Commission precedent holding that pipelines seeking to apply the used alternative test must provide actual, pipeline-specific usage and operational data, rather than generic observations about the available alternatives in the market.[68] LSG also states that the Commission's used alternative test raises many questions, such as used by whom, used where, and used when.[69]

33. LSG argues that the goal of a market power study is to identify competitive alternatives for the applicant pipeline's shippers.[70] LSG states that in *Seaway I*, the Commission denied Seaway's 2011 market-based rate application because Seaway could not identify its shippers, or their alternatives, at the time.[71] LSG argues that a pipeline seeking market-based rate authority must provide evidence that its shippers have used an

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[65] *Id.*

[66] LSG Brief on Exceptions at 12.

[67] *Id.* at 10-11.

[68] *Id.* at 13.

[69] *Id.*

[70] *Id.* at 16 (citing *Seaway I*, 146 FERC ¶ 61,115, at P 34 (2014) (emphasis in original)).

[71] LSG Brief on Exceptions at 19.

alternative, "to implicitly demonstrate that the alternative is economic or profitable to [those] shipper[s]."[72]

34. LSG states that it is not taking the position that competitive alternatives must provide a higher netback than Seaway.[73] Instead, LSG claims that its position is that an alternative must be profitable for the shippers on the applicant pipeline, based on the netback, before those shippers will divert their volumes from the applicant pipeline to the alterative.[74] LSG then states that usage by shippers on the applicant pipeline to the proposed alternative would meet the Commission's used alternative test by demonstrating that the alternative is profitable for those shippers.[75]

35. LSG states that the record does not show that market participants have used rail and waterborne transportation to move their crude oil from Seaway's origin market since Seaway began operating under its current configuration.[76] LSG argues that the Initial Decision's finding that the record contains evidence that rail transportation alternatives from the Cushing origin market were being used in 2013 and 2014 is incorrect.[77] LSG argues that, according to the most recent evidence in the record (from 2014), market participants are not using barge to transport their crude oil out of Oklahoma.[78]

36. Seaway counters LSG's arguments by stating that the record evidence amply demonstrated that each of the competitive alternatives relied on by the Initial Decision is used by market participants in Seaway's origin market.[79] Seaway refers to Trial Staff's discovery efforts involving subpoenas and other evidence of usage by market participants

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[72] *Id*. at 20-21 (citing *Seaway I*, 146 FERC ¶ 61,115 at P 56 (emphasis in original)).

[73] LSG Brief on Exceptions at 21.

[74] *Id*.

[75] *Id*.

[76] *Id*. at 23.

[77] *Id*. at 26.

[78] *Id*. at 27.

[79] Seaway Brief Opposing Exceptions at 26.

for most of the major pipelines in the origin market.[80] Seaway provided additional evidence of usage based on various sources, including FERC Form 6 data, 10-K and 10-Q filings with the U.S. Securities and Exchange Commission, other government data, as well as press releases and news articles.[81] Seaway notes that the record also demonstrates that refineries identified in the Initial Decision also utilize local crude oil production.[82]

37. Seaway states that instead of following Commission precedent, LSG is seeking to re-litigate the Commission's holdings in *Seaway I* and *Seaway II*.[83] Seaway argues that neither *Seaway I* nor *Seaway II* requires a showing that the specific shippers on the applicant pipeline use the alternative in question.[84] Further, Seaway claims that such a test would present an impossible burden on the applicant pipeline, as such usage data is not publicly available.[85] Seaway argues that LSG's interpretation of the used alternative test is contrary to economic logic.[86]

38. Finally, Seaway claims that the record demonstrates usage by both rail and barge alternatives.[87] Seaway states that the Sayre rail facility was being used as recently as 2013.[88] Seaway also states that barge movements from 2013 are sufficient to classify barge as a used alternative.[89]

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[80] *See* Ex. S-48.

[81] Seaway Brief Opposing Exceptions at 28 (citing Ex. SEA-14 at 37-39).

[82] Initial Decision, 157 FERC ¶ 63,024 at P 82 (cited in Seaway Brief Opposing Exceptions at 28).

[83] Seaway Brief Opposing Exceptions at 24.

[84] *Id*. at 30.

[85] *Id*. at 31.

[86] *Id*. at 30.

[87] *Id*. at 34

[88] *Id*. (citing Ex. SEA-28 at 3).

[89] Seaway Brief Opposing Exceptions at 35.

39. Trial Staff agrees with the Initial Decision that LSG's interpretation is flawed, characterizing it as "impractical and nonsensical."[90] Trial Staff concurs that Seaway provided evidence of use by crude oil shippers and producers for all of the refineries in the State of Oklahoma.[91] Trial Staff disputes LSG's argument that the Commission's used alternative test requires the applicant to demonstrate usage of potential alternatives by the applicant's shippers.

40. Trial Staff goes on to criticize LSG's specific interpretations of Commission precedent regarding the used alternative test, specifically LSG's interpretation of *Seaway I*. Trial Staff argues that LSG took a Commission statement in *Seaway I* that usage data is necessary, deletes the Commission's expressed reason why (to establish the production basin geographic origin market) and inserts its own (to establish an applicant pipeline's actual shippers have used an alternative).[92]

41. Finally, Trial Staff states that there is evidence in the record that rail was used to transport crude oil in the State of Oklahoma in the past.[93] Trial Staff also claims that evidence in the record established that the waterborne alternative at Catoosa, Oklahoma was used in 2013 to transport crude oil.[94] Trial Staff argues that analyzing the market both with and without rail and barge alternatives is a reasonable methodology to assess alternatives that were used in the recent, but not necessarily immediate, past.[95]

Commission Determination

42. The Commission affirms the Initial Decision as it pertains to the used alternative test, with the exception of its application to rail and barge alternatives in this proceeding. The Initial Decision's interpretation of the used alternative test is correct and consistent with Commission precedent. The Initial Decision's rejection of LSG's interpretation of the used alternative test was appropriate.

