168 FERC ¶ 63,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

INITIAL DECISION

Public Version

(Issued September 12, 2019)

APPEARANCES

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SUZANNE KROLIKOWSKI, Presiding Administrative Law Judge

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I. Introduction and Summary of Decision

1. White Cliffs Pipeline, L.L.C. (White Cliffs), filed an application for authorization to charge market-based rates for the interstate transportation of crude oil on its pipeline system between Platteville, Colorado in the Niobrara Shale formation region and Cushing, Oklahoma (Application) pursuant to part 348[1] of the Commission's regulations. In its Application, White Cliffs claimed that it does not possess market power in either its proposed origin market or its proposed destination market (Tulsa-Bartlesville, Oklahoma).

2. Liquids Shippers Group[2]—which is comprised of several current and potential shipping customers of White Cliffs—protested the Application. Liquids Shippers Group contends that White Cliffs possesses undue market power over the transportation of crude oil from its Platteville, Colorado receipt point and requests the Application be denied.[3] Liquids Shippers Group more specifically challenges White Cliffs' proposed geographic origin market and product market definitions, its competitive alternatives, and its market power measures, including its Herfindahl-Hirschman Index (HHI) calculation.

3. The Commission, in its order setting this proceeding for hearing, granted White Cliffs market-based rate authority in its proposed destination market.[4] The issue before me is whether White Cliffs has the ability to exercise market power in the challenged origin market.

4. Although I determine that the geographic origin market is appropriately defined more narrowly as the tight-oil producing portion of the Denver-Julesburg (DJ) Oil and Gas Basin and that the product market is appropriately defined as light crude oil, I

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[1] *See* 18 C.F.R. pt. 348 (2019).

[2] For purposes of this proceeding, the Liquids Shippers Group (LSG) includes HighPoint Resources Corporation f/k/a Bill Barrett Corporation (HighPoint), ConocoPhillips Company (ConocoPhillips), Kerr McGee Oil & Gas Onshore, LP (Kerr McGee), and Noble Energy, Inc. (Noble).

[3] Liquids Shippers Group February 20, 2018 Protest at 1-2 (LSG Protest).

[4] *White Cliffs Pipeline, L.L.C.*, 163 FERC ¶ 61,120, at P 23 (2018) (Hearing Order).

conclude that White Cliffs lacks market power in the origin market. Thus, its Application may be granted. My reasons follow.

II. Background and Procedural History

A. Factual background

5. White Cliffs is a 527-mile common carrier[5] crude oil pipeline that currently consists of two parallel 12.75-inch pipelines that transport crude oil from Platteville, Colorado and Healy, Kansas to Cushing, Oklahoma.[6]

6. Although White Cliffs' current capacity for transporting crude oil is 185,000 barrels per day (BPD), it has begun converting one of its pipelines from crude oil transportation service to natural gas liquids transportation service.[7] The conversion project will reduce White Cliffs' crude oil transportation capacity from 185,000 BPD to approximately 95,000 BPD.[8] The conversion is expected to occur in less than two years.[9]

7. White Cliffs is a joint venture formed in 2007 and is currently majority-owned by Rose Rock Midstream, L.P., a wholly owned subsidiary of SemGroup Corporation.[10]

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[5] Ex. WCP-0011 at 20; Joint Statement of Stipulated Facts (JSF) 3. White Cliffs provides common carrier service pursuant to FERC Tariff No. 3.11.0 (R&R Tariff) and FERC Tariff No. 4.8.0 (Rates Tariff). JSF 7. On January 29, 2019, White Cliffs submitted FERC Tariff No. 3.12.0 in Docket No. IS19-162-000, which is scheduled to become effective on March 1, 2019. *Id.* 7 n.1.

[6] JSF 3; Ex. WCP-0001 at 5 n.2; Ex. WCP-0011 at 10 n.10 (White Cliffs Market-Based Rate Application); *see also* Ex. WCP-0004 at 1 (map of White Cliffs pipeline system).

[7] JSF 5-6.

[8] *Id.* 6.

[9] *Id.*; White Cliffs commenced a publicized joint open season to solicit volume commitments for this conversion on May 24, 2018. Ex. WCP-0001 at 7:2-5 (Minielly); Ex. WCP-0006.

[10] JSF 1.

Prior to making its initial filing in this proceeding, White Cliffs had not sought authority to charge market-based rates.

B. Significant procedural history

8. On December 22, 2017, White Cliffs filed its Application with the Commission for authorization to charge market-based rates for the transportation of crude oil.[11] Liquids Shippers Group filed a timely protest, and each Liquids Shippers Group entity filed a timely motion to intervene. In its protest, Liquids Shippers Group challenged the appropriateness of White Cliffs' proposed geographic origin and product market definitions, identification of competitive alternatives, and market concentration statistics.[12]

9. On May 17, 2018, the Commission issued an order on the Application (Hearing Order). In the Hearing Order, the Commission granted White Cliffs market-based rate authority in its proposed destination market of BEA[13] No. 170 (Tulsa-Bartlesville, Oklahoma).[14] The Commission did not, however, grant White Cliffs market-based rate authority in its proposed origin market; instead, it established a hearing to determine whether White Cliffs has the ability to exercise market power in the challenged origin market of the Niobrara Shale region (which includes White Cliffs' Platteville, Colorado origin point).[15] The Hearing Order also granted all four Liquids Shippers Group members' motions to intervene.

10. On May 22, 2018, the Chief Administrative Law Judge (Chief Judge) designated me as Presiding Judge and established Track III procedural time standards for this

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[11] *See* Hearing Order at P 1. The Application did not seek market-based rate authority for its Healy, Kansas origin point. Ex. WCP-0011 at 10 n.10.

[12] *See generally* LSG Protest.

[13] The term BEA refers to United States Department of Commerce, Bureau of Economic Analysis Economic Areas. Hearing Order at P 4 n.8.

[14] Hearing Order at PP 1-2 & ordering para. (A). To the extent that Liquids Shippers Group contests this fact, I find that the Commission's Hearing Order was clear on this point. *See* Joint Statement of Contested Facts at PP 46-47.

[15] Hearing Order at PP 1-2 & ordering para. (B).

proceeding. Because of a scheduling conflict, the Chief Judge later extended the schedule.[16]

11. On November 8, 2018, Grand Mesa Pipeline, LLC (Grand Mesa) moved to intervene out-of-time for the sole purpose of ensuring that its highly confidential information is appropriately protected in this proceeding.[17] I subsequently granted its motion, which was unopposed.

12. The participants filed a Joint Statement of Stipulated Facts on February 19, 2019, which I hereby adopt.[18] The participants relied on and referred to these joint stipulated facts throughout the hearing and in their briefs.

13. The hearing commenced on March 19, 2019, and concluded on March 28, 2019. Seven witnesses testified in this proceeding: David Minielly and Dr. Michael Webb on behalf of White Cliffs; Christopher Skorski, Zachary Ruckert, and Dr. C. Shelley Norman on behalf of Commission Trial Staff (Trial Staff); and Jeffrey Kittrell and Dr. Daniel Arthur on behalf of Liquids Shippers Group.[19]

14. On April 26, 2019, White Cliffs, Liquids Shippers Group, and Trial Staff each timely filed initial posthearing briefs. Each also timely filed posthearing reply briefs on June 4, 2019.

III. List of Issues

15. Prior to the hearing, the participants filed a Joint Statement of Issues (JSI) setting forth the following nonexhaustive list of issues to be litigated at hearing:

JSI 1. What is the appropriate product market?

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[16] *Order of Chief Judge Designating Presiding Administrative Law Judge and Establishing Track III Procedural Schedule* (issued May 22, 2018); *Order of Chief Judge Extending Track III Procedural Time Standards* (issued Dec. 13, 2018).

[17] Motion to Intervene Out-of-Time of Grand Mesa Pipeline, LLC at 3.

[18] Insofar as any factual findings in this initial decision may be read as inconsistent with the participants' Joint Statement of Stipulated Facts, the more specific findings in this initial decision rule.

[19] Counsel for the intervenor, Grand Mesa, did not participate in the examination of witnesses.

JSI 2. What is the appropriate geographic origin market?

JSI 3. What are the competitive alternatives to White Cliffs in the geographic origin market?

JSI 4. What are the market power measures for the geographic origin market?

JSI 5. Does the record show that White Cliffs has the ability to exercise market power in the geographic origin market?

16. While I adopt the substance of these issues in this decision, I have included subissues where appropriate.

IV. Burden of Proof

A. In general

17. In a proceeding where an oil pipeline applicant seeks market-based rate authority, the Commission has placed the burden of proof on the applicant.[20] In more general terms, the Commission has explained the burden of proof as follows:

> The party with the burden of proof bears the burden of production, or the need to provide sufficient evidence to establish a *prima facie* case. Once it establishes a *prima facie* case, the burden of going forward shifts to the opposing party; although the ultimate burden of proof remains with the proponent. The party bearing the burden of proof will prevail only if, when the record is closed, *the preponderance of evidence* supports its position.[21]

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[20] Market Based Ratemaking for Oil Pipelines, Order No. 572, 59 Fed. Reg. 59,148, 59,151 & n.20 (1994), FERC Stats. & Regs. ¶ 31,007, at 31,185-86 (1994) (Order No. 572). According to section 15(7) of the Interstate Commerce Act, "[a]t any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice . . . the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable . . . ." 49 App. U.S.C. § 15(7) (1988). In Order No. 572, the Commission explained that it was imposing the statutory burden of proof on an applicant seeking market-based rates. *See* Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,182 & n.20.

[21] *Seaway Crude Pipeline Co. LLC,* 157 FERC ¶ 63,024, at P 26 (2016) (emphasis

18. Furthermore, the Commission has acknowledged that, according to the Supreme Court, "the burden of proof under the Administrative Procedure Act refers to a party's *burden of persuasion*, or the ultimate obligation to persuade the trier of fact as to the truth of the matter."[22]

19. Here, therefore, White Cliffs—the applicant seeking such authority in this proceeding—bears the burden of proving it does not have market power.[23] Importantly, the Commission, by setting this proceeding for hearing, has indicated that White Cliffs, in its application, had met its *prima facie* burden of proof.[24] Nevertheless, White Cliffs retains the overall burden of proof, i.e., the burden of persuasion, in this matter.

B. Role of Trial Staff

20. The participants, while agreeing that White Cliffs bears the burden of proof,[25] disagree over the role Trial Staff and the evidence it enters into the record play in this

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added) (*Seaway ID*) (quoting *Puget Sound Energy v. All Jurisd. Sellers*, Opinion No. 537, 151 FERC ¶ 61,173, at P 98 (2015) (Opinion No. 537)); *accord San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Opinion No. 536, 149 FERC ¶ 61,116, at P 45 (2014) (Opinion No. 536).

[22] Opinion No. 536, 149 FERC ¶ 61,116 at P 45 (emphasis added) (footnotes omitted) (citing *Dir. OWCP v. Greenwich Collieries*, 512 U.S. 267, 273, 279-80 (1994)); *accord* Opinion No. 537, 151 FERC ¶ 61,173 at P 98 & n.190.

[23] *See, e.g., Seaway ID*, 157 FERC ¶ 63,024 at P 26 (explaining that the applicant seeking market-based rate authority had the burden of proof).

[24] *See ANR Storage Co.*, Opinion No. 538, 153 FERC ¶ 61,052, at PP 43-46 (2015) (explaining that, in a gas storage market power proceeding with similar regulations to those here, the Commission, by setting the proceeding for hearing, had essentially found that the applicant had presented a *prima facie* case), *remanded on other grounds*, 904 F.3d 1020 (D.C. Cir. 2018); *see also SFPP, L.P.*, 84 FERC ¶ 61,338, 62,498 (1998) (*SFPP*) (setting matter for hearing because, although applicant pipeline had met its *prima facie* case that it did not have market power, protesters had raised issues that were not completely addressed by application); Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,188-189 (describing the shifting burdens in an oil pipeline market power determination proceeding).

[25] LSG Initial Br. 6-8; *see* WCP Reply Br. 15 (explaining that it is not attempting to "escape" *its* burden of proof); Staff Reply Br. 4-6 (asserting that it "shares" the burden

proceeding. More particularly, the participants dispute the extent to which Trial Staff's evidence may be used to support or refute White Cliffs' analyses and overall market power conclusion.

21. According to Liquids Shippers Group, because White Cliffs bears the burden of proving it does not have market power, I may only consider Trial Staff's evidence to the extent it supports the conclusion that White Cliffs has failed to meet its burden. I may not, however, consider that same evidence to the extent that it supports the conclusion that White Cliffs does not, in fact, have market power.[26] Liquids Shippers Group points to Commission language emphasizing that the burden of proof is on the applicant and that "it is not the Commission's job to determine ways in which a pipeline can establish market-based rates."[27]

22. In response, Trial Staff asserts that, because it has concluded that the applicant does not have the ability to exercise market power in the origin market, it "shares" the burden of proof with the applicant.[28] Trial Staff challenges Liquids Shippers Group's position that I may not consider "salient evidence" in the record that Trial Staff submitted.[29]

23. Finally, White Cliffs argues that it is entirely within the Presiding Judge's and the Commission's discretion to consider all the evidence submitted into the record in assessing whether (and to what extent) it should be afforded market-based ratemaking authority. White Cliffs further contends that it is Commission policy and practice to consider *all* evidence submitted in a proceeding.[30]

24. Upon review of Commission precedent and consideration of the participants' arguments, I conclude that I may rely upon Trial Staff's evidence in determining whether

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of proof with White Cliffs).

[26] LSG Reply Br. 5.

[27] LSG Initial Br. 8 (quoting *Mobil Pipe Line Co.*, 133 FERC ¶ 61,192, at P 7 (2010), *rev'd and vacated on other grounds*, 676 F.3d 1098 (D.C. Cir. 2012)).

[28] Staff Initial Br. 3; Staff Reply Br. 4-5 (citing cases).

[29] Staff Reply Br. 6.

[30] WCP Reply Br. 15-16.

or not White Cliffs has market power and am not limited to using the evidence merely to determine whether White Cliffs has met its burden of proof.

25. In several proceedings involving oil pipeline market power determinations, the Commission has considered and, indeed, relied on Trial Staff's evidence concerning geographic markets and competitive alternatives rather than on the applicant's or the complainant's evidence.[31] Significantly, in another oil pipeline case factually very similar to this one,[32] the Commission adopted the narrower geographic market that Trial Staff had proposed rather than the broader geographic market the applicant had proposed and ultimately determined that the applicant did not have market power.[33] The Commission also largely adopted the competitive alternatives and capacities that Trial Staff had put forth rather than those the applicant pipeline had proposed.[34] The Commission did not dismiss the application on burden of proof grounds, which it should have done under Liquids Shippers Group's theory.[35]

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[31] *See, e.g., Seaway Crude Pipeline Co. LLC*, Opinion No. 563, 163 FERC ¶ 61,127, at P 24 (2018) (Opinion No. 563 or *Seaway III*) (affirming the presiding judge's determination that the proper geographic origin market was Trial Staff's proposed geographic market, which was only a subsection of the applicant's); *Williams Pipe Line Co.*, Opinion 391-A, 71 FERC ¶ 61,291, at 62,137-78 (1995) (relying on Trial Staff's evidence, which differed from the applicant's, in calculating the HHI and determining market power); *cf. Guttman Energy, Inc. v. Buckeye Pipe Line Co., L.P.*, Opinion No. 558, 161 FERC ¶ 61,180, at PP 214, 221, 279-81, 303 (2017) (Opinion No. 558 or *Guttman*) (relying on Trial Staff's evidence, in part, to show that the respondent pipeline could exercise market power).

[32] In that matter, the applicant pipeline, Seaway, had asserted that the proper geographic market was the State of Oklahoma and the Permian Basin/West Texas area. *Seaway ID*, 157 FERC ¶ 63,024 at PP 50, 57. Trial Staff had argued that the geographic origin market should properly be the State of Oklahoma. *Id*. P 64. The respondents had argued that the appropriate geographic market was even smaller than Trial Staff's proposal. *Id*. PP 61, 63.