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[90] Trial Staff Brief Opposing Exceptions at 15.

[91] *Id*. at 18.

[92] Trial Staff Brief Opposing Exceptions at 23.

[93] *Id*. at 27.

[94] *Id*.

[95] *Id*.

43. The Commission's used alternative test is a methodology for determining whether a potential alternative to a pipeline seeking market-based rate authority is a "good" alternative in terms of price.[96] A market power analysis focuses on whether there are alternatives to a pipeline that can constrain the ability to profitably charge prices above competitive levels for a significant period of time.[97] For an alternative to be a good alternative, it must be competitively priced.[98]

44. In order to determine whether an alternative is competitively priced, either the actual competitive price, or an acceptable proxy for the competitive price, must be calculated.[99] It is inappropriate to assume that the applicant's tariff rate is an appropriate proxy for the competitive price.[100] A pipeline's regulated tariff rate may be below, perhaps far below, the competitive price. The used alternative test relies on actual shipper behavior in the market, recognizing that a used alternative will be priced at or below the competitive level. Usage therefore becomes the necessary "proxy" for the competitive price.[101] The Commission's used alternative test rests on the principle that a used alternative (a) provides a positive netback (i.e. is profitable to the shipper) and (b) provides a higher netback than available but unused alternatives that provide a lower profit to shippers.[102]

45. The Initial Decision correctly interprets and applies the used alternative test, relying on actual usage data from participants in the market.[103] The Initial

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[96] *Seaway I*, 146 FERC ¶ 61,115 at P 55.

[97] *Id*. P 54 (citing *Mobil*, 676 F.3d 1098 at 1100).

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

[99] *Seaway II*, 152 FERC ¶ 61,203 at P 15.

[100] *Id*. (citing *Mobil*, 676 F.3d 1098 at 1103).

[101] *Seaway II*, 152 FERC ¶ 61,203 at P 17. The used alternative test does not calculate an actual competitive price, but instead recognizes that used alternatives are charging no more than the competitive price and therefore are good alternatives.

[102] *Id*.

[103] Initial Decision, 157 FERC ¶ 63,024 at P 106.

Decision also correctly rejected the interpretation of the used alternative test offered by LSG.[104]

46. LSG's interpretation of the used alternative test is that it is not mere usage in the market the applicant for market-based rate authority must show, but that the applicant specifically needs to identify its own shippers and the alternatives that these shippers use in the origin market.[105] It is only the specific alternatives that are currently used by the applicant pipeline's existing shippers, argues LSG, which pass the used alternative test and can be characterized as good alternatives.

47. A review of precedent on the used alternative test illustrates that LSG's interpretation is contrary to the Commission's used alternative test. LSG incorrectly interprets Commission decisions concerning the used alternative test. Further, LSG's interpretation of the used alternative test results in an inaccurate analysis of the market and creates a seemingly impossible burden for applicant pipelines to meet.

48. LSG derives the bulk of its supporting precedent from its interpretation of the *Seaway I* decision. LSG states that in *Seaway I*, the Commission denied Seaway's 2011 market-based rate application because Seaway could not identify its shippers, or their alternatives, at the time of the application.[106] LSG argues that in *Seaway I*, the Commission determined that actual usage data is needed to identify competitive alternatives.[107] LSG then argues that in *Seaway I*, the Commission held that an applicant pipeline must provide evidence that its shippers have used an alternative "to implicitly demonstrate that the alternative is economic or profitable to [those] shipper[s]."[108]

49. LSG's claim as to the reasoning in *Seaway I* is incorrect. Seaway's 2011 application was denied because Seaway lacked operational data necessary to trace the crude oil that Seaway would actually ship, and therefore the analysis could not determine

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[104] *Id*. PP 105-106.

[105] LSG Brief on Exceptions at 22.

[106] *Id*.

[107] *Id*. at 19 (citing *Seaway I*, 146 FERC ¶ 61,115 at PP 80-82 n.107).

[108] LSG Brief on Exceptions at 20-21 (quoting *Seaway I*, 146 FERC ¶ 61,115 at P 56 (emphasis in original)).

the proper geographic market.[109] In a footnote, the Commission noted that actual usage data had also been used in prior cases to determine the product market and in determining the list of competitive alternatives.[110] At no point in *Seaway I* did the Commission state that the specific identity of Seaway's shippers was necessary, or that data on what other alternatives those shippers used was at all relevant to a market power analysis. In *Seaway I*, the Commission stated that "all alternatives being used in the origin market were 'good' alternatives."[111] The Commission continued, stating that "[s]hippers *in the market* will…use the alternative with the highest netback among available alternatives…until it no longer offers capacity."[112] The Commission did not find that the used alternative analysis focuses solely on shippers *on the applicant pipeline*.

50. As discussed above, the primary purpose of the used alternative test is to address the fact that although a market analysis requires a proxy for the competitive price, one cannot assume that the applicant's tariff rate is an acceptable proxy. LSG's approach focuses solely on the applicant's tariff rate, and in practice is even more restrictive.

51. LSG's argument is that alternatives can only be included in the market power analysis as good alternatives if they provide a competitive netback to Seaway at Seaway's current rate.[113] For example, LSG cites to its witness Ms. Crowe's statement that "it is highly improbable that (the BP Pipeline to Whiting) is being used by any of Seaway's shippers."[114] LSG witness Crowe only included alternatives in the market analysis when they provided "a comparable netback to shipping on Seaway."[115]

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[109] *Seaway I*, 146 FERC ¶ 61,115 at P 80 ("Absent any actual operational data, the geographic market cannot be properly identified and the market power analysis cannot be completed.").

[110] *Id*. P 80 n.107.

[111] *Id*. P 55.

[112] *Seaway I*, 146 FERC ¶ 61,115 at P 55 (emphasis added).

[113] LSG Brief on Exceptions at 16-17.