[33] *Seaway III*, 163 FERC ¶ 61,127 at PP 24, 80-81, 96.

[34] *Id.* P 80 (affirming presiding judge's alternate list of competitive alternatives and capacities, which was largely based on Trial Staff's, except for removal of rail and waterborne movements); *see Seaway ID*, 157 FERC ¶ 63,024 at PP 148, 155.

[35] *See Seaway III*, 163 FERC ¶ 61,127 at P 96 (affirming the presiding judge's

26. The Commission has also indicated that Trial Staff, in effect,[36] shares the burden of proof with the party with which its position aligns.[37] Not only has the Commission suggested as much, but several Commission administrative law judges have also stated that Trial Staff shares the burden of proof in such cases.[38]

27. Regarding the Commission language Liquids Shippers Group quotes, I do not read it to mean that, if Trial Staff does perform a market power analysis, such analysis may not be considered or that Trial Staff may not take a position or assume the evidentiary burden of the side its analysis supports. As the Commission has explained, "Trial Staff . . . is a participant in proceedings set for hearing and, in this capacity, making judgment calls of its own and taking advocacy positions of its own, assists in developing the record so that the Commission has a full and complete record upon which to make decisions."[39]

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finding that the applicant lacked significant market power, a determination based, in large part, on Trial Staff's evidence).

[36] Even assuming *arguendo* that, because the regulations do not explicitly place the burden of proof on Trial Staff, Trial Staff cannot, as a technical matter, "share" the burden of proof, it is clear that Trial Staff—by placing evidence in the administrative record that supports White Cliffs' overall position and aligning itself with White Cliffs on the issue of market power—is, *in effect*, "sharing" the burden of proof with White Cliffs. This is because, as I further explain in the text, in deciding whether White Cliffs has met its overall burden of proof (i.e., its burden of persuasion), I must weigh *all* evidence, including Trial Staff's and any other participant's.

[37] *See Guttman*, 161 FERC ¶ 61,180 at P 303 (affirming that complainants *and Trial Staff* had met their burden of proof in a case imposing the burden of proof on complainants); *Seaway III*, 163 FERC ¶ 61,127 at P 24 (relying on Trial Staff's evidence rather than the applicant's where the applicant had the burden of proof, thereby allowing Trial Staff, in effect, to share the burden of proof with the applicant).

[38] *See, e.g.*, *Tex. Gas Serv. Co.*, 136 FERC ¶ 63,010, at P 330 (2011) (explaining that the party proposing the rate change and any other proponents of the rate change, which included Trial Staff, "share" the burden of proof); *Mo. River Energy Servs*., 130 FERC ¶ 63,014, at P 76 (2010) (explaining that Trial Staff "bears the same burden of proof, (if any) as the party it sides with"); *Pac. Gas. Transmission Co.*, 62 FERC ¶ 63,017, 65,064 (1993) (explaining that the proponents of a rate change, which included Trial Staff, bear the burden of proof).

[39] *Appalachian Power Co.*, 59 FERC ¶ 61,313, at 62,157 (1992) (citing *Kan. Gas*

28. Furthermore, as Liquids Shippers Group themselves point out (and as I quoted above), the Commission has stated that "[t]he party bearing the burden of proof will prevail only if, when the record is closed, *the preponderance of evidence supports its position*."[40] Such evidence includes the evidence Trial Staff, or any other party for that matter, has entered into the record.[41] Notably, this language does not say that the applicant will prevail only if the preponderance of the evidence that *the applicant itself submitted* supports its position. Consequently, in determining whether White Cliffs has prevailed on its claim that it lacks market power in the origin market, I *must* consider *all* the evidence in the administrative record, including Trial Staff's. And, if the preponderance of the evidence supports White Cliffs' position, it will prevail.[42]

& Elec. Co., 35 FERC ¶ 61,208, at 61,481 (1986); *Gulf States Utils. Co.*, 29 FERC ¶ 61,294, at 61,600-01 (1984); *S. Co. Servs., Inc*., 57 FERC ¶ 61,093, at 61,342-43 (1991)). Importantly, in market-based rate proceedings, Trial Staff often has a greater ability to obtain shipper information than the other parties do, thus allowing it to submit key information into the administrative record.

[40] LSG Initial Br. 8 (emphasis added) (quoting *Seaway ID*, 157 FERC ¶ 63,024 at P 26 (quoting Opinion No. 537, 151 FERC ¶ 61,173 at P 98)).

[41] *See Sw. Power Pool, Inc.*, Opinion 562-A, 166 FERC ¶ 61,019, at P 18 (2019) (emphasizing, in response to a claim that a party with the burden of proof did not present evidence in its direct case to support its position, that the presiding judge and the Commission consider arguments "in connection with the *entirety of the record evidence*" (emphasis added)); *cf. City of Winnfield, La. v. FERC*, 744 F.2d 871, 877 (D.C. Cir. 1984) ("If evidence is introduced in the proceeding supporting a rate increase, the increase can lawfully be imposed, regardless of the source from which that evidence comes. In this case, the evidence introduced by the Commission staff satisfied the requirement of § 205.").

[42] Such an approach makes sense as a practical matter in a market-based rate proceeding. If I were to deny White Cliffs' application on burden of proof grounds based on Trial Staff's analysis—which, as discussed below, shows that White Cliffs' proposed geographic market is too broad and that it includes some competitive alternatives that are not good in terms of price, but that also shows that White Cliffs lacks market power—and were the Commission to agree, White Cliffs could simply refile an updated application with the Commission using Trial Staff's calculations the day after the Commission issues its final decision. And, because the Commission would have already determined that Trial Staff's analysis demonstrated that White Cliffs did not have market power, the

29. In sum, I conclude that I must consider the evidence Trial Staff entered into the record in deciding whether the preponderance of evidence supports White Cliffs' position that it does not have market power.

V. General Market Power Methodology

30. The Commission requires an oil pipeline applicant seeking market-based rate authority to first define the relevant markets for which it seeks such authority, which necessarily includes the relevant product and geographic markets. The applicant must then identify the competitive transportation alternatives, including potential competition and other competition that could constrain its rates in those markets. Using this information, the pipeline next must compute market concentration and market share information for the relevant markets. The Commission uses this information to determine whether the applicant pipeline lacks significant market power in the relevant markets.[43]

31. Importantly, as the Commission explained in *Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, "the 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."[44]

32. Keeping these principles in mind, I turn to the issues raised in this proceeding.

VI. Issue I: What Constitutes the Relevant Product Market of the White Cliffs Pipeline?

33. The first step in performing a market power analysis requires the determination of the relevant product market. White Cliffs and Trial Staff argue that the appropriate product market is the transportation (i.e., absorption) of all grades of crude oil,[45] while

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refiled application could be immediately granted.

[43] *Enterprise Prods. Partners L.P.*, 146 FERC ¶ 61,115, at P 34 (2014) (*Seaway I*); *accord Enterprise TE Prods. Pipeline Co.*, Opinion No. 529, 146 FERC ¶ 61,157, at P 7 (2014) (Opinion No. 529).

[44] *Guttman*, 161 FERC ¶ 61,180 at P 241; *accord Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, Opinion No. 558-A, 164 FERC ¶ 61,025, at P 13 (2018).

[45] *See* WCP Initial Br. 10; Staff Initial Br. 4.

Liquids Shippers Group defines the product market as the transportation of light crude oil.[46]

34. Upon review of the record evidence, I conclude that the preponderance of the evidence demonstrates that the appropriate product market in this proceeding is the transportation (i.e., absorption) of light crude oil as that term is defined in this proceeding (i.e., crude oil with an API gravity no less than 35 degrees).[47] My reasons follow.

A. Participants' positions

35. *White Cliffs*. White Cliffs contends that the appropriate product market includes the transportation of all grades of crude oil.[48] In defining the product market, White Cliffs considered the absorption of all grades of crude oil, including that crude oil which "is both consumed (or absorbed) in the origin market" by local refineries and moved out of the origin market on pipeline, truck, and rail.[49] According to White Cliffs, examination of the appropriate product market requires consideration of the capabilities of White Cliffs and other pipelines serving the market, as well as the capabilities and behavior of refineries operating along the supply chain in both the origin and destination markets.[50] Applying these principles, White Cliffs maintains that the evidence in this proceeding shows that White Cliffs and its competitors are capable of transporting or absorbing multiple grades of crude oil,[51] thereby demonstrating a cross-elasticity of substitution between different grades of crude oil that warrants expanding the product

[46] LSG Initial Br. 11-18.

[47] *See* JSF 31.

[48] WCP Initial Br. 10; Ex. WCP-0009 at 22:8-10 (Webb).

[49] WCP Initial Br. 10-11.

[50] *Id*. at 12.

[51] *See, e.g.*, *id*. at 13-15; WCP Reply Br. 10-11.

market to include all grades of crude oil.[52] White Cliffs contends that Liquids Shippers Group ignores these facts.[53]

36. White Cliffs also claims that cross-elasticity of substitution is demonstrated by the fact that "different grades of crude oil at a location tend to track closely in price," positing that one would not expect to observe such price tracking "[i]f different grades of crude oil were truly in different product markets."[54] White Cliffs therefore contends that, if it increased its light crude transportation rate, the response of shippers would be to divert volumes to local refineries or to move their volumes out of the origin market on pipeline, truck, or rail.

37. White Cliffs argues that the method Liquids Shippers Group uses to define the product market is inconsistent with Commission precedent and economic principles, and is also contrary to the record evidence.[55] According to White Cliffs, the product market analysis performed by Liquids Shippers Group witness Dr. Arthur is incomplete because it mistakenly focuses on "the behavior of a small subset of market participants—namely producers in the Wattenberg Field that currently use White Cliffs"—rather than examining "the way market participants beyond members of the [Liquids Shippers Group] could shift to different products to discipline a supra-competitive price increase in the transportation of light crude oil."[56] White Cliffs further contends that the proper inquiry into the relevant product market is whether transportation and refining alternatives exist, and argues that "the fact that producers or shippers may not be able to switch to processing or shipping different grades of crude oil in response to a price increase in the transportation rate of a particular grade of crude oil does not, in and of itself, serve as the basis for defining the product market."[57]

38. *Liquids Shippers Group*. Liquids Shippers Group raises a number of challenges to White Cliffs' proposed product market. First, Liquids Shippers Group maintains that the

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[52] WCP Initial Br. 12.

[53] WCP Reply Br. 11.

[54] WCP Initial Br. 17.

[55] *Id*. at 17; WCP Reply Br. 6-7.

[56] WCP Initial Br. 17; *see also* WCP Reply Br. 7.

[57] WCP Initial Br. 19-20.

product market should be limited to the transportation of light crude oil.[58] According to Liquids Shippers Group, a product market analysis "must be focused on the cross-elasticity of demand for the transportation of the product, not the cross-elasticity of demand for the products themselves."[59] Liquids Shippers Group asserts that in the context of a crude oil origin market, the product market "is generally limited to 'those products available from the production fields (*i.e.*, the geographic market).'"[60] Consequently, according to Liquids Shippers Group, White Cliffs' product market analysis should focus on the transportation service it provides as defined in its tariff: the transportation of two grades of light crude oil produced in the Wattenberg Field (both of which have API gravities of 35 degrees or greater).[61]

39. Second, Liquids Shippers Group claims that Dr. Webb's proposed product market (i.e., the absorption of all crude oil) is inappropriate because it is broader than the service (i.e., transportation) for which White Cliffs seeks market-based rates in this proceeding. Third, according to Liquids Shippers Group, the behavior of refineries *in the destination market* in response to the imposition of supracompetitive rates by White Cliffs is irrelevant to the product market analysis because "it is only the shippers or consumers of light crude oil that would respond" to a rate increase imposed by White Cliffs.[62]

40. Finally, Liquids Shippers Group contends that White Cliffs' and Trial Staff's reliance on the *Seaway* decisions in defining their proposed product market is misplaced because, unlike White Cliffs, Seaway actually transported both heavy crude and light crude oil, thereby evidencing that shippers on Seaway had a cross-elasticity of demand for the transportation of heavy and light crude.[63] The same facts are not present in this proceeding, says Liquids Shippers Group, and therefore "a conclusion reached in that case does not automatically apply in this case, especially when Seaway's market-based rate case involved different shippers, an origin point at a hub [i.e., an area with wide

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[58] LSG Initial Br. 11-18.

[59] *Id*. at 10 (citing Opinion No. 529, 146 FERC ¶ 61,157 at PP 26-29).

[60] *Id*.

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

[62] *Id*. at 14-15.

[63] *Id*. at 17 (citing *Seaway III*, 163 FERC ¶ 61,127); *Seaway ID*, 157 FERC ¶ 63,024 at PP 31, 43-46).

accessibility to all grades of crude, not a distinct area of tight oil sand production of near entirely light crude as exists in this case] that brought in significant production from distant producing areas, and provided a wider variety of transportation services than the one at issue in this case."[64]

41. *Trial Staff.* Trial Staff recommends defining the product market as the transportation (i.e., absorption) of all grades of crude oil.[65] Trial Staff argues that, pursuant to the analysis set forth in *Seaway I*, its product market definition turns on identifying any product that could discipline an exercise of market power by White Cliffs.[66] According to Trial Staff, the products that could discipline White Cliffs include the transportation services offered by pipelines and rail alternatives as well as the disposition or local usage of crude oil by refineries.[67]

42. According to Trial Staff, assessing cross-elasticity of the transport of light crude oil with other transportation services should not be construed so narrowly as to "restrict attention to the applicant's shippers" because doing so "would yield a different appropriate product market depending on which of the multiple pipelines in the same market [files a market-based rate] application."[68] Trial Staff further claims that "limiting the market power inquiry to current Wattenberg Field area production inappropriately superimposes a predetermined geographic market on the candidate product market"—contrary to Commission precedent and agency guidance.[69]

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[64] LSG Initial Br. 17-18.

[65] Staff Initial Br. 4.

[66] *See id*. at 4-5 (citing *Seaway I*, 146 FERC ¶ 61,115 at P 44).

[67] Staff Reply Br. 6-7.

[68] Staff Initial Br. 7 (citing Ex. S-0001 at 30:10-31:3 (Norman)).

[69] *Id*. at 8 (citing *Seaway III*, 163 FERC ¶ 61,127 at P 56; U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Apr. 2, 1992, rev. Apr. 8, 1997) (*1992 DOJ-FTC Merger Guidelines*)); *see also* Staff Reply Br. 8; Ex. S-0001 at 23-28:5, 36:10 (Norman) (citing Opinion No. 529, 146 FERC ¶ 61,157 at PP 27-28).

43. Trial Staff also argues that "substitutability of the product transported implies substitutability of the transportation service."[70] Applied here, Trial Staff argues that the ability of pipelines, refineries, and blenders to respond to changes in the relative prices of different types of crude by altering their product mix evidences cross-elasticity of demand between the transportation of light and heavy crude oil.[71]

44. Trial Staff claims that Liquids Shippers Group improperly imposes a temporal limit to the product market inquiry by assessing only the product White Cliffs currently offers and the current physical capabilities of White Cliffs and its competitors.[72] Trial Staff argues that applying the two-year pipeline modification time frame that the Commission has previously used to assess cross-elasticity demonstrates that White Cliffs has the ability to transport heavier grades of crude oil.[73] Trial Staff also asserts that co-movements in the prices of various grades of crude oil suggest substitutability.[74] Finally, Trial Staff claims that even if the Commission narrowly defines the product market, evidence of heavy crude oil produced in the Wattenberg Field supports its proposed product market.[75]

B. Discussion

1. Commission guidance

45. In *Seaway I*, the Commission provided detailed guidance regarding the product market. There it said:

> The Commission determines that the product market(s) for an oil pipeline consists of that service or those services which the pipeline holds itself out as offering. The appropriate product market in a market-power analysis includes (1) those services for which the applicant seeks to charge market-based rates,

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[70] Staff Initial Br. 9.

[71] *Id*. at 9, 11.

[72] Staff Reply Br. 7.