[114] *Id*. at 17 (citing Ex. LSG-8 at 10:9-11:7; S-32 at 1).

[115] LSG Brief on Exception at 38.

52. That LSG is focused solely on Seaway's current tariff rate is further demonstrated in its discussion of profitability of a used alternative. LSG states that an alternative must be profitable for the shippers on the applicant pipeline, based on the netback, before those shippers will divert their volumes from the applicant pipeline to the alternative.[116] Unless shippers have made such a diversion to an alternative, claims LSG, that alternative does not satisfy the used alternative test.[117] LSG's definition of profitability requires that an alternative be as profitable as the applicant pipeline at its current tariff rate.

53. However, profitability for purposes of the used alternative test does not require that an alternative be as or more profitable than the applicant. In *Seaway I*, the Commission held that a shipper would not use an alternative if it was not profitable, and therefore any used alternative was charging at or below the marginal cost.[118] That an alternative must be profitable is meant in actual terms such that the alternative cannot produce a negative netback.[119] As the Commission found, "[i]t would simply not be rational for a shipper to use an alternative that was not profitable *in that it produced a negative netback*."[120] The Commission in *Seaway II* however rejected the argument that an alternative must provide a similar or higher netback (*i.e.*, be as or more profitable than the applicant pipeline based on its tariff rate).[121] To LSG, however, profitability becomes instead more profitable than current shipments on the applicant pipeline.

54. Requiring that all alternatives offer a netback equal to or greater than the applicant pipeline in order to be a good alternative is by definition using the applicant's current tariff rate as the competitive price proxy. LSG's interpretation is therefore in direct conflict with the Commission's used alternative test. In prior Commission orders that

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[116] *Id.* at 21 (emphasis in original).

[117] *Id.*

[118] *Seaway I*, 146 FERC ¶ 61,115 at PP 55-56 (The lowest netback among used alternatives is the marginal netback).

[119] *Id.* P 56.

[120] *Id.*

[121] *Seaway II*, 152 FERC ¶ 61,203 at P 47.

discuss the used alternative test, the Commission has clearly stated that it is improper to assume that the applicant's tariff rate is an appropriate proxy for the competitive price.[122]

55. Even those portions of LSG's interpretation of the used alternative test that are not contrary to Commission precedent suffer from flaws in economic reasoning and/or feasibility. Primary among these flaws, LSG has created a test for good alternatives that removes price entirely from the analysis. By requiring that good alternatives be defined solely by focusing on usage by the applicant's current shippers, an alternative that provides an identical netback to Seaway could still be excluded from the list of competitive alternatives. An alternative could offer a netback one cent less than Seaway, yet it would not be a good alternative under LSG's interpretation unless a shipper on Seaway utilized that alternative. This is contrary to the important tenet of market power analyses that good alternatives must be determined competitive in terms of price.[123]

56. Further, as Seaway correctly states in its Brief Opposing Exceptions, LSG's interpretation could result in the calculation of different measures of the competitiveness of a given market depending upon which pipeline applies for market-based ratemaking authority.[124] The Commission addressed this type of analysis in *Seaway II*, in reference to potential flaws resulting from the market power analysis focusing solely on the tariff rate of an applicant pipeline.[125]

57. Finally, as Seaway correctly notes in its Brief Opposing Exceptions, the identities of specific shippers on the various competitive alternatives and the identities of crude oil suppliers to refineries are not publicly available.[126] LSG does not identify how an applicant would be able to meet such a burden, especially with publicly-available data and without violating section 15(13) of the Interstate Commerce Act.

58. In total, the Commission finds that LSG's interpretation of the used alternative test is contrary to Commission precedent and would not produce an accurate view of the

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[122] *See, e.g., Seaway I*, 146 FERC ¶ 61,115 at P 52; *Seaway II*, 152 FERC ¶ 61,203 at P 36.

[123] *Seaway I*, 146 FERC ¶ 61,115 at P 53.

[124] Seaway Brief Opposing Exceptions at 31.

[125] *Seaway II*, 152 FERC ¶ 61,203 at Appendix at P 6, cited in Seaway Brief Opposing Exceptions at 31.

[126] Seaway Brief Opposing Exceptions at 31.

competitiveness of the market. The Initial Decision's rejection of LSG's interpretation is affirmed.

59. Concerning rail and barge alternatives, the Initial Decision included rail and barge alternatives in some of its market power calculations, based on past usage.[127] Seaway defined the current period for determining usage as the second half of 2015.[128] Seaway identified 96.1 thousand barrels per day (MBD) of capacity for rail in the second half of 2015, but did not identify any rail usage during that time period.[129] Seaway identified 6.4 MBD of barge movements in 2013 as the most recent actual usage of barge alternatives.[130]

60. The Commission overturns the Initial Decision with respect to this issue. Seaway has failed to demonstrate that rail or barge alternatives are currently used by shippers to transport crude oil out of the geographic origin market. Whether rail or barge transportation was used prior to the second half of 2015 is not relevant to the market power analysis. An alternative must be currently used[131] for it to be included as a good alternative.[132]

D. Allocation of Capacity

61. To conduct a market power analysis, market shares must be allocated to each participant.[133] In the oil pipeline industry, the Commission has recognized readily-available pipeline capacity data as indicative of market shares. To allocate capacity shares in pipelines, the capacity of each pipeline or other means to transport crude oil must be allocated to its parent companies.

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[127] Initial Decision, 157 FERC ¶ 63,024 at PP 110-111, 116.

[128] *Id*. P 78 (citing Ex. SEA-17 at D-5:6-11 (Updated Statement D)).

[129] Initial Decision, 157 FERC ¶ 63,024 at PP 80-81.

[130] *Id*.

[131] Whether an alternative is currently used is a question of fact to be determined on a case-by-case basis.

[132] As discussed below, the exclusion of rail and barge did not affect the overall determination that Seaway lacks market power.

[133] *Id*. P 117.