[73] Staff Initial Br. 12; Staff Reply Br. 8.

[74] Staff Initial Br. 13.

[75] *Id*. at 14; *see* Staff Reply Br. 7-8.

> and (2) any product that could discipline the exercise of market power over those products.[76]

46. Thus, "[i]f an oil pipeline application seeks market-based rates for all forms of crude oil transportation, the product market could expand accordingly to include all transport, or be divided into separate product markets . . . based on the cross-elasticity between products."[77]

47. Significantly, the Commission more specifically stated that "[i]n 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."[78]

48. In *Seaway I*, the Commission also provided guidance on cross-elasticity principles as they apply to the transportation or disposition of different grades of crude. It explained that cross-elasticity (i.e., substitutability) measures the willingness and ability of consumers to respond to an increase in the price of one good by substituting or shifting to another.[79] "In general terms, cross-elasticity requires identifying the choices available, focusing on whether consumers [i.e., producers/shippers in the production field(s)] will shift from one product to another in response to changes in their relative costs."[80] In the context of crude oil pipelines, the Commission explained that "the question is whether the transportation or disposition of different grades or types of crude oil . . . could serve to discipline a potential price increase above competitive levels."[81] The Commission

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[76] *Seaway I*, 146 FERC ¶ 61,115 at P 44. I note that these two statements are not necessarily congruent.

[77] *See id.*

[78] *Id.* (emphasis added). This statement suggests that much of the Commission's guidance on cross-elasticity applies to destination markets or, at least to date, the Commission has not used this concept in expanding the product market when analyzing an origin market alone.

[79] *Id.* P 43 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)); *see also Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098, 1102 (D.C. Cir. 2012).

[80] *Seaway I*, 146 FERC ¶ 61,115 at P 43.

[81] *Id.* The Commission has made clear that "transportation" includes the disposition or local usage of crude oil by refineries. Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,190 (stating that the "disposition of product (*i.e.*, local usage or refiners)"

provided an example using heavy crude.[82] Reversing the terms "light" and "heavy" in the example leads to the following proposition: "[i]f a price increase for the transportation of [light] crude would potentially cause producers [or shippers] to shift their demands to [heavy] crude transport, these products would generally both be included in one product market. If however a price increase on [light] crude could not be disciplined by such a shift, they would not exhibit a significant cross-elasticity and would instead constitute separate product markets."

49. As with the geographic market, the Commission allows oil pipeline applicants to propose any product market definition, but places the burden to justify the definition on the applicant.[83] The relevant product market is determined on a case-by-case basis.[84]

2. Analysis

50. Following this Commission precedent, I identify what the appropriate product market should be in this proceeding. To do so, I review the facts regarding the service that White Cliffs holds itself out as offering, the products available from the production fields,[85] and any product that could discipline the exercise of market power over those products.

51. With respect to the last factor, I consider the choices available to shippers in the production fields attached to the relevant origin market to shift their purchases of light crude oil transportation or disposition service to purchases of heavy crude oil transportation or disposition service in response to a change in their relative costs. Identifying the choices available to shippers will indicate whether products exist that share a cross-elasticity of demand with the transportation or disposition of light crude oil.

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is relevant to a product market definition).

[82] *Seaway I*, 146 FERC ¶ 61,115 at P 43.

[83] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,189.

[84] *Id*. at 31,184, 31,189.

[85] The discussion in this section focuses on the product(s) available from the production fields attached to the relevant origin market. The participants focused their discussions largely on the Wattenberg Field and the DJ Basin and did not provide much information about the Niobrara Shale Region.

a. Key factual findings

52. *Facts regarding the crude oil produced in the production fields*. White Cliffs' Platteville, Colorado receipt point is located in Weld County, within the Wattenberg Field production area.[86] During the period from January 1, 2016, through May 31, 2018, Kerr McGee, one of the largest producers in the area, produced less than 0.06 percent (less than three barrels per day (BPD)) of crude with an API gravity of less than 35 degrees in the production it measures separately.[87] Kerr McGee's heavy crude volume production is so small that it cannot be marketed separately; thus Kerr McGee aggregates these volumes with its other production and sells them as light crude.[88] A small volume of crude oil with API gravities greater than 57 degrees is also produced in the Wattenberg Field. It too is combined with the substantial volumes of crude oils with API gravities between 35 and 57 degrees.[89]

53. **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)].**[90] **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)].**[91]

[86] Ex. LSG-0001 at 5:10-17 (Kittrell); Ex. LSG-0002 at 48:17-21 (Arthur), 49 (Figure 1); *see also* Ex. GEO-0001.

[87] Ex. LSG-0030 at 2:17-20 (Kittrell); Ex. LSG-0034 at 8:21-9:3 (Arthur).

[88] Ex. LSG-0030 at 2:23-3:3 (Kittrell).

[89] Ex. LSG-0034 at 12:4-19 (Arthur). Although this crude oil is not "light" crude as that term is defined in this proceeding, it is not "heavy" crude either. For purposes here, I consider it "ultralight."

[90] *Id.* at 9:11-10:4.

[91] *Id.* at 10:7-11:4; Ex. S-0029 at 89–92.

54. *Facts regarding crude oil shipped on White Cliffs and White Cliffs' tariff.* White Cliffs ships crude oil from its Platteville, Colorado receipt point to Cushing, Oklahoma.[92] White Cliffs receives crude oil at its Platteville receipt point by connected gathering system or by truck.[93] The majority, but not all, of the crude trucked to the Platteville receipt point originates from the Wattenberg Field production area.[94]

55. White Cliffs seeks market-based rate authority for the transportation of all grades of crude oil. White Cliffs currently only offers tariff rates for light crude oil with API gravities ranging from 35 to 57 degrees.[95] The tariff specifies that White Cliffs ships two types of light crude: DJ Basin Crude and Niobrara Shale Crude as these are defined therein.[96] White Cliffs operates a batched system capable of transporting different grades of crude oil.[97] White Cliffs has never shipped a dedicated batch of heavy crude.[98] Any **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[99] Any **[BEGIN**

[92] JSF 2.

[93] *Id.* 9; Ex. WCP-0001 at 8:8-11 (Minielly); Ex. LSG-0001 at 6:7-8 (Kittrell).

[94] JSF 19, 52; Ex. WCP-0028 at 1-2; Ex. LSG-0001 at 6:11-12 (Kittrell). For further details on trucking volumes, *see infra* Part VII.B.2.a.

[95] Tr. 210:12-15 (Webb); Ex. WCP-0002 at 4. "Light crude oil" is defined as "crude oil that has an API gravity of 35 degrees or greater" for purposes of this proceeding. JSF 31.

[96] Ex. WCP-0002 at 4; JSF 27-28.

[97] Tr. 78:22-79:3, 89:14-90:2 (Minielly); Ex. S-0002.

[98] Tr. 81:24-82:6 (Minielly).

[99] Tr. 81:24-82:6 (Minielly); Ex. LSG-0030 at 2:15-3:3, 3:10-13 (Kittrell); Ex. LSG-0034 at 10:5-11:20, 12:13-19 (Arthur); *see also* Ex. S-0001 at 32:14-7 (Norman); Ex. S-0029 at 89-92; Ex. S-0004; JSF 36.

CUI//PRIV-HC-Section 15(13)] [redacted] **[END CUI//PRIV-HC-Section 15(13)].**[100]

56. As a technical matter, White Cliffs could modify its system to transport heavier grades of crude.[101] Such modifications "may require larger and/or more closely spaced pumps,"[102] but it is unclear from the record what time frames are necessary to implement such modifications. In addition, White Cliffs presents no evidence that, at this time, it intends to modify its system.

57. *Facts regarding rail terminals*. Several rail terminals are located in the Wattenberg Field and DJ Basin.[103] I take administrative notice that rail facilities are generally capable of transporting all grades of crude oil.

58. *Facts regarding the Saddlehorn/Grand Mesa pipeline*. Saddlehorn Pipeline Company, LLC (Saddlehorn) and Grand Mesa Pipeline, LLC (Grand Mesa) own an undivided, joint-interest pipeline with origin points in Weld County, the same county which encompasses White Cliffs' Platteville receipt point.[104] The Saddlehorn/Grand Mesa joint-interest pipeline transports crude oil from Weld County to Cushing, Oklahoma.[105] The Saddlehorn transports various grades of light crude oil; the Grand Mesa transports **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[106]

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[100] Ex. S-0001 at 32:14-21 (Norman); Ex. S-0004; *see also* Tr. 211:11-15 (Webb).

[101] Ex. WCP-0001 at 12:4-7 (Minielly).

[102] Ex. S-0001 at 35:2-4 (Norman) (citing Ex. WCP-0001 at 12:4-7 (Minielly)); *see also* Tr. 274:6-16 (Webb).

[103] Ex. S-0023 at 62:5-8 (Ruckert). See *infra* Parts VIII.C.3.c and VIII.C.3.d for a detailed discussion of these rail terminals.

[104] Ex. WCP-0011 at 120 & fig. E.1; Ex. S-0019 at 6:4-20, 8:10-21 (Skorski).

[105] JSF 65-67; Ex. WCP-0013 at 13 (Saddlehorn), 32 (Grand Mesa); *see also* Ex. GEO-0001.

[106] Ex. S-0019 at 7:2-11, 9:2-6 (Skorski); Ex. S-0020 at 17 (Saddlehorn); Ex. S-0021 at 4-5 (Grand Mesa).

59. *Facts regarding the Pony Express Mainline and Pony Express NECL*.[107] The Tallgrass Pony Express Pipeline, LLC Mainline extends from Guernsey, Wyoming, to Cushing, Oklahoma.[108] An extension, the Pony Express Northeast Colorado Lateral (Pony Express NECL), connects with this main trunkline.[109] It has origin points in Weld County, Colorado, including the Platteville Extension which originates in Platteville (also in Weld County).[110] The Pony Express NECL is located within the Wattenberg Field production area.[111] The Pony Express Mainline is located outside of the Wattenberg Field.[112] The tariff governing the Pony Express system provides that the Pony Express Mainline can transport heavy grades of crude with an API as low as 28 degrees and as high as 52 degrees, and that the Pony Express NECL may transport grades of crude with an API between 28 to 57 degrees.[113] Both segments of the Pony Express system have access to DJ Basin, Bakken Shale, and Powder River Basin production.[114]

60. *Facts regarding the Platte pipeline*. The Platte Pipe Line Company, LLC (Platte) pipeline transports crude oil from Casper, Wyoming, to Guernsey, Wyoming and to various other delivery points in the Midwest.[115] Its Casper and Guernsey terminals are

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[107] Because the Pony Express NECL interconnects directly with the Pony Express mainline in Logan County, Colorado, these two pipeline alternatives are discussed together. Ex. WCP-0011 at 121:1-9; *see also* Ex. GEO-0001. Some participants refer to both sections together as the Pony Express system.

[108] Ex. S-0019 at 10:7-9 (Skorski); Ex. WCP-0011 at 121:1-4.

[109] Ex. S-0019 at 10:13-19 (Skorski); Ex. WCP-0011 at 121:7-9.

[110] Ex. S-0019 at 10:13-19 (Skorski); Ex. S-0038 at 28-36; Ex. S-0023 at 43:16-20 (Ruckert); Ex. WCP-0011 at 121:1-4.

[111] *See* Ex. GEO-0001; Ex. S-0046 at 1; Ex. LSG-0002 at 49 (Arthur) (Figure 1).

[112] *See* JSF 66; Ex. GEO-0001; Ex. S-0046 at 1.

[113] Ex. LSG-0032 at 6; *see also* Tr. 275:9-15 (Webb), 1020:2-1021:14 (Arthur).

[114] Ex. LSG-0041 at 5.

[115] Tr. 279:5-9, 279:15-16 (Webb); Ex. WCP-0009 at 26:18-27:3 (Webb); Ex. WCP-0013 at 3-5; JSF 37.

located outside of the Wattenberg Field production area.[116] The Platte tariff states that it transports light, medium, heavy, and super-heavy grades of crude.[117] Platte also transports a heavy grade of crude called Wyoming asphaltic.[118]

61. *Facts regarding the Suncor Refinery.* Suncor's refinery is located in Commerce City, Denver County, Colorado (Suncor Refinery), is located near the Wattenberg Field production area.[119] The Suncor Refinery is generally capable of receiving all grades of light crude oil[120] and can process a variety of crude qualities such as Suncor synthetics, Canadian heavy, and Colorado Sweet.[121] **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[122] The Suncor Refinery sources some of its crude oil from Weld County, the broader Wattenberg Field production area, Wyoming, and

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[116] *See* Ex. GEO-0001; Ex. S-0046 at 1; Ex. WCP-0013 at 34.

[117] JSF 37. I note that the Platte tariff does not provide any numerical range of API gravity specifications. Ex. WCP-0013 at 3-5.

[118] Tr. 279:5-9 (Webb).

[119] *See* Ex. S-0023 at 31:5-6; Ex. LSG-0002 at 49 (Arthur) (Figure 1).

[120] *See* JSF 34; Ex. WCP-0015 at 20 (ranging from 35 to 60 API).

[121] Ex. WCP-0015 at 2 (Suncor publicly available presentation); *see also* Tr. 941:14-22 (Kittrell).

[122] Ex. LSG-0022 at 4, 18. Exhibit No. LSG-0022 **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**

Canada.[123] The Suncor Refinery does not have a coker.[124] Refineries with cokers have more ability to process heavier crudes.[125]

62. *Facts regarding the HollyFrontier Refinery*. HollyFrontier's refinery in Cheyenne, Laramie County, Wyoming (HollyFrontier Refinery), is located outside of the Wattenberg Field production area but within the tight oil sand portion of DJ Basin.[126] The HollyFrontier Refinery is capable of processing heavy Canadian crudes and local sweet crudes.[127] The HollyFrontier Refinery has a coker.[128]

b. Summary of key factual findings and conclusions

63. Based on these factual findings, I conclude that the preponderance of the evidence supports a product market defined as the transportation (or disposition) of light crude oil. Despite its application for market-based rates for the transportation of all crude oil, White Cliffs only provides light crude oil transportation service.[129] Nearly all of the crude oil produced in the Wattenberg Field and the tight-oil producing portion of the DJ Basin is

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[123] *See* Tr. 223:25, 224:16-17 (Webb) (sourcing from Wyoming); Tr. 223:25-224:2, 224:11-15 (Webb) (sourcing from Weld); Tr. 467:8-11 (Skorski) (sourcing from Canada as well as locally); Tr. 485:1-7 (Skorski) (sourcing from Wattenberg Field); Ex. WCP-0015 at 19-21 (sourcing from Canada, Wyoming, and Colorado); *see also* Tr. at 941:14-22 (Kittrell); Ex. WCP-0019.

[124] Tr. 277:4-5 (Webb); Ex. WCP-0034 at 11.

[125] Tr. 276:24-25 (Webb).

[126] Ex. S-0046 at 1; Ex. LSG-0002 at 49 (Arthur) (Figure 1); *see also* Ex. GEO-0001.

[127] Ex. WCP-0016 at 2; *see also id.* at 3 (showing percentages of feedstocks of various grades of crude oil for years 2015 through 2017). The percentages apply to two of HollyFrontier's refineries, including the one in Cheyenne.

[128] Ex. WCP-0016 at 3.

[129] As noted above, White Cliffs holds itself out as transporting two products, DJ Basin Crude and Niobrara Shale Crude, which are both types of light crude. JSF 27-28. Tr. 210:12-15 (Webb); *see also* JSF 31 (defining light crude for purposes of this proceeding).

light crude,[130] with the exception of very small amounts of crude oil with API gravities of less than 35 degrees.[131] Furthermore, light crude oil is the only product produced in the Wattenberg Field and the tight oil-producing portion of the DJ Basin in significant enough quantities to be marketed separately.[132] All nonlight crude produced in these production fields is aggregated with light crude and shipped as light crude. In light of the Commission's statement that, in the context of crude oil origin markets, "only transportation of those products *available from the production fields* (i.e., the geographic market) is to be included in the product market,"[133] the appropriate product market here is transportation or absorption of all grades of light crude oil.

64. The Commission's statement regarding crude oil origin markets suggests that cross-elasticity is not relevant once it is determined that only one product is realistically available from the relevant production fields. Nonetheless, because of the importance of cross-elasticity in defining product markets generally, I consider cross-elasticity here out of an abundance of caution. Even considering the issue of potential cross-elasticity in this market, I find the preponderance of evidence does not demonstrate that there is cross-elasticity of demand between the transportation or absorption of light and heavy crude *in this market*.

65. Although the participants presented evidence that both the Suncor and HollyFrontier Refineries accept both heavy and light crude oil, the participants did not provide any evidence that the heavy crude comes from Wattenberg Field or DJ Basin producers. The evidence instead suggests that the heavy crude is shipped to the refineries from other more distant markets.[134] The participants also failed to present persuasive (or

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[130] JSF 32; Ex. LSG-0034 at 8:10-9:3, 9:14-17 (Arthur); Tr. 279:24-25, 280:4-6 (referring to DJ Basin production), 281:13-17 (Weld County), 281:24-282:1 (Webb); *see also* Ex. LSG-0030 at 2-3 (Kittrell).

[131] Ex. LSG-0030 at 2:10-20 (Kittrell) (referring to it as "*de minimis*"); Ex. LSG-0031 at 1; Ex. LSG-0034 at 8:21-10:4 (Arthur) (referring to it as "miniscule" and "minute"); Ex. LSG-0035 (summary table); Ex. S-0029 at 89-92. As I found, there are some crude volumes that are even lighter than the light crude

[132] In accordance with *Seaway I*, I have considered all shippers in the market and not merely current shippers on White Cliffs. *See Seaway I*, 146 FERC ¶ 61,115 at P 43.

[133] *Id.* P 44 (emphasis added).

[134] *See, e.g.*, Tr. 467:8-11 (Skorski); *see also* Tr. at 941:14-22 (Kittrell).

specific) evidence showing how shipments of heavy crude from other more distant geographic markets to these refineries create cross-elasticity with light crude in the local Wattenberg Field or DJ Basin markets. Additionally, the Grand Mesa, Saddlehorn, and Pony Express NECL pipelines ship light crude, and there is no evidence that they are able to transport other grades of crude oil.[135] And while the rail alternatives, like the local refineries, may be able to accept and transport heavy crude in lieu of light, such heavy crude would have to be shipped to the rail terminals in the market being analyzed here from other more distant geographic markets. In other words, White Cliffs and Trial Staff did not demonstrate how a price increase for the transportation of light crude in the geographic market analyzed here could potentially cause Wattenberg Field producers and/or shippers to shift *their* demand to heavy crude transport.

66. Some of the testimony referred to—and relied on—findings of cross-elasticity between heavy and light crude in other proceedings involving other geographic markets.[136] But cross-elasticity in other distant geographic markets does not demonstrate cross-elasticity in our particular market. As the Commission has emphasized, defining the product market is a case-by-case determination.

67. Overall, therefore, the weight of evidence does not show cross-elasticity of demand between the transportation (absorption) of light and heavy crude in our origin market.

c. Participants' challenges to defining the product market as the transportation of light crude

68. As already mentioned, White Cliffs and Trial Staff argue that the appropriate product market should be the transportation or disposition of all crude oil. Their arguments are unpersuasive and are not supported by the weight of the evidence in this proceeding.

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[135] I note that the Pony Express NECL tariff allows for shipment of crude that is below API 35, but the participants presented no evidence that the Pony Express NECL actually ships anything but light crude.

[136] *See, e.g.*, Ex. S-0001 at 30:4-10 (Norman) (quoting Opinion No. 529, 146 FERC ¶ 61,157 at PP 27-28), 33:12-34:11 (discussing *Buckeye Pipe Line Co., L.P.*, Opinion No. 360, 53 FERC ¶ 61,473, at 62,664 (1990) (Opinion No. 360), which found that heavy and light crude are "an example of a substitution in use"); Ex. WCP-0050 at 40:5-41:18 (Webb) (discussing the presiding judge's findings regarding refining in the *Seaway ID*).

69. Fundamentally, each of the arguments White Cliffs and Trial Staff raises ignores the Commission's guidance in Order No. 572 and *Seaway I* on performing a product market analysis within an origin market. Significantly, those orders emphasize the Commission's preference for a fact-specific determination of the relevant product market in each proceeding. Contrary to the generalized macroeconomic theories of cross-elasticity propounded by White Cliffs and Trial Staff, nothing in those orders suggests that the Commission intended to forego consideration of actual market behavior in favor of evidence of the general capabilities and willingness of market participants across multiple, distant markets to switch between different types of crude oil. Because White Cliffs and Trial Staff offered no substantive support for their purported observations of cross-elasticity in the market at issue in this proceeding, I find their arguments unpersuasive.

70. In addition to raising other challenges, White Cliffs and Trial Staff contend that Dr. Arthur's analysis is incomplete because it mistakenly focuses on "the behavior of a small subset of market participants—namely producers in the Wattenberg Field that currently use White Cliffs"—and ignores the way market participants beyond Liquids Shippers Group members "could shift to different products to discipline a supra-competitive price increase in the transportation of light crude oil."[137] White Cliffs and Trial Staff misconstrue Dr. Arthur's approach to defining the product market. In his prefiled testimony, Dr. Arthur states that "the identification of the relevant product market begins with the service purchased by shippers or consumers *at the origin*, which is the transportation for specific grades of light crude oil in the Wattenberg Field area."[138] Contrary to the claims of White Cliffs and Trial Staff, Dr. Arthur appears to be following the Commission's guidance in *Seaway I* by analyzing only those products that are available *from the production fields* where the applicant pipeline is physically located.[139] White Cliffs and Trial Staff do not even attempt to reconcile the importance the Commission has placed on identifying the products available to shippers in the applicant pipeline's production field(s). More important, *I* have considered all market participants' (i.e., producers' and shippers') behaviors, not just White Cliffs' shippers.

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[137] WCP Initial Br. 17-18; *see also* Staff Initial Br. 7 (quoting Ex. S-0001 at 30:10-31:3 (Norman)).

[138] Ex. LSG-0002 at 35:5-9 (Arthur) (emphasis added).

[139] *Compare* Ex. LSG-0002 at 35:5-9 (Arthur) *with Seaway I*, 146 FERC ¶ 61,115 at P 44.

71. White Cliffs next argues that defining the product market as including only light crude ignores the capabilities of refineries operating along the supply chain in both the origin and *destination* markets to process heavier crude and is inconsistent with Commission precedent.[140] I disagree. As Dr. Arthur correctly explained, the relevance of refineries in an origin market turns on whether the evidence shows that the refinery at issue "would switch from refining light crude *from the origin producing basin* to refining heavy crude *from the origin market* in response to a rate increase for the transportation of light crude out of the origin producing basin."[141] Thus, a refinery's ability to process heavier grades becomes irrelevant when the production fields *in the origin market* cannot supply the heavier crude needed to make substitution possible. This makes sense, as the market participants that would be impacted by a price increase in the transportation rate of light crude oil are the shippers and producers operating *in the origin market*, and it is therefore *their* ability to avoid a price increase that is the crux of the market power analysis. In addition, White Cliffs and Trial Staff have provided no evidence establishing a nexus between the market at issue and refineries located in other distant markets (including White Cliffs' destination market), which are far removed from the market realities affecting the DJ Basin products that we are concerned with in defining the product market here.

72. White Cliffs and Trial Staff additionally claim that evidence of co-movements in price between light and heavy crude across multiple markets demonstrates cross-elasticity in the transportation of light and heavier crude oil.[142] Again, they fail to establish a nexus between co-movements in price observed in the aggregate and co-movements in price observed in the particular market at issue in *this* proceeding. Indeed, White Cliffs and Trial Staff do not even identify which market or markets these purported co-movements have been observed.[143] Insofar as White Cliffs and Trial Staff argue that observations of price tracking between various grades of crude across different markets demonstrates

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[140] WCP Initial Br. 18 (citing Ex. LSG-0002 at 41:8-42:2 (Arthur)); *see also, e.g.*, Ex. WCP-0050 at 38:11-40:10 (Webb).

[141] Ex. LSG-0034 at 14:12-17 (Arthur) (citing Opinion No. 529, 146 FERC ¶ 61,157 at PP 27-28) (emphasis added).

[142] WCP Initial Br. 17; Staff Initial Br. 13-14 (citing Opinion No. 360, 53 FERC ¶ 61,473 at 62,664).

[143] *See, e.g.*, Ex. WCP-0050 at 43:7-13 (Webb); Ex. WCP-0009 at 28-29 (Webb); Ex. S-0069 at 11:9-11 (Norman).

cross-elasticity, I find their claims inconsistent with Opinion No. 360, wherein the Commission considered evidence of price tracking observed *at a particular location* (i.e., the destination market at issue) in assessing cross-elasticity in the destination market.[144] Absent evidence of price tracking in the origin market at issue here or other evidence providing a logical nexus with the destination market claims, White Cliffs' and Trial Staff's claims lack credibility here.

73. Finally, insofar as White Cliffs and Trial Staff rely on the *Seaway Initial Decision*[145] defined herein in support of their product market definition, the findings and conclusions of the presiding judge therein are, again, for a different market, for a wholly different pipeline situation, and are not precedential. Consequently, they are not addressed further.[146]

d. Conclusion

74. For all these reasons, I conclude that the preponderance of the evidence demonstrates that the appropriate product market here is the transportation (absorption) of light crude grades as defined in this decision.

VII. Issue II: What Constitutes the Geographic Origin Market of the White Cliffs Pipeline?

75. I must next decide what constitutes the appropriate geographic origin market. All participants agree that the Wattenberg Field (the production field in which White Cliffs is physically located) is part of the appropriate geographic origin market but disagree on the scope of the market beyond the Wattenberg Field.[147] White Cliffs and Trial Staff argue that an appropriate geographic market is broader than the Wattenberg Field, whereas

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[144] *Id.* at 62,664.

[145] 157 FERC ¶ 63,014.

[146] *See, e.g.*, WCP Initial Br. 18-20; WCP Reply Br. 8; Staff Initial Br. 4, 10; Staff Reply Br. 9, 10-11; Ex. WCP-0050 at 40:7-41:18 (Webb).

[147] WCP Initial Br. 21-22; LSG Initial Br. 18; Staff Initial Br. 15-16.

Liquids Shippers Group asserts that the Wattenberg Field should be the extent of the geographic market.[148]

76. Furthermore, although the participants generally agree that the hypothetical monopolist test is an appropriate method to define the geographic market,[149] each claims that they are the only participant that has properly applied Commission guidance on performing a geographic origin market analysis to the facts of this proceeding.[150]

77. Upon review of the evidence and the participants' arguments, I conclude that the appropriate geographic origin market here is the DJ Basin Origin Market as defined by Trial Staff. My reasoning is discussed in more detail below.

A. Participants' positions

78. As an initial matter, in developing proposed geographic markets (i.e., JSI 2), the participants rely, in part, on the results of their competitive alternatives analyses (i.e., JSI 3). This is a typical practice. As the Commission has stated, although these two issues "are separate and distinct," they may involve "similar methodologies."[151] Due to this relatedness, I too rely to some degree on the participants' competitive alternative analyses in analyzing the appropriate geographic market.

79. *White Cliffs*. White Cliffs argues that the appropriate geographic market in this proceeding is the Niobrara Shale Region, as that region is defined by the U.S. Energy

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[148] WCP Initial Br. 21; LSG Initial Br. 22-23; Staff Initial Br 15.

[149] *See* Ex. WCP-0050 at 3:12-4:2 (Webb); *see also* Ex. S-0023 at 35:2-5 (Ruckert); Ex. LSG-0002 at 55:7-57:19 (Arthur).

[150] *See, e.g.*, Ex. WCP-0009 at 31:19-32:7 (Webb); Ex. WCP-0050 at 4:3-8, 53:11-20 (Webb); Ex. LSG-0002 at 6:11-7:14 (Arthur); Ex. S-0001 at 46:18-47:4, 51:14-20 (Norman).

[151] Opinion No. 529, 146 FERC ¶ 61,157 at P 39; *see also Guttman*, 161 FERC ¶ 61,180 at PP 112 (stating that "parties may use a detailed price analysis for determining geographic markets"), 183 (explaining that a candidate geographic market may expand if alternatives that could respond to a small but significant nontransitory increase in price (SSNIP) are outside that candidate market); Opinion No. 563, 163 FERC ¶ 61,127 at P 27 (relying on trucking to refineries in Oklahoma to expand the geographic market to the entire state); *Seaway ID*, 157 FERC ¶ 63,024 at P 66.

Information Administration (Niobrara Origin Market).[152] The Niobrara Origin Market is comprised of thirty-seven counties in Colorado, Wyoming, Kansas, and Nebraska.[153] The Niobrara Origin Market encompasses the entirety of the geographic market Liquids Shippers Group has proposed and much of the geographic market Trial Staff has proposed.[154] White Cliffs maintains that the Niobrara Origin Market is appropriate because it reflects actual market behavior and captures both the direct and indirect alternatives that are competitive with White Cliffs.[155] In the alternative, White Cliffs asserts that the DJ Basin Origin Market (defined below) that Trial Staff proposes is also a reasonable origin market for purposes of considering whether to grant White Cliffs market-based rate authority.[156]

80. White Cliffs relies on the testimony of its expert, Dr. Webb, for its geographic market definition. White Cliffs claims that Dr. Webb's analysis properly began with the identification of the counties comprising the production field in which White Cliffs is physically located (i.e., the Wattenberg Field production area), systematically identified all alternatives in the Wattenberg Field with which White Cliffs competes,[157] and then reasonably expanded the market to include those areas beyond the Wattenberg Field where the local refinery sources *its* crude oil.[158] As part of this process, Dr. Webb also considered, as potential alternatives to White Cliffs, the outbound movements of

[152] WCP Initial Br. 21 (citing Ex. WCP-0009 at 30:16-20 (Webb); Ex. WCP-0018 at 1 (counties comprising Niobrara Origin Market); Ex. GEO-0001 (map of geographic origin markets)).

[153] Ex. WCP-0009 at 30:17-18 (Webb); *accord* JSF 41; Ex. WCP-0018 (listing the counties comprising the Niobrara Origin Market).

[154] *See* Ex. GEO-0001.

[155] WCP Initial Br. 21-22; *see also* Ex. WCP-0009 at 31:11-18 (Webb).

[156] WCP Initial Br. 21 (citing Ex. S-0001 at 45:18-22 (Norman)).

[157] *Id.* at 22-23 (citing Ex. WCP-0009 at 35:2-15 (Webb)); WCP Reply Br. 12-13.

[158] WCP Initial Br. 22-29; WCP Reply Br. 12-13; *see also* Ex. WCP-0009 at 36:10-37:3 (Webb) (expanding the geographic market based on where the Suncor Refinery sources it crude).

Wattenberg Field production[159] as well as the inbound movements of crude sourced from areas outside of the Wattenberg Field that are shipped into the Wattenberg Field for further movement to downstream markets.[160] According to White Cliffs, properly accounting for those alternatives that move crude into and out of the Wattenberg Field required expanding the market to include the entire Niobrara Shale Region.[161]

81. White Cliffs argues that Dr. Webb's approach is substantially similar to the approach adopted in the *Seaway* proceedings[162] because, although the Commission permits participants to use quantitative economic analyses to define the geographic market as part of an overall market power analysis, pipelines seeking market-based rate authority are not required to do so.[163] White Cliffs argues, in the alternative, that Trial Staff's proposed DJ Basin Origin Market is reasonable as well because Trial Staff also used a permissible method to define the geographic market (i.e., a hypothetical monopolist test that included a netback analysis to identify the marginal supplier).[164]

82. *Trial Staff*. Trial Staff claims that the appropriate origin market is "the 18 counties encompassing the tight-oil producing portion of the DJ Basin" (DJ Basin Origin Market).[165] The DJ Basin Origin Market encompasses the six counties comprising the market Liquids Shippers Group proposed, as well as twelve surrounding counties covering northeast Colorado, southwest Wyoming, and southwest Nebraska.[166] The DJ

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[159] WCP Initial Br. 24-26 (citing Ex. WCP-0009 at 38:4-39:7 (Webb)).