62. In general, oil pipelines rely on the Department of Justice (DOJ) *Deregulation Study* rubric for allocating capacity.[134] In the *DOJ Deregulation Study*, market shares were assigned to pipeline owners/suppliers according to several rules. Rule 4 pertains to the instant case:

> **Rule 4:** If no joint venturer owns more than fifty percent of a pipeline, however it is organized, the pipeline is treated as a single independent competitor, regardless of whether its owners also own competing facilities in the market.[135]

63. Seaway is a joint venture pursuant to an LLC Agreement wherein neither of its owners, Enterprise nor Enbridge, owns a controlling interest, and neither has full control without the consent of the other.[136] On Seaway, there is what is known as the Flanagan South Lease, consisting of 430,000 barrels per day (bpd) of capacity leased to Enbridge's wholly-owned affiliate, Enbridge Pipelines (FSP), LLC.[137] Enbridge also owns the 215,000 bpd Ozark Pipeline. Seaway's market analysis allocates both the 430,000 bpd Flanagan South Lease and the 215,000 bpd Ozark Pipeline to Enbridge.

64. The Initial Decision ruled that although Ozark Pipeline was properly allocated to Enbridge, Seaway's capacity should include the 430,000 bpd Flanagan South Lease.[138] The Initial Decision noted that Enterprise and Enbridge, as 50/50 owners in Seaway, were involved in a joint venture between independent entities, rather than a unitary entity.[139] The Initial Decision noted that under Seaway's ownership structure, Enterprise's only pipeline interest in the Oklahoma origin market is its 50 percent share in Seaway. In contrast, Enbridge's 50 percent ownership interest in Seaway is only one of Enbridge's several interests in the origin market.[140] The Initial Decision found that since Enbridge is required to share any profits from Seaway with Enterprise, the pipelines wholly owned by Enbridge (Ozark Pipeline, for example) have a strong incentive to

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[134] Report of U.S Dept. of Justice, *Oil Pipeline Deregulation* at 26-27 (May 1986) (DOJ Deregulation Study).

[135] Ex. SEA-40 at 42; DOJ Deregulation Study at 27.

[136] Initial Decision, 157 FERC ¶ 63,024 at PP 119, 143.

[137] *Id*. P 122.

[138] *Id*. P 147.

[139] *Id*. P 139.

[140] *Id*. P 131.

compete with Seaway in order to maximize volumes on the pipelines where Enbridge derives 100 percent of the profits.[141] The Initial Decision found that although there might be times when Enbridge and Enterprise's interests in the origin market may align, it depends in large part upon the relative competitive positions between the companies, which do not control one another and whose interest can diverge.[142] The Initial Decision found that the Flanagan South Lease does not create a whole new pipeline inside of Seaway's pipeline, but rather affords Enbridge rights and privileges on Seaway similar to other committed shippers on Seaway with the exception that Enbridge maintains its own tariff for suppliers using its leased portion of the pipeline.[143] The Initial Decision found that there was nothing about the Flanagan South Lease that would justify treating it as a separate pipeline from the remaining capacity of Seaway just because the lease dedicates specific capacity to Enbridge[144] noting that there is no claim that Seaway's capacity is offered in differentiated segments, or that, if granted market-based rate authority, each of its owners would establish rates for a fractional share of Seaway's capacity.[145] The Initial Decision found that it would be inappropriate to attribute the Flanagan South Lease wholly to Enbridge, as it resembled an agreement similar to committed shipments on Seaway.[146] Following Rule 4 of the 1986 *DOJ Deregulation Study*, the Initial Decision attributed the entire Flanagan South Lease to Seaway for purposes of allocating capacity.[147]

65. LSG argues in its Brief on Exceptions that the Initial Decision erred in treating Ozark Pipeline as a competitor to Seaway.[148] For this proposition, LSG relies on *ANR Storage II*, arguing "pipeline systems owned or controlled by the applicant's affiliates

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[141] *Id*. P 132.

[142] *Id*. P 134.

[143] *Id*. P 143.

[144] *Id*. P 146.

[145] *Id*. P 146; CAPP Reply Brief at 18.

[146] Initial Decision, 157 FERC ¶ 63,024 at P 143.

[147] *Id*. P 147.

[148] LSG Brief on Exceptions at 28.

should not be considered among the customer's good alternatives."[149] Specifically, LSG argues that Ozark Pipeline is an affiliate of Seaway, and the 215 MBD of Ozark Pipeline capacity should not be considered an alternative to Seaway.[150] LSG further argues that Ozark Pipeline's capacity should be included with Seaway's capacity, since both are owned or controlled by Enbridge. LSG states that the Commission's Alternative Rate Policy Statement for gas pipelines, as well as the Commission's regulations for electric utilities, stand for the proposition that the capacity should be aggregated.[151]

66. LSG asserts that the Initial Decision erred in finding that Seaway and Ozark Pipeline did not have significant incentives to cooperate rather than compete with each other.[152] Additionally, LSG argues that the Initial Decision misapplied the *ANR Storage II* precedent and incorrectly cited portions of the *ANR Storage I* order that have been reversed on rehearing to find that Enbridge does not "control" Seaway, and that Seaway and Ozark Pipeline are competitors.[153] LSG states that the Commission reversed itself on that point in *ANR Storage II* and reaffirmed its position that "control" is presumed when the applicant has an interest of 10 percent or more in the affiliate in question.

67. CAPP argues in its Brief on Exceptions that the capacity allocations in the Initial Decision seriously distort the impact of corporate affiliations and underestimate the measurement of market power.[154] Specifically, CAPP argues that the Initial Decision's approach to segregate Seaway's capacity from Enbridge disregards the common ownership of two of the three largest pipelines in the origin market, and treats them as though there were no common ownership.[155] CAPP argues that the Initial Decision ignores the dicta in the *DOJ Study Guidelines*, which identifies a major problem created by Rule 4: "Rule 4 implicitly assumes that a joint venture pipeline that is not controlled by a single owner behaves like a totally independent entity. Since this approach

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[149] *Id*. (citing *ANR Storage Co.*, 155 FERC ¶ 61,279, at PP 31-32 (2016) (*ANR Storage II*)).