[160] *See id.* at 26-28 (citing Tr. 429:15-430:4 (Webb)).

[161] *See id.* at 28-30.

[162] WCP Initial Br. 29-30; WCP Reply Br. 13; Opinion No. 563, 163 FERC ¶ 61,127 (2018); *Seaway I*, 146 FERC ¶ 61,115; *Seaway ID*, 157 FERC ¶ 63,024.

[163] *See* WCP Initial Br. 29-30 (citing Opinion No. 563, 163 FERC ¶ 61,127 at P 24; *Seaway ID*, 157 FERC ¶ 63,024 at P 72).

[164] *Id.* at 30 (citing Ex. WCP-0050 at 3:12-15 (Webb); Ex. S-0001 at 45:16-22 (Norman); Ex. S-0023 at 36:1-37:17 (Ruckert)).

[165] Staff Initial Br. 15; *accord* JSF 44. These counties are listed in Table 21 of Exhibit No. S-0023 at page 113 and Exhibit No. S-0066 at page 1.

[166] Ex. S-0001 at 63-64 (Norman); Ex. S-0023 at 111-13 (Ruckert); *see also* Ex. S-

Basin Origin Market overlaps portions of the Niobrara Origin Market, but several counties in the DJ Basin Origin Market are not included in the Niobrara Origin Market and vice versa.[167] Trial Staff asserts that the DJ Basin Origin Market "properly includes both the producing field from where the majority of the crude oil shipped on White Cliffs originates as well as the competitive alternatives that could provide market discipline to White Cliffs."[168]

83. In developing its geographic market definition, Trial Staff relies on the testimony of several of its witnesses: Dr. Norman; Mr. Ruckert, who—under the direction of Dr. Norman—performed a hypothetical monopolist test, which included a comprehensive netback analysis; and Mr. Skorski, who provided factual information upon which Mr. Ruckert relied in performing the analysis.[169] According to Trial Staff, performing a hypothetical monopolist test that includes a netback analysis to identify the marginal supplier is necessary to accurately define the origin market in this proceeding.[170]

84. Trial Staff began its analysis by first identifying a narrow candidate geographic market, the Wattenberg Field, contending that it encompasses the production field where White Cliffs sources most of its crude oil.[171] Trial Staff then performed a hypothetical

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0023 at 35:1 (Ruckert) (Figure 4).

[167] Ex. S-0023 at 34:1 (Ruckert) (map comparing the two proposed geographic markets); Ex. GEO-0001 (map showing all participants' proposed geographic markets).

[168] Staff Initial Br. 15.

[169] *Id.* at 17 n.82 & n.84 (citing Ruckert), 21 n.99-100 (citing Norman); Tr. 595:20-596:14, 598:14-599:3, 599:7-15 (Ruckert); Ex. S-0023 at 9:20-10:11 (Ruckert); *see also, e.g.*, Ex. S-0023 at 36:3-37:17 (Ruckert) (referring to a number of directions that Dr. Norman provided), 43:20-44:3 (relying on Mr. Skorski's capacity figures).

[170] *See* Staff Initial Br. 17-18, 28 (stating that unused alternatives that are price competitive may expand the geographic origin market to include the alternative's location); Ex. S-0001 at 45:18-22, 46:18-48:3, 59:6-12 (Norman); *see also* Ex. S-0023 at 25:14-21, 29:3-30:20 (Ruckert) (explaining why the other experts' geographic market analyses did not properly perform a hypothetical monopolist test), 36:3-37:17 (listing key steps in performing hypothetical monopolist test), 38:6-102:7 (presenting detailed hypothetical monopolist test).

[171] Staff Initial Br. 17 (citing Ex. S-0023 at 38:6-40:5 (Ruckert)); *accord* Ex. S-

monopolist test to evaluate whether any competitive alternatives, both used and unused but usable**,** are "good" alternatives that would be able to accept diverted volumes in the event that White Cliffs attempted to raise the rates above a competitive level.[172] In performing its hypothetical monopolist test, Trial Staff performed a netback analysis[173] and looked at the implications of a small but significant nontransitory increase in price (SSNIP) above the competitive level (i.e., performed a SSNIP test) on the various alternatives.[174]

85. Based on the results of its analysis, Trial Staff found that several competitive alternatives were outside the Wattenberg Field counties. It therefore expanded the geographic market to find the smallest basin that encompasses all the competitive alternatives,[175] which was the tight oil shale portion of the DJ Basin.[176]

86. Trial Staff disagrees with the other participants' proposed geographic markets for several reasons. Trial Staff generally claims that White Cliffs' Niobrara Origin Market is overly broad. Trial Staff argues that White Cliffs did not start with a narrow market and systematically expand it, which is the method the Commission has endorsed.[177] Moreover, according to Trial Staff, White Cliffs improperly included indirect alternatives to White Cliffs and the production fields that supply such other alternatives. Trial Staff further argues that White Cliffs did not provide evidence that these indirect alternatives

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0001 at 53:18-54:4 (Norman); Ex. S-0023 at 110:6-8 (Ruckert).

[172] Staff Initial Br. 17-18; Staff Reply Br. 15; *see also*, *e.g.*, Ex. S-0023 at 35:2-5 (Ruckert); Ex. S-0001 at 45:16-22 (Norman).

[173] *See*, *e.g.*, Ex. S-0023 at 16:11-14, 46:27-29 (Ruckert); Ex. S-0001 at 62:3-63:3 (Norman).

[174] Ex. S-0023 at 88:1-90:10 (Ruckert); Ex. S-0001 at 59:15-60:9 (Norman).

[175] Staff Initial Br. 17-18; Staff Reply Br. 15-16; *see* Ex. S-0001 at 54:12-15, 59:15-17 (Norman); Ex. S-0023 at 37:11-17, 110:14-113:12 (Ruckert).

[176] Staff Initial Br. 18; Staff Reply Br. 13, 15; Ex. S-0001 at 64:4-8 (Norman); Ex. S-0023 at 111:4-8 (Ruckert); *see also* Ex. S-0023 at 111:4-113:12, 115:11-116:1 (Ruckert) (Table 12) (map of Trial Staff's proposed geographic market).

[177] Staff Initial Br. 21 (citing Ex. S-0001 at 46:20-47:1 (Norman)).

are actually "available" to White Cliffs' shippers, and that, in fact, Trial Staff's netback analysis showed that several of these alternatives are *not* competitive in terms of price.[178]

87. Trial Staff, turning to Liquids Shippers Group's geographic market, claims that it is too narrow. Trial Staff contends that, while all of its good, used alternatives are also included in Liquids Shippers Group's proposed market, because the results of its hypothetical monopolist test demonstrate the price competitiveness of certain unused but usable alternatives located beyond the Wattenberg Field that are outside of Liquids Shippers Group's proposed market,[179] expansion of the geographic market definition to encompass the next significant formation beyond the Wattenberg Field (i.e., the tight oil-producing portion of the DJ Basin) is warranted and consistent with Commission precedent.[180]

88. *Liquids Shippers Group*. Liquids Shippers Group defines the geographic market as the following six Colorado counties, which encompass the Wattenberg Field production area: Adams, Boulder, Broomfield, Denver, Larimer, and Weld (Wattenberg Field Origin Market).[181] Liquids Shippers Group claims that the Wattenberg Field Origin Market is the appropriate market because "the relevant geographic market should be defined based on the location of the [pipeline's] customers, which in this case are the producing wells that flow product to White Cliffs' Platteville, Colorado receipt point."[182] In its posthearing brief, Liquids Shippers Group notes that, based on "recent developments," Arapahoe County, Colorado, could be added to its geographic market.[183]

89. To determine the appropriate market, Liquids Shippers Group's expert Dr. Arthur also applied the hypothetical monopolist test. He first selected a small candidate geographic market (in conjunction with a candidate product market) to determine

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[178] *Id.* at 21-22 (citing Ex. S-0023 at 107:16-27 (Ruckert)).

[179] Staff Initial Br. 17-18; *see* Ex. S-0001 at 59:15-60:1, 63:5-64:8 (Norman); *see* Ex. S-0023 at 107:5-15, 110:2-15 (Ruckert).

[180] Staff Initial Br. 18; Ex. S-0023 at 111:4-113:12 (Ruckert); S-0001 at 45:16-22 (Norman); *see also* Opinion No. 563, 163 FERC ¶ 61,127 at PP 25-27.

[181] JSF 43.

[182] LSG Reply Br. 15 (citing Ex. LSG-0034 at 23:1-24:8 (Arthur)).

[183] LSG Initial Br. 23 (citing Tr. 1309:1-1311:9 (Arthur)).

whether shippers would move to other locations in response to an increase in price above the competitive level by a hypothetical monopolist that controlled all transportation options from a specified receipt point.[184] Dr. Arthur chose to define the candidate product and geographic market as "the transportation of light crude oil and White Cliffs' receipt point at Platteville, Colorado."[185]

90. In his first iteration of the hypothetical monopolist test, Dr. Arthur found that shippers were capable of shifting to alternatives outside of the Platteville receipt point to avoid the hypothetical monopolist's rate increase, leading him to expand the market to include the other five counties comprising the Wattenberg Field.[186] In his second iteration, Dr. Arthur examined how shippers would react if a hypothetical monopolist that controlled all transportation options in the expanded Wattenberg Field area increased the rates over a competitive level.[187] Relying on statements made by Liquids Shippers Group witness Mr. Jeffrey Kittrell that "local refiners have maximized their capability to process light crude oil" and "in the absence of any alternative for transporting light crude oil produced in the Wattenberg Field area in the DJ Basin that can flow into White Cliffs' Platteville receipt point," Dr. Arthur determined that shippers would have no option but to shut-in production.[188] Dr. Arthur therefore concluded that "a monopolist over all transportation alternatives of light crude oil from the Wattenberg Field production area could profitably sustain a rate increase above a competitive level" and thus no further expansion of the geographic market was appropriate.[189]

91. In his cross-answering testimony, Dr. Arthur questioned the reasonableness of the competitive transportation rate proxy Trial Staff used in its netback analysis. As an

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[184] Tr. 1061:16-21, 1062:4-9 (Arthur); Ex. LSG-0002 at 55:10-56:1 (Arthur).

[185] Ex. LSG-0002 at 48:4-7 (Arthur).

[186] Tr. 1062:15-1063:6 (Arthur); Ex. LSG-0002 at 56:6-16 (Arthur).

[187] Tr. 1063:7-10 (Arthur); Ex. LSG-0002 at 56:17-57:14 (Arthur).

[188] Ex. LSG-0002 at 56:22-57:2 (Arthur) (citing Ex. LSG-0001 at 14 (Kittrell)). Notably, Mr. Kittrell did not precisely say this. He stated that they were concerned about prorationing or decreases such that they would have to use an alternative with a lower netback. *See* Ex. LSG-0001 at 13:13-14:16 (Kittrell).

[189] Ex. LSG-0002 at 57:11-19 (Arthur).

alternative method for deriving such a proxy,[190] he presented a Long Run Marginal Cost (LRMC) analysis. Using the competitive rate proxy he calculated in his LRMC analysis, Dr. Arthur then replicated Mr. Ruckert's SSNIP test. Dr. Arthur's SSNIP test resulted in post-SSNIP netback values that exceeded *all* of the netbacks for the "potentially usable alternatives" that Trial Staff's analysis had identified.[191] Based on these calculations, he concluded that—contrary to Dr. Norman and Mr. Ruckert's analysis—none of these potentially usable alternatives were good in terms of price and thus the geographic market should not be expanded to include them.

92. Liquids Shippers Group raises a number of methodological and factual challenges to White Cliffs' and Trial Staff's geographic market analyses. Liquids Shippers Group alleges that White Cliffs ignored the Commission's directives in Order No. 572 by assuming that a broadly defined geographic area comprised the relevant market and improperly "presum[ing] that all transportation and refinery alternatives within that broadly defined producing region are competitive alternatives for transporting light crude oil produced anywhere within that region."[192] Liquids Shippers Group also asserts that White Cliffs failed to apply any analysis to define a relevant market within which shippers on White Cliffs "can shift their purchases in sufficient quantity to render a SSNIP unprofitable."[193]

93. In challenging Trial Staff's geographic market, Liquids Shippers Group maintains that Trial Staff's proposal to define the relevant market "based on the location of the alternatives it deems to be competitive erroneously combines the determination of the relevant geographic market with the identification of competitive alternatives."[194]

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[190] Ex. LSG-0034 at 47:5-76:24 & fig. 5 (Arthur).

[191] *Id.* at 81:19-25 & fig. 6.

[192] LSG Initial Br. 21 (citing Ex. LSG-0002 at 58:1-68:7 (Arthur)).

[193] *Id.* (citing Ex. LSG-0011 at 223).

[194] LSG Reply Br. 16 (citing to Ex. LSG-0034 at 24:9-25:13 (Arthur)). Although Liquids Shippers Group relies on Dr. Arthur's testimony for this point, I note that Dr. Arthur's testimony is not as definitive as Liquids Shippers Group suggests in its brief. What Dr. Arthur actually stated was that "it does not make sense to *automatically* expand a geographic origin market associated with the transportation of crude oil to include the area that encompasses the location of all alternatives found to be competitive." Ex. LSG-0034 at 24:12-14 (Arthur) (emphasis added). His statement therefore suggests that the geographic origin market could be expanded to include the area encompassing the

Liquids Shippers Group also challenges Trial Staff's netback analysis, contending that it suffers from fatal flaws.[195]

B. Discussion

1. Commission guidance

94. According to Commission precedent, an applicant pipeline seeking market-based rate authority must define the geographic origin market and justify the methodology by which it selects its market.[196] The Commission does not require use of a particular methodology to define geographic markets,[197] but restricts the relevant market to "that area in which a shipper may rationally look for transportation service."[198] As the Commission explained, "a market's geographic scope must correspond to the commercial realities of the industry."[199]

95. The Commission has stated that the "proper geographic origin market for crude oil pipelines is the production field where the crude oil being shipped on the pipeline derives."[200] This is often the production field in which the pipeline is physically located.[201] In certain origin markets where inbound pipelines provide crude oil from

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competitive alternatives under the right circumstances.

[195] LSG Initial Br. 38-54. I address these specific challenges in Part VIII, discussing JSI 3 (competitive alternatives).

[196] *Seaway I*, 146 FERC ¶ 61,115 at P 39; *see also* Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,187-89.

[197] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,188; *Guttman*, 161 FERC ¶ 61,180 at P 112. An applicant pipeline may, for example, present evidence demonstrating that the proper market is a BEA or a hub. Opinion No. 563, 163 FERC ¶ 61,127 at P 25.

[198] *Guttman*, 161 FERC ¶ 61,180 at P 183.

[199] *Id*.

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

[201] Opinion No. 563, 163 FERC ¶ 61,127 at P 25.

other production fields that is then shipped on the applicant pipeline, such fields may also be included in the geographic market.[202] Including these production fields in the market definition is appropriate because doing so properly identifies additional shippers that would be impacted by a SSNIP.

96. Importantly, the Commission has allowed participants to expand the geographic market to include alternatives to the applicant pipeline that are accessible to shippers in the event the applicant pipeline were to impose supracompetitive rates.[203] Typically, in the overall analysis of a geographic market, consideration is first given to alternatives that are currently being used ("used alternatives") and may be followed by consideration of alternatives that are not currently being used but that are available for use ("unused but usable alternatives") as long as they are shown to be price competitive.[204] These alternatives may be identified through the use of a hypothetical monopolist test.

97. Applying a systematic analysis in this manner ensures that the geographic market definition remains as narrow as possible while addressing two prominent concerns of the Commission when evaluating market-based rate applications: first, that the geographic market definition reflects actual market behavior (i.e., by including those shippers that would be impacted by a SSNIP as well as those alternatives which are actually used by shippers on the applicant pipeline), and second, that alternatives that could discipline the applicant pipeline (i.e., by capturing those alternatives to whom the applicant's shippers could divert their volumes in the event the applicant imposes supracompetitive rates) are further considered and included as necessary.