[150] LSG Brief on Exceptions at 28.

[151] *Id*. at 29.

[152] *Id*. at 30-31.

[153] *Id*. at 35; *see also* Initial Decision, 157 FERC ¶ 63,024 at PP 130-131 (citing *ANR Storage Co.*, 153 FERC ¶ 61,052 (2015) (ANR Storage I)).

[154] CAPP Brief on Exceptions at 26.

[155] *Id*.

implicitly assumes that the joint venture and its parents make throughput decisions as if they had no other interests, it understates true market concentration."[156] CAPP points to "practical evidence" to argue that Enbridge as a joint owner exercises influence over Seaway's operational decisions,[157] including evidence that Enbridge treats Seaway as a key strategic asset, without regard to the size of its ownership interest, the technical terms of the joint venture, or Enterprise's role in daily operations.[158]

68. CAPP asserts that the absence of marketing affiliate rules for oil pipelines warrants greater scrutiny.[159] Although the Initial Decision concluded that it is inappropriate to analogize that the marketing affiliate standards applicable to gas should be the same in the oil regime,[160] CAPP argues that the analysis is backwards, as greater scrutiny and prudence would be called for in allowing an oil pipeline to obtain market-based rate authority than a natural gas storage company.[161]

69. In its Brief Opposing Exceptions, Seaway argues that the LSG and CAPP position that Seaway and Ozark Pipeline should effectively be treated as a single entity in calculating the market concentration and market share measures lacks merit and provides no justification for reversing the Initial Decision.[162] Seaway notes that the Initial Decision correctly determined that Seaway's capacity should be separate from that of Enbridge, since neither of Seaway's owners owns a greater than 50 percent share of Seaway, pursuant to the *DOJ Deregulation Report* and Commission precedent.[163]

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[156] *Id*. at 27 (citing Ex. S-40 at 7-8).

[157] CAPP Brief on Exceptions at 28, Ex CAP-1 at 7:7-8:10 and n.7

[158] CAPP Brief on Exceptions at 29, Ex. CAP-1 at 8:14-22.

[159] CAPP Brief on Exceptions at 34.

[160] *Id*.

[161] *Id*.

[162] Seaway Brief Opposing Exceptions at 36.

[163] *Id*. at 40 (citing Initial Decision, 157 FERC ¶ 63,024 at P 139). As proof that it is not appropriate to combine the two, Seaway notes that the Ozark Pipeline was sold by Enbridge to MPLX Pipe Line Holdings LLC, an affiliate of Marathon Pipeline Company on March 1, 2017.

70. Trial Staff agrees with the Initial Decision, arguing that CAPP and LSG ignored the fact that their proposal to combine Seaway's capacity with one of its owners overstates the anticompetitive effect of Seaway's joint ownership.[164] Trial Staff notes that the DOJ methodology is a balanced approach that both overstates and understates the anticompetitive effects of partial ownership through its various rules to achieve, on balance, a reasonable result.[165]

71. Trial Staff argues that Seaway overcame the rebuttable presumption of control discussed in *ANR Storage* by virtue of the LLC agreement. Additionally, Trial Staff notes that it is unclear whether a rebuttable presumption of control should be applied in an oil pipeline market-based rate case.[166] Finally, Trial Staff states that the Initial Decision correctly analyzed the incentives of Seaway's owners to compete in the market, and correctly found that Enbridge's lack of control over Seaway was not trumped by a commonality of interest between Enbridge and Enterprise.[167] Trial Staff takes issue with CAPP's speculative attempts to discredit straight-forward analysis of economic incentives in the market with insinuations that Enbridge and Enterprise's divergent interests in regard to pricing were not supported with an examination of comparative revenues that would have been achieved by the owners from the per barrel rates on Seaway and Enbridge's wholly-owned Ozark Pipeline.[168] Trial Staff additionally notes that CAPP makes a series of wholly unsupported claims speculating on the motives of Seaway's joint-owners for pursuing market-based rate authority.[169]

Commission Determination

72. The Commission affirms the Initial Decision on this issue. The Initial Decision correctly followed Rule 4 in the *DOJ Deregulation Study*, and it is clear that Enbridge and Enterprise each own 50 percent of Seaway. Seaway Pipeline is governed by its

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[164] Trial Staff Brief Opposing Exceptions at 30.

[165] *Id*.

[166] *Id*. at 32.

[167] *Id*. at 35.

[168] *Id*. at 35-36.

[169] Seaway Brief Opposing Exceptions at 37.

LLC Agreement, which allocates 50 percent control to each of the non-affiliated owners Enterprise and Enbridge.[170]

73. The Commission notes that *ANR Storage I* made it clear that the entire ownership structure must be taken into account, and the presumption of control may be rebutted. Specifically, *ANR Storage I* noted that a "[50] percent share is not sufficient to outvote the remaining 50 percent if held by a single entity."[171] *ANR Storage II* did not take away the ability for parties to rebut the presumption that a ten percent ownership raises concerns. The concerns presented in *ANR Storage II* emerge from a section of the 2010 DOJ-FTC Merger Guidelines regarding horizontal mergers in which "two competitors come under common ownership and control, completely and permanently eliminating competition between them."[172] The 2010 DOJ-FTC Merger Guidelines discussed partial acquisitions in horizontal mergers where affiliates have incentives and the opportunity to cooperate, rather than compete, regardless of whether one affiliate "controls" the other.[173] The Guidelines noted that when two companies are affiliated, they could influence each other in ways that decrease competition, will not have incentives to compete with one another, and will have the ability to share information in ways that lessen competition.[174] In this case, the Oklahoma origin market has many competing market participants indicating significant competition. As noted above, the relationship pursuant to the LLC between Enterprise and Enbridge in regards to Seaway is one of a joint venture between independent entities, with no indication that one owner controls Seaway over the other. The Initial Decision found that for this reason, Seaway satisfied its burden of rebutting the presumption that its 50/50 ownership structure implies control by Enbridge.[175] The Commission affirms this finding.