98. Finally, the Commission has emphasized that the determination of a geographic market is a fact-specific inquiry and must be determined on a case-by-case basis.[205]

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

[203] *See, e.g.*, Opinion No. 563, 163 FERC ¶ 61,127 at P 27; *see also Guttman*, 161 FERC ¶ 61,180 at P 112 (stating that "parties may use a detailed price analysis for determining geographic markets"); *see also Seaway ID*, 157 FERC ¶ 63,024 at P 66.

[204] *See, e.g.*, Opinion No. 563, 163 FERC ¶ 61,127 at P 27; *Seaway ID*, 157 FERC ¶ 63,024 at PP 20-25, 66, 69.

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

2. Analysis

99. Keeping this Commission precedent in mind, I consider the proposed geographic markets. Although no participant challenges the inclusion of the Wattenberg Field production area in the geographic market, for completeness I must first look at the facts supporting inclusion of the Wattenberg Field to ensure that the Wattenberg Field is appropriately included.

a. Did the participants appropriately include the Wattenberg Field in the geographic market?

100. As already explained, the starting point in ascertaining an appropriate geographic market is to identify the production field(s) where the crude oil being shipped on White Cliffs originates. The physical location of the applicant pipeline is usually relevant as well.

101. *Facts regarding pipeline location*. The origin (or receipt) point of White Cliffs' system is in Platteville, Weld County, Colorado.[206] The pipeline is thus located in the Wattenberg Field production area.[207] The Colorado counties that encompass the Wattenberg Field are: Adams; Boulder; Broomfield; Denver; Larimer; and Weld.[208]

102. *Facts regarding crude oil origin areas.* As I already found, White Cliffs currently receives crude oil into its system by a connected gathering network and by truck deliveries.[209] During the 12-month period ending on July 31, 2018, approximately **[BEGIN CUI//PRIV-HC-Section 15(13)]** ■ **[END CUI//PRIV-HC-Section 15(13)]** percent of crude oil receipts at the White Cliffs origin point came from crude oil gathering systems connected to White Cliffs facilities or White Cliffs' interconnection

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[206] JSF 39.

[207] Ex. GEO-0001; Ex. WCP-0009 at 35:7 (Webb); *see also* Ex. S-0001 at 48 (Norman) (seemingly agreeing with Webb).

[208] Ex. WCP-0009 at 35 n.34 (Webb). I note that these are the six counties making up the Wattenberg Field Origin Market that Liquids Shippers Group proposes to use and that both of the other participants include within their proposed geographic markets.

[209] *See supra* notes 92-94 and accompanying text.

with the Wattenberg Oil Trunkline. The other **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]** percent arrived via truck.[210]

103. The Wattenberg Oil Trunkline extends from Briggsdale, Colorado, to Platteville, Colorado.[211] The Wattenberg Oil Trunkline Extension further reaches from Grover, Colorado, to Briggsdale, Colorado.[212] I take administrative notice that Grover and Briggsdale are in Weld County, Colorado, and thus are within the Wattenberg Field production area.

104. The gathering systems currently able to deliver into White Cliffs have receipt points located in the following four Colorado counties: Weld, Larimer, Broomfield, and Adams.[213] These four counties are four of the six counties listed above that encompass the Wattenberg Field production area. Some small portion of the gathering systems extend outward from the Wattenberg Field production area into the DJ Basin.[214]

105. There are some truck deliveries into the White Cliffs system that originate from locations outside of the Wattenberg Origin Market, i.e., outside the six above-indicated Wattenberg Field counties, including **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[215] A small amount of production from Laramie County, Wyoming, which is outside the Wattenberg Field Origin Market, is moved to

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[210] JSF 19.

[211] *Id.* 21.

[212] *Id.* 22.

[213] *Id.* 12.

[214] Ex. LSG-0002 at 48:15-17 (Arthur); Ex. LSG-0004 at 5 (citing map); Ex. LSG-0001 at 5:13-17 (Kittrell); Ex. S-0001 at 52:1-6 (Norman) (mentioning Dr. Arthur's statement). None of the witnesses explain precisely where into the DJ Basin these gathering systems extend.

[215] JSF 10, 52; Ex. LSG-0034 at 18:12-15 (Arthur); *see also* Ex. LSG-0034 at 18:16-26:12 (Arthur) (discussing these other volumes and their implications); Ex. S-0016 (Third Party Data); Ex. S-0023 at 38:14-16 (Ruckert).

Platteville and shipped on White Cliffs.[216] Also, some volumes originate in **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[217] **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[218]

106. In addition, **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[219] Furthermore, **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[220] Also, **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[221] Both Arapahoe County and Adams County each produced 1.2 percent of the overall shares of production across the eighteen DJ Basin

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[216] Ex. LSG-0034 at 20:20-21:2 (Arthur).

[217] Ex. S-0016 at 1; Ex. LSG-0036 at 8 (compilation of information); *see also* Ex. WCP-0018 at 1 (list of counties comprising the Niobrara Origin Market); Ex. S-0023 at 32:3 (Ruckert) (Table 4) (listing counties in Trial Staff's geographic market), 35:1 (Figure 4) (map comparing Trial Staff's geographic market with Liquids Shippers Group's); Ex. S-0066 at 1.

[218] Ex. LSG-0034 at 18:19-19:1 (Arthur) (citing Ex. LSG-0036).

[219] *Id.* at 20:16-21:2 & n.48 (referring to Ex. LSG-0036).

[220] Tr. 291:22-292:3 (Webb); Ex. LSG-0123 at 3, 64.

[221] Tr. 1308:2-6 (Arthur).

Origin Market counties for the 12-month period ending August 2018. Laramie County produced 5.4 percent for the same period.[222]

107. *Summary of key factual findings and conclusions*. Based on these factual findings, I conclude that the preponderance of the evidence supports a geographic market that, *at a minimum*, includes the Wattenberg Field production area (I refer to this initial minimum geographic market as the "candidate" geographic market). Importantly, White Cliffs' pipeline is physically located in the Wattenberg Field production area and the vast majority of crude oil being shipped on White Cliffs derives from the Wattenberg Field production area.[223] Using the counties that encompass this field is a reasonable approach to defining the boundary of such a geographic market.[224] Consequently, an appropriate candidate geographic market, at a minimum, would be the Wattenberg Field Origin Market as defined by Liquids Shippers Group and included as part of the other participants' proposed geographic markets. I therefore conclude that the participants properly included the counties encompassing the Wattenberg Field in their proposed geographic origin markets.

108. I further conclude that the preponderance of the evidence supports expanding such a geographic market to include the other locations from where the remaining crude oil originates.[225] The evidence shows that some crude oil originates **[BEGIN CUI//PRIV-**

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[222] Ex. LSG-0034 at 22:1 (Arthur) (Figure 3).

[223] *Id.* at 18:12-24:8; Ex. S-0023 at 39:5-41:15 (Ruckert).

[224] All the participants used counties in defining their geographic markets. And, as Trial Staff noted, use of counties is a "well-settled methodology." *See, e.g.*, *Guttman Energy, Inc. v. Buckeye Pipe Line Co., L.P.*, Opinion No. 558-A, 53 FERC ¶ 61,025, at PP 40, 43 (2018) (evaluating geographic market definition on a county-by-county basis).

[225] Liquids Shippers Group questions including counties or areas outside of the Wattenberg Field Origin Market that source light crude to White Cliffs but produce a low percentage of that product in relation to other counties. LSG Reply Br. 16-17 (citing Ex. LSG-0034 at 18:16-24:8 (Arthur) and Tr. 1303:23-1312:20 (Arthur)). Insofar as they are arguing that these other counties *must* be excluded or that the producing wells in lower-producing counties are "*irrelevant*" to the geographic market, I find the argument unpersuasive for several reasons. First, Liquids Shippers Group's arguments and positions on this point have not been entirely consistent. *Compare* Tr. 1308:11-14 (Arthur) *with* Ex. LSG-0034 at 20:15-20, 23:22-8 (Arthur); *see also* LSG Initial Br. 23

HC-Section 15(13)] [redacted] **[END CUI//PRIV-HC-Section 15(13)]** from outside the Wattenberg Field production area, including from the counties of Laramie, Wyoming, and **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**. None of the participants' geographic markets captures all such areas, however, although White Cliffs' and Trial Staff's proposed geographic markets capture more of the areas from where the crude oil shipped on White Cliffs originates than does the geographic market proposed by Liquids Shippers Group.[226] Because none of the participants propose a geographic market that captures all the locations from where the crude oil originates and because the administrative record fails to describe a basin or oil-producing region that includes *all* of these counties as a discrete set, I am unable to expand the geographic market on these grounds.

109. Keeping this in mind, however, I next look at whether the candidate geographic market can and should be expanded to encompass alternatives that are competitive in terms of price.

(acknowledging the market could be expanded). Second, the Commission has not established a cutoff for including or excluding counties or areas based on crude oil production volumes or percentages. It has, however, explained that the source of the crude oil being shipped on the pipeline is a crucial question. This suggests that, as a general matter, all counties from whence crude oil originates that ships on a pipeline could be included and, for the most part, should be included. Ignoring these areas of production may distort the analysis of the market as a whole, which is contrary to the Commission's goal. In addition, although a number of counties may each constitute a low percentage of the shipped volumes, together they may provide a more substantial percentage of shipped volumes. Thus automatically excluding counties based on their production percentages is a slippery slope. Finally and perhaps most important, because identifying geographic markets should be done case-by-case, a bright-line rule excluding low percentage counties is inappropriate.

[226] *Compare* Ex. S-0016 at 1 *with* Ex. WCP-0018 at 1 *and* Ex. S-0023 at 32:3 (Ruckert) (Table 4), 35:1 (Figure 4) *and* Ex. LSG-0002 at 49 (Arthur) (Figure 1).

b. May the geographic market be expanded further and, if so, what is an appropriate geographic market here?

110. Both White Cliffs and Trial Staff expand their candidate geographic origin markets beyond the Wattenberg Field counties. Liquids Shippers Group does not. I review the participants' arguments concerning whether geographic market expansion is appropriate here.

i. White Cliffs' geographic market is too broad

111. Liquids Shippers Group and Trial Staff contend that White Cliffs' geographic market is overly broad. I agree. Although White Cliffs did start with a narrow market (Wattenberg Field),[227] it did not systematically nor analytically expand it using a traditional hypothetical monopolist test.[228] Instead, as White Cliffs acknowledges, its expert used an "interconnectivity" approach, relying on the interlinkages between various production areas and refineries to expand the market.[229] For example, Dr. Webb expanded the market to include the area from which the Suncor Refinery is *sourcing* the majority of its crude oil.[230] In using this approach, he included direct competitive alternatives to White Cliffs as well as indirect alternatives and the production fields that supply such indirect alternatives.[231] But he did not offer evidence of movements of Wattenberg Field crude oil production to these indirect alternatives, i.e., the Frontier Aspen, LLC pipeline (Frontier Aspen Pipeline), the Rocky Mountain Pipeline System pipeline, the Rangely pipeline (Rangely Pipeline), the Par Pacific refinery (Par Pacific Refinery), two Sinclair Oil refineries (located in Sinclair and Evansville, Wyoming) (individually or collectively, Sinclair Oil Refinery), or a number of rail terminals.[232] The

[227] *See* Ex. WCP-0009 at 35:5-7 (Webb).

[228] I am not saying that this, by itself, is fatal, as the Commission has not required an oil pipeline to file pursuant to any particular methodology. *Guttman*, 161 FERC ¶ 61,180 at P 112.

[229] *See* WCP Initial Br. 22-30; *see also* Ex. WCP-0050 at 50:2-51:4 (Webb) (explaining that he used an approach similar to the interlinkage approach used by a witness in the *Seaway* proceedings).

[230] WCP Initial Br. 23 (citing Ex. WCP-0009 at 36:10-37:3 (Webb)).

[231] *See* Ex. WCP-0009 at 31:14-18 (Webb).

[232] *See id.* at 56:6-59:5 (explaining that he relied on generalized information about

Commission has indicated that such an interconnectivity approach, by itself, is insufficient to establish a geographic origin market; instead, an applicant must present sufficient evidence that its proposed web of interconnections provides a "meaningful substitute" for shippers on the applicant pipeline.[233] White Cliffs did not do so here.

112. White Cliffs also failed to provide evidence that the alternatives it included in its proposed geographic market are competitive in terms of price. Moreover, Trial Staff's netback analysis showed that several of these alternatives, in fact, are *not* competitive in terms of price.[234] For these reasons, I find that White Cliffs' methodology led to a geographic market that is too broadly defined.[235]

ii. It is appropriate to expand the geographic market to the DJ Basin Origin Market

113. Liquids Shippers Group's proposed geographic market is a subset of Trial Staff's. It includes all of Trial Staff's good, used alternatives, but does not include the alternatives located outside the Wattenberg Field that Trial Staff found to be unused but usable in its hypothetical monopolist test. The question therefore is whether it is appropriate to expand Liquids Shippers Group's proposed geographic market to Trial Staff's DJ Basin Origin Market based on the results of Trial Staff's hypothetical monopolist test. I conclude that it is.

114. As an initial matter, Liquids Shippers Group appears to argue in its reply brief that Trial Staff may not expand the geographic market based on the location of the

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the Niobrara Shale Region but not providing specifics for each alternative); Ex. WCP-0001 at 13:10-19:7 (Minielly) (same); *see also* Part VIII.C.3.d (factual findings regarding these alternatives).

[233] *SFPP*, 84 FERC ¶ 61,338 at 62,496.

[234] Staff Initial Br. 21-22 (citing Ex. S-0023 at 107:16-27 (Ruckert)). Because Dr. Arthur's reevaluation using Trial Staff's netback analysis led to more conservative netbacks, he too found that these alternatives were not competitive in terms of price. *See* discussion *infra* Part V.C.3.a.

[235] I do not, however, conclude that White Cliffs' Application must therefore be rejected as Liquids Shippers Group argues. *See* LSG Initial Br. 19. Liquids Shippers Group's argument reiterates its burden of proof argument, which I have already addressed. *See supra* Part IV.

alternatives it found could provide market discipline in its hypothetical monopolist test.[236] Insofar as Liquids Shippers Group is indeed making such a sweeping argument, it is inconsistent with Commission precedent. As I stated above, the Commission allows a geographic market to be expanded to include alternatives that shippers could access if the pipeline were to charge anticompetitive rates.[237] In fact, the Commission has explicitly stated that "parties may use a detailed price analysis for determining geographic markets,"[238] thereby allowing competitive alternatives derived from hypothetical monopolist tests to expand the geographic market.

115. Liquids Shippers Group also seems to question Trial Staff's reliance on unused but usable alternatives accessed via trucking.[239] The Commission, however, has indicated that an evaluation of alternatives should include consideration of feeder pipelines and trucking.[240] That is because suppliers may use these two resources to access other pipelines' and refineries' capacities[241] if a hypothetical monopolist were to raise prices on a pipeline emanating from the applicant pipeline's origin point.[242] In fact, in Opinion

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[236] LSG Reply Br. 13-16 (citing to Ex. LSG-0034 at 24:9-25:13 (Arthur) and Opinion No. 529, 146 FERC ¶ 61,157 at P 39). In particular, Liquids Shippers Group states that the relevant geographic market "should not be defined based on the location of pipeline and refinery alternatives alleged to be competitive with White Cliffs." LSG Reply Br. 15. Liquids Shippers Group's expert testified differently. As I observed in a previous footnote, Dr. Arthur testified that it does not make sense to "automatically" expand the geographic market, implying that it could be expanded to include competitive alternatives.

[237] *See, e.g.* Opinion No. 563, 163 FERC ¶ 61,127 at P 27 (affirming the presiding judge's finding that the geographic origin market should be expanded upon finding that alternatives outside Cushing could constrain a hypothetical monopolist); *Guttman*, 161 FERC ¶ 61,180 at P 112; *see also Seaway ID*, 157 FERC ¶ 63,024 at P 66.