74. Further, the Commission affirms the proposed treatment of the Flanagan South Lease. Based on language in the Flanagan South Lease Agreement, the arrangement is more akin to a capacity commitment, practically affording Enbridge rights and privileges

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[170] Initial Decision, 157 FERC ¶ 63,024 at P 143.

[171] *ANR Storage I*, 153 FERC ¶ 61,052 at P 206.

[172] Initial Decision, 157 FERC ¶ 63,024 at P 138; U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 13 (August 19, 2010).

[173] Initial Decision, 157 FERC ¶ 63,024 at P 137; LSG Initial Brief at 36; Reply Brief at 19.

[174] Initial Decision, 157 FERC ¶ 63,024 at P 137.

[175] *Id*. P 139.

on the Seaway Pipeline similar to other committed shippers on Seaway. The Initial Decision appropriately found there was nothing about the Flanagan South Lease that justified treating it like a separate pipeline from the remaining capacity of Seaway under the *DOJ Deregulation Study* rules just because the lease dedicates a specific capacity to Enbridge.[176] The Commission affirms the Initial Decision's finding that the Flanagan South Lease should be included in Seaway's capacity for the market analysis.

75. As the Initial Decision correctly determined, Ozark Pipeline is properly assigned 215,000 bpd of capacity, separate from Seaway. The Flanagan South Lease is correctly included in Seaway's capacity of 850,000 bpd.

E. Market Statistics

76. The Initial Decision determined, as discussed above, that the capacity of Seaway and the Flanagan South Lease be combined to total 850,000 bpd; that Ozark Pipeline be considered a separate competitor; and that barge and rail were viable competitive options. In the calculations presented, the list of alternative options stayed in keeping with Trial Staff's list in Exhibit S-42 at 2, Table 1.B, of participants in the Oklahoma (Cushing) market only, with minor adjustments to the crude-by-rail capacity and refinery capacity.[177] The Initial Decision calculated the HHI at 1724.9, below the 1800 level of concern identified in the *1992 DOJ-FTC Merger Guidelines*.[178] The Initial Decision noted that the Commission has generally granted market-based ratemaking authority where the HHI is less than 2500, and has always granted market-based ratemaking authority where the HHI is less than 1800.[179]

77. In its Brief on Exceptions, LSG presents a revised market power analysis excluding rail and barge transportation, combining Ozark Pipeline's capacity with Seaway's capacity, including various assumptions regarding the behavior of Seaway's

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[176] *Id.* P 146.

[177] Initial Decision, 157 FERC ¶ 63,024 at P 154; Ex. SEA-27 at 126:14-127:5 (Schink Rebuttal Test.).

[178] Initial Decision, 157 FERC ¶ 63,024 at P 157 (citing Ex. SUN-17 at 17 (*U.S. Dept. of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* section 1.5 (April 2, 1992, rev. April 8, 1997)).

[179] Initial Decision, 157 FERC ¶ 63,024 at P 157; Seaway Initial Brief at 43; Ex. SEA-11 at 62:8-13 (Statement I).

shippers,[180] and excluding alternatives LSG determined had not been shown to be viable alternatives for Seaway's shippers under the Commission's used alternative test,[181] resulting in an HHI of 2947 and a 40 percent market share for Seaway.[182] Alternatively, LSG argues that if the Commission adopts the Initial Decision's application of the "used alternative test," but excludes barge and rail transportation and includes Ozark Pipeline's capacity with Seaway's capacity, the resulting HHI would be 2257.7 with a resulting market share for Seaway of 37.7 percent.[183]

78. Seaway in its Brief Opposing Exceptions argues that the Initial Decision correctly applied the Commission's "used alternatives" test in identifying the competitive alternatives in Seaway's origin market; rail and barge shipments are properly included as competitive alternatives; and the Ozark Pipeline is properly treated as a separate entity from Seaway.[184] Seaway points out that the LSG arguments emphasize the highly competitive nature of Seaway's origin market, and only by excluding all rail and barge alternatives and all but one pipeline alternative and including Ozark Pipeline's capacity with that of Seaway is LSG able to generate an HHI that exceeds 2500.[185]

79. Trial Staff states in its Brief Opposing Exceptions that the Initial Decision correctly determined that the Commission has not been concerned in the past with the

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[180] These adjustments included assuming TransCanada Keystone and MarketLink LLC (TransCanada/MarketLink), affiliated entities that share a pipeline transporting oil from Cushing to the Gulf Coast, are good alternatives for Seaway's shippers; assuming Seaway's shippers would divert their volumes to TransCanada/MarketLink because it transports crude oil to the Gulf Coast and provides a comparable netback to shipping on Seaway; and assuming local refineries near Cushing are good alternatives for Seaway's shippers (LSG Brief on Exceptions at 38-39).

[181] LSG excluded approximately five pipelines moving crude oil from Cushing to destinations other than the Gulf Coast, taking 730,000 bpd of capacity out of the analysis (Enbridge, PB, Osage, 37,000 bpd from Phillips 66, and Plains). Ex. LSG-8 at 10:9-13:12.

[182] LSG Brief on Exceptions at 37-40; Ex. LSG-8 at 10:9-13:12 (market power study described at 12:2-12); LSG-9.

[183] LSG Brief on Exceptions at 40; Initial Decision, 157 FERC ¶ 63,024 at P 160 (table, "Enbridge and Flanagan Combined, Rail and Barge Excluded").

[184] Seaway Brief Opposing Exceptions at 43.

[185] *Id*. at 45.

combination of an HHI less than 2500 and a market share of less than 40 percent.[186] Trial Staff argues that LSG's interpretation of use is "arbitrary, illogical, contrary to Commission precedent, and should be rejected, along with its attendant HHI and market share calculations."[187]

Commission Determination

80. As discussed above, rail and barge capacity should not be included in Seaway's market analysis.[188] The proper market share calculation therefore excludes any market share attributed to rail or barge alternatives. The Initial Decision presented an alternative HHI calculation combining the capacities of Seaway and the Flanagan South Lease, with the rest of Enbridge independent, and excluding rail and barge capacity. This calculation is the most appropriate in the instant case. Under this scenario, the HHI is calculated at 1800 and Seaway possesses a 30.1 percent market share.[189]

81. Accordingly, the Commission affirms the finding that the HHI calculations as presented in the alternative HHI calculation in the Initial Decision (which excludes rail and barge capacity) demonstrate that the Oklahoma origin market is not so highly-concentrated that it is susceptible to the exercise of market power by Seaway or any other participant.

F. Excess Capacity

82. The Initial Decision stated that the presence of excess capacity among good alternatives in the origin market is an additional indicator of the inability of the applicant pipeline to assert market power, consistent with Order No. 572.[190] The excess capacity ratio "equals the total capacity to absorb the crude oil produced within the origin market (*i.e.*, the capacity of outbound pipelines, local refineries, and rail/waterborne transportation), divided by crude oil production in the origin market."[191] The Initial

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[186] Trial Staff Brief Opposing Exceptions at 40.

[187] *Id.*

[188] *See supra* P 61.

[189] Initial Decision, 157 FERC ¶ 63,024 at P 159.

[190] *Id.* P 167 (citing Order No. 572, FERC Stats. & Regs. ¶ 31,007, at 31,181.

[191] Seaway Brief Opposing Exceptions at 48 (citing Initial Decision, 157 FERC ¶ 63,024 at P 169).

Decision noted that Trial Staff's expert witness, Siskind, found the presence of significant excess capacity based on confidential pipeline and public refinery information.[192] The Initial Decision held that Seaway's calculation of excess capacity indicated the presence of a highly competitive origin market in which Seaway does not possess market power.[193]

83. In its application, Seaway calculated two measures of excess capacity—the excess capacity ratio, which equals the total capacity to absorb the crude oil produced within the origin market divided by crude oil production in the origin market; and the excess capacity held by others ratio, which equals the total capacity to absorb crude oil in the market, minus the quantity of crude oil to be absorbed in the market, minus the applicant pipeline's excess capacity (unutilized capacity) divided by the applicant pipeline's movements of crude oil out of the origin market.[194]

84. Seaway's calculation of its ratios for the State of Oklahoma origin market, supported by LSG and Trial Staff, results in an excess capacity ratio of 1.35 and an excess capacity held by others of 2.1.[195]

85. On exceptions, LSG argues that the Initial Decision's calculation of excess capacity, as provided by Seaway, is incorrect and unsupported.[196] LSG states that it utilized delivery and capacity data from Seaway's direct testimony to estimate the supply volumes and calculate an excess capacity ratio.[197] LSG argues that Seaway submitted new supply data in its rebuttal testimony that were inconsistent with the estimates in its direct case.[198]

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[192] Initial Decision, 157 FERC ¶ 63,024 at P 168.

[193] *Id*. P 171.

[194] *Id.* P 169.

[195] *Id*. P 171; Seaway Initial Brief 44-45; Ex. SEA-27 at 20:6-12 and App. 1 (citing to privileged exhibit) (Schink Rebuttal Test).

[196] LSG Brief on Exceptions at 44.

[197] *Id*.

[198] *Id*. at 45.

86. LSG also argues that the Initial Decision erred in relying on Trial Staff's unused capacity calculation to find that significant excess capacity exists in Seaway's origin market.[199] LSG states that Trial Staff's analysis suffers from three errors: (1) it uses an incorrect capacity figure; (2) Trial Staff's study contained numerous errors; and (3) Trial Staff did not follow the Commission's traditional excess capacity calculation.[200]

87. Seaway agrees with the Initial Decision that the presence of excess capacity is an additional indicator of Seaway's lack of market power in the origin market.[201] Seaway states that even if the Commission accepted LSG's access capacity calculation, the market would still be competitive, given the HHI and market share.[202] Seaway also states that it correctly updated its excess capacity ratio in its rebuttal testimony to include actual data.[203] Seaway states that actual shipping volumes present a more accurate picture of the origin market, and thus are appropriate to rely on when such data can be obtained.[204]

88. Trial Staff argues that storage can serve to significantly reduce the demand for transportation out of the market and for refining in the market when commodity prices make it advantageous to store crude oil.[205] Trial Staff argues that its excess capacity calculation properly reflects this observed market dynamic by utilizing the actual amounts of crude oil transported and refined in the market as the proper metric for demand.[206] Trial Staff states that although its calculation was not based on the Commission's traditional excess capacity ratio calculation, it was an accurate methodology to account for the significant role of storage in this particular origin

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[199] *Id*.

[200] *Id*. at 46-47.

[201] Seaway Brief Opposing Exceptions at 47 (citing Initial Decision, 157 FERC ¶ 63,024 at P 167).

[202] Seaway Brief Opposing Exceptions at 47.

[203] *Id*.

[204] *Id*. at 50.

[205] Trial Staff Brief Opposing Exceptions at 43.

[206] *Id*.

market by measuring the capacity to transport and refine crude oil that was in excess of actual demand in the market.[207]

Commission Determination

89. The Commission affirms the Initial Decision's acceptance of Seaway's methodology for calculating excess capacity for the State of Oklahoma origin market.[208] The Commission also recognizes the important role that storage could play in certain origin markets and Trial Staff's attempt to incorporate storage into the excess capacity ratio. Participants are not required to follow one methodology for determining excess or under-utilized capacity, nor are they restricted from putting forth alternative approaches in appropriate circumstances. Trial Staff appropriately identified the Commission's traditional excess capacity methodology, and then identified specific reasons why an alternative approach may be appropriate in this case.