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

[239] LSG Reply Br. 15 (citing Tr. 1315:2-17, 1316:12-19 (Arthur)).

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

[241] *See id.* P 27 (affirming Presiding Judge's inclusion of refinery and pipeline alternatives).

[242] *Id.* PP 27, 29. Although the Commission has explained that trucking may be used "as a means to reach potential alternatives within a reasonable distance from the

No. 563, trucking to refineries in Oklahoma led to the expansion of the geographic market.[243] I am therefore unpersuaded by these arguments.

116. I find that Trial Staff performed its geographic market analysis in a manner consistent with Commission precedent, beginning with a narrow candidate market and expanding it based on the results of a hypothetical monopolist test. Furthermore, in Part VIII.C.3.b, I find Trial Staff's hypothetical monopolist test to be both credible and persuasive,[244] and conclude that the preponderance of the evidence demonstrates that Trial Staff's proposed unused but usable alternatives would be able to accept diverted volumes in the event that White Cliffs attempted to raise its rates above a competitive level. Accordingly, the preponderance of the evidence demonstrates that it is appropriate to expand the geographic market definition to encompass these unused but usable alternatives. Expansion of Liquids Shippers Group's geographic market to include the DJ Basin—the next significant formation beyond the Wattenberg Field—is appropriate and consistent with Commission precedent. This expansion also has the advantage of allowing additional areas that source White Cliffs to be included in the geographic market. Finally, in light of this determination, I conclude that Liquids Shippers Group's proposed geographic market is too narrow.

c. Conclusion

117. In sum, upon review of the evidence and the participants' arguments, I conclude that the preponderance of the evidence demonstrates that the appropriate geographic origin market here is the DJ Basin Origin Market as defined by Trial Staff. I do not adopt White Cliffs' proposed geographic market because it is too broad, and I do not adopt Liquids Shippers Group's proposed geographic market because it is too narrow.

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applicant," it has limited its use to "trucking over a relatively short distance to another alternative [that] provides a cost-effective means of avoiding an anticompetitive price increase in the origin market." *Id.* P 29.

[243] *See id.* P 27; *see also Guttman*, 161 FERC ¶ 61,180 at PP 183-184 (describing geographic market analyses). Thus I am unpersuaded by Liquids Shippers Group's (and its expert witness's) suggestion that trucking to refineries from the Wattenberg Field may not be considered.

[244] In that section, I also address Liquids Shippers Group's challenges to Trial Staff's netback analysis and discuss Dr. Arthur's alternate approach.

VIII. Issue III: What Are the Competitive Alternatives to the White Cliffs Pipeline in the Geographic Origin Market?

118. I must next consider the following question: what are the competitive alternatives to White Cliffs in the geographic origin market? This issue overlaps, to some degree, with the previous issue, the appropriate geographic market.[245] In addition, because the participants disagree over whether an alternative whose capacity may be full can be considered a good alternative, I also address these capacity arguments in this section.[246]

119. For the reasons described more fully below, upon review of the evidence and consideration of the participants' arguments, I conclude that there are a number of good, competitive alternatives to White Cliffs in the geographic origin market.

A. Participants' positions

120. *White Cliffs*. White Cliffs contends that it "faces significant competition for the receipt of crude oil volumes produced in the Niobrara Shale Region from other pipelines, rail, trucks, and refineries."[247] According to White Cliffs' witnesses, seven pipelines—including its own—compete to transport crude oil volumes from the Niobrara Shale Region: White Cliffs, the Pony Express system, Saddlehorn, Grand Mesa, Platte, Frontier Aspen, and Rangely.[248] White Cliffs' witnesses also state that five refineries compete with its pipeline for the receipt of crude oil volumes in this same region: the Suncor Refinery; the HollyFrontier Refinery; the Par Pacific Refinery in Newcastle, Wyoming; the Sinclair Oil Refinery in Sinclair, Wyoming; and the Sinclair Oil Refinery in Evansville, Wyoming.[249] White Cliffs further states that several crude-by-rail facilities

[245] As mentioned above, although these two issues "are separate and distinct," they may involve "similar methodologies." *See supra* note 151 and accompanying text.

[246] I recognize that, according to the Commission, questions about an alternative's appropriate capacity is more properly addressed in the market metrics section. Opinion No. 563, 163 FERC ¶ 61,127 at P 28.

[247] WCP Initial Br. 38.

[248] Ex. WCP-0001 at 13:14 (Minielly) (Table 1); Ex. WCP-0009 at 53:12-54:3, 54:14-55:3 (Webb); Ex. WCP-0032 (listing all market competitors).

[249] Ex. WCP-0001 at 15:16-16:3 (Minielly); Ex. WCP-0009 at 54:6-11 (Webb); Ex. WCP-0032 (listing all market competitors).

located in the Niobrara Shale Region compete with its pipeline for the receipt of crude oil volumes.[250] Finally, White Cliffs' witnesses testify that trucks play a limited role to the extent they may transport volumes from production fields to pipelines, refineries, and rail.[251]

121. *Trial Staff.* Trial Staff argues that it appropriately selected the competitive alternatives.[252] Trial Staff claims that Liquids Shippers Group errs as a matter of law and as a matter of fact in excluding several used alternatives as competitive alternatives.[253]

122. In its analysis, Trial Staff identified a number of alternatives within its geographic market—the tight oil-producing portion of the DJ Basin—that it asserts are good, competitive alternatives to White Cliffs.[254] In determining its list of good alternatives, Trial Staff relied upon a detailed netback analysis performed by Trial Staff witness Mr. Ruckert, at the direction of Dr. Norman, which relied on inputs from Mr. Skorski as well as on usage data.[255] Trial Staff included the following "used" alternatives as competitive alternatives: Grand Mesa, Saddlehorn, Pony Express NECL, the Suncor Refinery, and the Plains All American Pipeline rail loading terminal in Tampa, Colorado (Plains Tampa Rail Terminal).[256]

123. Relying on its netback analysis, Trial Staff also included the following "unused but usable" alternatives as competitive alternatives: Platte, Pony Express via the Sinclair

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[250] Ex. WCP-0001 at 16:9-18:8 (Minielly); Ex. WCP-0009 at 55:6-56:5 (Webb); Ex. WCP-0032 (listing all market competitors); Ex. WCP-0023 (map showing four rail facilities in Wyoming); Ex. WCP-0033 (listing crude oil receipts by rail from PADD IV).

[251] Ex. WCP-0001 at 18:9-18 (Minielly); Ex. WCP-0009 at 44:6-45:9 (Webb).

[252] *See* Staff Initial Br. 22-59; Staff Reply Br. 16-37.

[253] Staff Initial Br. 26-29; *see also* Staff Reply Br. 16-37.

[254] Staff Initial Br. 22 (citing Ex. S-0023 at 107:5-17 (Ruckert)). As already noted, the netback analysis, which was used in Trial Staff's hypothetical monopolist test, was also instrumental in determining the geographic market.

[255] Ex. S-0023 at 8:18-9:11, 107:5-15 (Ruckert).

[256] Staff Initial Br. 22 (citing Ex. S-0023 at 107:5-15 (Ruckert)).

Logistics, LLC Pipeline, the HollyFrontier Refinery, and three additional rail terminals in Weld County, Colorado, and two rail terminals in Cheyenne, Wyoming.[257]

124. Trial Staff also concluded that, based on its netback analysis, several crude oil transportation alternatives White Cliffs included in its analysis are not price competitive.[258] These include the following: (1) the Rangely Pipeline; (2) the Frontier Aspen Pipeline; (3) the Par Pacific Refinery; (4) the Sinclair Refinery in Evansville, Wyoming; (5) the Sinclair Refinery in Sinclair, Wyoming; (6) the Casper Crude Oil Rail Terminal in Casper, Wyoming; (7) the Black Thunder Rail Terminal in Gillette, Wyoming; (8) the Upton Logistics Center Rail Terminal in Upton, Wyoming; (9) the Douglas Rail Terminal in Douglas, Wyoming; and (10) the Guernsey Rail Terminal in Guernsey, Wyoming.[259] This led Trial Staff to include fewer competitive alternatives in its analysis than White Cliffs did.

125. *Liquids Shippers Group*. Liquids Shippers Group, in its analysis, identifies only three competitive alternatives: Saddlehorn Pipeline, Grand Mesa Pipeline, and the Plains Tampa Rail Terminal.[260] Its list therefore contains even fewer competitive alternative than does Trial Staff's (and thus White Cliffs').

126. Liquids Shippers Group challenges the other participants' inclusion of competitive alternatives on a number of grounds. Liquids Shippers Group first argues that "used alternatives" may not automatically be assumed to be "good alternatives" because the market at issue in this case lacks a "cost-based, regulated rate."[261] Liquids Shippers

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[257] *Compare* Ex. S-0023 at 107:5-15 (Ruckert) (listing alternatives that he found to be competitively priced) *and* Ex. S-0063 at 1 (same) *with* Ex. S-0023 at 45:3-46:2 (Ruckert) (explaining that he only found evidence that one of the four Wattenberg Field counties' rail terminals, the Plains Tampa Rail Terminal, is currently being used by shippers) *and* 46:3-24 (listing the unused but potentially usable alternatives proposed by Dr. Webb).

[258] Ex. S-0001 at 6:18-7:2 (Norman); Ex. S-0023 at 11:1-7, 107:16-27 (Ruckert).

[259] Ex. S-0023 at 107:16-27 (Ruckert).

[260] Ex. LSG-0002 at 91:14-92:4 & fig. 6 (Arthur); *see also id.* at 71:7-9 (noting that he considered the rail loading facility owned by Plains All American located in Tampa, Colorado); Ex. LSG-0034 at 101:12-102:7 (Arthur).

[261] LSG Initial Br. 24-28; LSG Reply Br. 17-18.

Group next argues that Trial Staff and White Cliffs have failed to demonstrate that certain proposed competitive alternatives—Suncor Refinery, Pony Express NECL, and Platte Pipeline—are comparable in terms of availability.[262] Liquids Shippers Group also asserts that Trial Staff and White Cliffs have failed to show that the Cheyenne HollyFrontier Refinery is a competitive alternative.[263] Liquids Shippers Group further claims that Trial Staff and White Cliffs have failed to show that rail is comparable in terms of availability and quality.[264] Finally, Liquids Shippers Group contends that the netback analysis performed by Trial Staff suffers from several fatal flaws.[265]

127. For comparison purposes, I have presented the participants' views on the competitive alternatives in Table 1 below by listing the alternatives that they found competitive. I also included the capacities they relied upon in their market statistics analyses. I note that Table 1 lists Dr. Webb's rebuttal testimony figures, which White Cliffs relies on in its posthearing briefs.

TABLE 1: Proposed Competitive Alternatives and Proposed Capacities

Proposed Competitive Alternative	Capacity used by White Cliffs in its market metrics[266] (BPD)	Capacity used by Trial Staff in its market metrics[267] (BPD)	Capacity used by Liquids Shippers Group in its market metrics[268] (BPD)
Saddlehorn Pipeline	190,000	190,000	190,000

[262] LSG Initial Br. 28-37; LSG Reply Br.18-20.

[263] LSG Initial Br. 37; LSG Reply Br. 21-23.

[264] LSG Initial Br. 37-38; *see also* LSG Reply Br. 35-36 (discussing rail figures).

[265] LSG Initial Br. 38-54; LSG Reply Br. 32-35 (discussing competitive rate proxy and LRMC estimates).

[266] Figures are those listed by Dr. Webb in Exhibit No. WCP-0084.

[267] Figures are those listed by Dr. Norman in Exhibit No. S-0001, page 66, table 2.

[268] Figures are those listed by Dr. Arthur in Exhibit No. LSG-0002 at page 91, line 14 through page 92, line 8 and figure 6.

Proposed Competitive Alternative	**Capacity used by White Cliffs in its market metrics[266] (BPD)**	**Capacity used by Trial Staff in its market metrics[267] (BPD)**	**Capacity used by Liquids Shippers Group in its market metrics[268] (BPD)**
Grand Mesa Pipeline	150,000	150,000	150,000[269]
Pony Express Pipeline[270]	400,000	130,000	None; not included as a competitive alternative
Platte Pipeline	145,000	145,000	None; not included as a competitive alternative
Rangely Pipeline	48,000	None; not included as a competitive alternative	None; not included as a competitive alternative
Frontier Aspen Pipeline	72,000	None; not included as a competitive alternative	None; not included as a competitive alternative
HollyFrontier Refinery[271]	49,400	48,000	None; not included as a competitive alternative
Suncor Refinery[272]	98,000	103,000	None; not included as a competitive alternative
Par Pacific Refinery	17,575	None; not included	None; not included

[269] Dr. Arthur raised concerns about Grand Mesa's capacity, but noted that he used the total capacity in his market analysis as a conservative estimate. Ex. LSG-0002 at 75:10-11 (Arthur).

[270] The difference between Trial Staff's and White Cliffs' Pony Express system capacity figures are addressed below.

[271] The difference between Trial Staff's and White Cliffs' HollyFrontier Refinery capacity figures are addressed below.

[272] The difference between Trial Staff's and White Cliffs' Suncor Refinery capacity figures are addressed below.

Proposed Competitive Alternative	Capacity used by White Cliffs in its market metrics[266] (BPD)	Capacity used by Trial Staff in its market metrics[267] (BPD)	Capacity used by Liquids Shippers Group in its market metrics[268] (BPD)
		as a competitive alternative	as a competitive alternative
Sinclair Oil Refinery (Sinclair, WY)	85,500	None; not included as a competitive alternative	None; not included as a competitive alternative
Sinclair Oil Refinery (Evansville, WY)	24,225	None; not included as a competitive alternative	None; not included as a competitive alternative
Rail Transportation[273]	34,370	11,968	10,410
(White Cliffs Pipeline[274])	95,000	95,000	95,000
HHI	1,455	1,556	3,414
White Cliffs' Market Share	6.5%	10.9%	21.3%

B. Commission guidance

128. The Commission requires an oil pipeline applicant seeking to establish that it lacks significant market power to describe available transportation alternatives in competition with it in the relevant markets and other competition restraining its rates in those markets.[275] Alternatives may include other pipelines, rail, trucks, refiners, and local consumption; the Commission has not categorically excluded any alternative form of

[273] The differences between the participants' rail capacity figures are addressed below.

[274] Although White Cliffs is not a competitive alternate, it is included on this list for purposes of showing its capacity volumes and because of its use in calculating the HHI.

[275] 18 C.F.R. § 348.1(c)(4); Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,191; *Seaway I*, 146 FERC ¶ 61,115 at P 45.

transportation or other competition from being considered in such an analysis.[276] The Commission has placed the burden of proving an alternative's inclusion in the market power analysis on the applicant pipeline seeking market-based ratemaking authority.[277]

129. As a general matter, "for an alternative to be competitive, it must possess the ability to discipline, or prevent, a potential increase in price above the competitive levels by the pipeline applicant."[278] It must also "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."[279] A competitive alternative that meets all these requirements—price competitiveness, availability, and quality—is often referred to as a "good alternative."[280]

130. One method for determining the extent of the geographic market and whether an alternative is a good alternative in terms of price is by performing a detailed price analysis, such as a traditional netback analysis.[281] In a traditional netback analysis, one identifies good alternatives based on a comparison of the netback a shipper receives (i.e., the price to the shipper after all costs of delivery are taken into account) for a barrel of oil over various alternatives.[282] Importantly, not only can a traditional netback analysis

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

[277] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,191; *Seaway I*, 146 FERC ¶ 61,115 at P 45. But, as discussed in Part IV, in making my ultimate determination, I must also consider record evidence that other participants, including Trial Staff, submit.

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

[279] *Id.* P 45 (citing *Koch Gateway*, 66 FERC ¶ 61,385).

[280] *See, e.g.*, *id.* PP 45, 47.