G. Potential Competition

90. The Initial Decision found that in addition to the current competition in the origin and destination markets, Seaway also faces significant potential competition.[209] Specifically, the Plains All American Diamond Pipeline (Diamond Pipeline) was expected to begin service in 2017, providing an additional 200 MBD of crude oil transportation from Cushing to Memphis, Tennessee.[210] The Initial Decision noted that the Diamond Pipeline, once completed, will be the tenth pipeline other than Seaway to provide crude oil transportation out of Oklahoma, providing shippers with another option for transporting crude oil out of Cushing.[211] The Initial Decision concluded that the "presence of such additional competition further demonstrates that Seaway does not possess market power in the Oklahoma origin market."[212]

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[207] *Id.*

[208] Initial Decision, 157 FERC ¶ 63,024 at P 171.

[209] *Id.* P 172.

[210] *Id.* (citing Ex. SEA-18 at E8-E9 (Updated Statement E)). The evidentiary record was closed prior to 2017.

[211] Initial Decision, 157 FERC ¶ 63,024 at P 172.

[212] *Id.*

91. LSG claims that the Initial Decision disregarded Commission precedent when analyzing potential competition in Seaway's origin market.[213] LSG cites to the 1994 *Koch Gateway* case for the proposition that an applicant for market-based rate authority "must show that any new entrants would be available…at rates and on terms competitive to [the applicant]."[214] LSG argues that although the Initial Decision found that Diamond Pipeline is a source of potential competition in Seaway's origin market,[215] the Initial Decision does not discuss the transportation rates for service on the planned Diamond Pipeline. The Initial Decision also did not find that the planned pipeline would provide service under terms that are comparable to Seaway's terms of service.[216]

92. Seaway argues that the LSG argument is without basis. Seaway notes that LSG relied on a natural gas decision that concentrated on a market power analysis of good alternatives that would be available within one or two years.[217] Seaway and Trial Staff argue that the Initial Decision simply found the Diamond Line to be a potential competitive alternative, rather than an alternative that could be included in the HHI analysis or other market power measures.[218] Seaway asserts that the Initial Decision's HHI calculations and other measures of market concentration were based solely on existing competition and clearly demonstrated that Seaway's origin market is highly competitive without including any potential competition.[219]

Commission Determination

93. The Commission affirms the Initial Decision in recognizing the Diamond Pipeline as a potential competitor. Under Commission regulations, applicants for market-based ratemaking authority are required to identify potential competition separately from

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[213] LSG Brief on Exceptions at 48.

[214] *Id*. (citing *Koch Gateway Pipeline Co.*, 66 FERC ¶ 61,385, at 62,302 (1994) (*Koch Gateway*)).

[215] Initial Decision, 157 FERC ¶ 63,024 at P 172

[216] LSG Brief on Exceptions at 48.

[217] Seaway Brief Opposing Exceptions at 54.

[218] Trial Staff Brief Opposing Exceptions at 45.

[219] Seaway Brief Opposing Exceptions at 53-54.

competitive alternatives.[220] This information is only used when the application presents a close case. Here, it is clear Seaway does not possess market power in its origin market based on existing competition alone.

94. LSG's argument concerning *Koch Gateway* is misplaced. In *Koch Gateway*, the Commission was reviewing an experimental market-based rate program for bundled gas transportation and storage.[221] In examining the market power analysis, the Commission held that good alternatives could include new entrants. The Commission required that for any new entrant to be a good alternative, Koch Gateway must show the new entrant would be available within one or two years to Koch Gateway customers at rates and terms competitive to Koch Gateway's services.[222] Importantly, Koch Gateway was already charging market-based rates under the experimental program. It can therefore be assumed that Koch Gateway was charging at or above the competitive price.[223] In such an instance, a new entrant indeed must show it can enter at such a rate.[224]

95. Seaway, however, is not currently charging a market-based rate. It therefore cannot be assumed that Seaway's rates are at or above the competitive rate.[225] Further, it can be difficult if not impossible to know with any certainty what rates a potential competitor will charge one to two years out from the date of entry. Finally, as the Commission recently held, because potential competitors are not included in the market metric calculations, they need not be cost-justified to the same extent as competitive

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[220] See 18 C.F.R. §§ 348.1(c)(4) and (5) (2017).

[221] *Koch Gateway*, 66 FERC ¶ 61,385 at 62,298.

[222] *Id*. at 62,302.

[223] *See Guttman Energy, Inc. v. Buckeye Pipe Line Co., L.P.*, 161 FERC ¶ 61,180 at P 108 (Pipelines, like most firms, are profit maximizers that will set rates at the level to earn the highest profits).

[224] The reference to similar "terms" in *Koch Gateway* involves issues specific to gas storage that are not relevant to common carriers such as oil pipelines. A good alternative in the oil pipeline context must be good in terms of price, availability and quality. *Seaway I*, 146 FERC ¶ 61,115 at P 45.

[225] *See* Order No. 572, FERC Stats. & Regs. ¶ 31,007, at 31,181 (The Commission "must assume that market-based rates would be higher than indexed rates.").

alternatives that are included in the market calculations.[226] As Seaway notes, under the Commission's regulations, applicants for market-based rate authority are required to identify potential competition separately from the existing competitive alternatives.[227]

H. Conclusion

96. The Commission affirms the Initial Decision's finding that Seaway lacks significant market power in its origin and destination markets.

The Commission orders:

(A) The exceptions to the Initial Decision are resolved as stated in the body of this order; to the extent an exception is not discussed, it should be considered denied.

(B) Seaway's application for market-based rate authority is granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[226] *Guttman Energy, Inc. v. Buckeye Pipe Line Co., L.P.*, 161 FERC ¶ 61,180, at P 296 (2017).

[227] Seaway Brief Opposing Exceptions at 54 (citing 18 C.F.R. §§ 348.1(c)(4) and (5) (2017)).