[281] *See, e.g.*, *Guttman*, 161 FERC ¶ 61,180 at PP 112, 113 (discussing detailed cost analyses as a nonmandatory method for determining good alternatives); *Seaway I*, 146 FERC ¶ 61,115 at PP 47 (discussing examination of price to determine competitive alternatives), 53, 55-57 (discussing traditional netback analyses vis-à-vis analyses relying on usage).

[282] *Seaway I*, 146 FERC ¶ 61,115 at PP 47, 48 (citing *Shell Pipeline Co., L.P.*, 103 FERC ¶ 61,236, at 61,901 n.16 (2003)).

identify used alternatives that are good alternatives, but it can also identify unused but available alternatives that are also good alternatives.[283]

131. The Commission does not always require applicants to perform a traditional netback analysis to determine whether an alternative is a good alternative in terms of price.[284] In several proceedings, the Commission has assumed that used alternatives—i.e., those that are currently being used by producers and/or shippers in the origin market—are presumptively good alternatives.[285] Shipper behavior concerning an alternative demonstrates its economic viability; thus usage, in essence, "becomes the necessary 'proxy' for determining whether an alternative is in fact a good alternative in terms of price."[286]

132. Responding to concerns that this assumption could lead to the so-called "cellophane trap," the Commission explained in *Seaway II* that "[t]he ability to charge a monopoly price would require that the monopolist not be subject to *any form of cost-of-service rate regulation or similar restriction* on the ability to raise price."[287] The Commission further explained that "[t]he oil pipeline industry, unlike the market analyzed in *DuPont*, is dominated by entities *under some form of price regulation*."[288] The Commission concluded that the extent of this price regulation minimizes the potential for a "cellophane trap" to occur. The Commission noted, moreover, that it requires an applicant pipeline to charge a regulated rate until the pipeline can

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[283] *Id.* P 65 (noting that identifying unused but available alternatives "must be established through a detailed price analysis"); *accord Guttman*, 161 FERC ¶ 61,180 at P 112.

[284] *Seaway I*, 146 FERC ¶ 61,115 at PP 53, 56-57.

[285] *See, e.g.*, Opinion No. 563, 163 FERC ¶ 61,127, at PP 42-44 (affirming Presiding Judge's application of the "used alternative as a good alternative" test in *Seaway ID*, 157 FERC ¶ 63,024 at PP 20, 105-106); *see also Guttman*, 161 FERC ¶ 61,180 at P 124 (discussing Commission assumption); *Enterprise Prods. Partners L.P.*, 152 FERC ¶ 61,203, at P 34 (2015) (*Seaway II*) (same); *Seaway I*, 146 FERC ¶ 61,115 at PP 55-56 (same).

[286] *Seaway I*, 146 FERC ¶ 61,115 at P 56.

[287] *Seaway II*, 152 FERC ¶ 61,203 at P 27 (emphasis added).

[288] *Id.* P 27 (emphasis added).

affirmatively show that it does not possess significant market power. The Commission additionally pointed out that its "methodologies concerning market shares and market calculations would effectively capture such a scenario and reflect a noncompetitive market," thereby identifying such a monopolist.[289]

133. Keeping these principles in mind, I consider the participants' proposed competitive alternatives and the arguments raised in connection with them. As explained above, Liquids Shippers Group challenges alternatives that White Cliffs and Trial Staff consider competitive (i.e., "good" alternatives) on the basis of price, availability, and/or quality. I address each challenge below in the order that I find most logical.

C. Discussion

134. In determining what alternatives are appropriately considered to be competitive in this origin market, I first look at the "used" alternatives and decide whether they may be assumed to be "good" alternatives. After that, I turn to the participants' analyses of the "unused but usable" alternatives and consider the arguments related specifically to those alternatives. Finally, I consider the remaining arguments such as availability and quality.

1. What are the "used alternatives" here?

135. *Facts regarding used alternatives.* The participants agree that the following alternatives have been used to transport or to consume Wattenberg Field crude oil production[290]: (1) three pipelines (the Pony Express via the NECL, Grand Mesa, and Saddlehorn); (2) the Plains Tampa Rail Terminal; and (3) the Suncor Refinery.[291]

136. *Summary of factual findings and conclusions*. Based on this stipulation and the evidence in the record,[292] I conclude that the preponderance of the evidence demonstrates that these alternatives are "used alternatives."

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[289] *Id.* P 29.

[290] JSF 71.

[291] *Id.*

[292] *See* Ex. LSG-0001 at 11:1-6 (Kittrell) (noting that Anadarko's gathering system is connected to the Plains Tampa Rail Terminal); Ex. S-0023 at 42:21-43:9 (Ruckert) (describing use of all listed pipeline and refinery alternatives), 45:3-19 (explaining use of Plains Tampa Rail Terminal); *see also* Ex. LSG-0002 at 18:14-19:3 (Arthur) (implying

2. May the assumption that "used alternatives" are "good alternatives" (in terms of price) be applied here where the rates were set through negotiated rates?

137. White Cliffs and Trial Staff consider all these used alternatives to be competitive alternatives. Liquids Shippers Group questions reliance on used alternatives as good alternatives in terms of price here because it contends that the origin market lacks a regulated, and specifically a cost-based, rate. More particularly, Liquids Shippers Group claims that, because Pony Express Platteville Extension/NECL, Grand Mesa, Saddlehorn and White Cliffs all implemented negotiated rates, the "used is good" assumption should not be applied.[293]

a. Participants' positions

138. In challenging White Cliffs' and Trial Staff's application of the "used is good" assumption, Liquids Shippers Group asserts that, in *Guttman*, the Commission concluded that "'it cannot be assumed that a used alternative is a good alternative in terms of price" because the market did not consist of alternatives with cost-based rates constrained by regulation."[294] Liquids Shippers Group further argues that negotiated rates are "set by negotiation and cannot be presumed to reflect competitive levels,"[295] seeming to imply that negotiated rates are not regulated rates.[296] Thus, according to Liquids Shippers Group, because every alternative in the Wattenberg Field Origin Market has implemented

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use of Grand Mesa, Saddlehorn, and Pony Express); Ex. S-0030 at 3-5; *see generally* Ex. S-0032.

[293] LSG Initial Br. 24-27; LSG Reply Br. 17-18. Despite this argument, Liquids Shippers Group includes Grand Mesa and Saddlehorn in their HHI, which arguably is an inconsistent position.

[294] LSG Initial Br. 25.

[295] *Id.* at 26.

[296] *Id.* at 24-26; *see also* Ex. LSG-0002 at 86:14-87:1 (Arthur).

negotiated rates,[297] no alternative has a regulated cost-based rate that permits use of the presumption in this proceeding.[298]

139. Liquids Shippers Group also maintains that, because a used alternative cannot be assumed to be a good alternative, White Cliffs should have performed a netback analysis incorporating a reasonable competitive rate proxy to identify competitive alternatives in the geographic market. White Cliffs' failure to do so, according to Liquids Shippers Group, renders White Cliffs' application incomplete.[299]

140. In response, White Cliffs first claims that "every pipeline at issue in this proceeding is subject to the Commission's cost-based rate regulations."[300] White Cliffs next claims that Liquids Shippers Group's reliance on the Commission's *Guttman* decision is misplaced.[301] White Cliffs also asserts that not all the competitive alternatives that were included in the HHI calculation in the *Seaway* proceeding had cost-based rates on file, but the Commission nonetheless approved application of the used alternative test to determine good alternatives.[302] White Cliffs notes that Liquids Shippers Group's expert Dr. Arthur confirmed this reading of *Seaway* during cross-examination.[303] White

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[297] Liquids Shippers Group identifies the following four pipelines as having implemented negotiated rates upon commencement of Commission-jurisdictional service: (1) White Cliffs; (2) Saddlehorn; (3) Grand Mesa; and (4) Pony Express NECL and Platteville Extension. LSG Initial Br. 41; Ex. LSG-0002 at 19:3-4 (Arthur).

[298] LSG Initial Br. 26; LSG Reply Br. 17.

[299] LSG Initial Br. 27-28. Liquids Shippers Group also contends that Trial Staff's netback analysis was an attempt to "remedy" White Cliffs' "defective" application. *Id.* at 38-39. I addressed Trial Staff's role in the burden of proof section. *See supra* Part IV. I emphasize that the Commission has authorized Trial Staff to perform its own analyses in these cases to provide additional evidence for the Commission and its administrative law judges to consider. I am therefore unpersuaded by Liquids Shippers Group's implication.

[300] WCP Initial Br. 42 (citing 18 C.F.R. § 342.2 (2019)).

[301] WCP Initial Br. 43-44; WCP Reply Br. 17-18.

[302] WCP Reply Br. 19 (citing Opinion No. 563, 163 FERC ¶ 61,127 at PP 42-48).

[303] *Id.* at 18-19 (citing Tr. 1221:2-5, 1223:20-1224:17, 1227:14-1228:1 (Arthur)).

Cliffs, in response to Liquids Shippers Group's claim that it had failed to perform a netback analysis, contends that it was not required to do so because it had relied upon alternatives that were "used alternatives" in its geographic market.[304]

141. Trial Staff, responding to Liquids Shippers Group's arguments, similarly contends that Liquids Shippers Group has misconstrued *Guttman*. Trial Staff argues that, in *Guttman*, the Commission did not rely on the "used is good" presumption "because the market included participants with unconstrained market-based rates, *not*, as Liquids Shippers Group claims, because of the absence of cost-based rates."[305] Nor, according to Trial Staff, did the Commission state that "the *absence* of a regulated, cost-based rate means that the used alternatives test should not apply."[306]

142. Trial Staff further argues that, although negotiated rates are by definition neither cost-based nor market-based rates, they are nonetheless subject to Commission regulation.[307] Trial Staff asserts that "the appropriate treatment of used alternatives in an origin market consisting of negotiated rates must turn on the Commission's treatment of negotiated rates and whether alternatives offering negotiated rates can constrain the exercise of market power."[308]

143. Trial Staff next argues that negotiated rates *are* regulated rates, pointing to the Commission's regulations governing them.[309] Trial Staff also describes several regulatory oversight mechanisms and built-in protections for shippers.[310]

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[304] WCP Reply Br. 20-21 (citing JSF 69-70, 82); *see also* WCP Initial Br. 41.

[305] Staff Reply Br. 17.

[306] *Id.*

[307] *Id.* at 18.

[308] *Id.*

[309] *Id.* at 19 (citing to 18 C.F.R. pt. 342).

[310] *Id.* at 19-21.

144. Finally, Trial Staff claims that additional indicators support the conclusion that the used alternatives are good alternatives here.[311] Trial Staff points out that, under its netback analysis, none of the used alternatives Trial Staff identified produce negative netbacks. Trial Staff also points out that, in White Cliffs' Petition for Declaratory Order for approval of its negotiated initial rates, White Cliffs filed a methodology for calculating cost-based rates, and its calculation of its uncommitted ceiling tariff rate was $6.81 per barrel. This is "well above any negotiated rates offered by any used alternative pipelines in the Wattenberg Field area."[312]

b. Analysis

145. At bottom, the participants dispute whether the "used is good" assumption applies to alternatives with negotiated rates, or more narrowly, to the "used" pipeline alternatives here, all of which have negotiated rates. Although the Commission has addressed the "used is good" assumption in connection with cost-based rates[313] and market-based rates,[314] it has not explicitly done so for negotiated, uncommitted and committed rates.[315] Negotiated rates are not necessarily cost-of-service-based or market-based. The analysis therefore turns on how to apply the Commission's precedent, and the principles underlying that precedent, to the facts and circumstances here.

146. Upon consideration of the participants' arguments, I find Trial Staff's and White Cliffs' interpretation of the Commission's regulations and precedent, and the application of the principles therein to the present situation, more persuasive. Further, upon review of the record, I find that it supports relying on an assumption that used alternatives are good alternatives in terms of price in this origin market

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[311] *Id.* at 21.

[312] *Id.* at 22.

[313] *Guttman*, 161 FERC ¶ 61,180 at P 124 (referring to Seaway's rates).

[314] *Id.* at PP 125, 127.

[315] *See* Staff Reply Br. 18. It has, however, noted that "tariff rates that are negotiated rates or settlement rates have been used as proxies." *Seaway I*, 146 FERC ¶ 61,115 at P 50 n.56. The Commission has also relied on competitive alternatives in its HHI that were based on negotiated rates. *See* Tr. 1224:10-17 (Arthur) (referring to the Commission's use of Osage in Opinion No. 563, 163 FERC ¶ 61,127).

147. As an initial matter, I am unpersuaded by any suggestion that *Guttman* somehow precludes application of the "used is good" assumption here or that it has much relevance to negotiated rates. In *Guttman*, the Commission did not apply the "used is good" assumption to that market because it contained alternatives offering *market-based rates*. Nowhere did the Commission state that the assumption was inapplicable "because the market did not consist of alternatives with *cost-based* rates constrained by regulation" as Liquids Shippers Group argues.[316] Moreover, as Trial Staff points out, the Commission has never gone so far as to state that "the absence of a regulated, cost-based rate means the used alternatives test should not apply."[317]

148. I also note that, insofar as Liquids Shippers Group is arguing that negotiated rates are not "regulated" rates, I disagree. A review of the Commission's regulations show that negotiated rates are clearly regulated rates.[318]

149. Thus the question boils down to whether, like market-based rates, the negotiated rates *here* are suspect (i.e., they may be supracompetitive) so that a used alternative cannot be assumed to be a good alternative in terms of price. The answer is no.[319]

150. As the Commission has explained, it approved "*the use of negotiated rates as a just and reasonable ratemaking methodology* separate and distinct from cost-of-service rate making."[320] The Commission noted that "there are legitimate reasons why a shipper may pay a negotiated rate above a cost-based recourse rate" and that this decision would

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[316] The Commission did say that "the market does not consist of alternatives with rates constrained by regulation." *Guttman*, 161 FERC ¶ 61,180 at P 127.

[317] Staff Reply Br. 18 (discussing paragraph 124 of the *Guttman* decision, 161 FERC ¶ 61,180).

[318] *See* 18 C.F.R pt. 342 (2019) (containing regulations that, among other things, govern negotiated and settled rates). Dr. Arthur acknowledged as much during the hearing. *See* Tr. 1215:4-9 (Arthur).

[319] I am in no way saying that alternatives with negotiated rates should always be assumed to be good alternatives in terms of price. I only look at the question as it applies to the facts and circumstances of this case.

[320] *Seaway Crude Pipeline Co.*, 146 FERC ¶ 61,151, at P 24 (2014) (emphasis added).

be considered reasonable absent compelling circumstances.[321] The Commission also stated that, "[o]nce these rates are negotiated and accepted, any divergence between the rates and cost-of-service rates is not an issue of over-recovery."[322] These statements suggest that such rates are unlikely to be suspect in the same way that market-based rates are.

151. Moreover, the Commission established a process to guard against the possibility that a pipeline with market power could negotiate unjust high rates. The rules require that, if a protest to the initial rate is filed, "a negotiated rate applicable to all shippers must be justified by a cost-of-service filing to mitigate any market power concerns."[323] This process "ensures that negotiated rates remain just and reasonable, and further demonstrates why a negotiated rate above cost of service levels can still be just and reasonable."[324] The rules also require at least one non-affiliated prospective shipper to agree to the negotiated rate.[325] These mechanisms help to alleviate concerns that negotiated rates are suspect and, indeed, these are the very reasons that these regulations were enacted.

152. Looking more specifically at the facts related to the relevant pipelines here, I find nothing indicating that the used is good assumption is suspect here. As Trial Staff points out,[326] no shipper protested or filed a complaint concerning the negotiated rates offered by any of the "used" pipeline alternatives Liquids Shippers Group challenges here.[327] Consequently, the Commission accepted the filed rates. Furthermore, there is no evidence (or even a suggestion) that the shippers entering into the negotiated rate contracts with these pipelines were unsophisticated. There is also no evidence that the

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[321] *Id.* P 25.

[322] *Id.*

[323] *Id.* P 30 (referring to 18 C.F.R. § 342.2).

[324] *Seaway Crude Pipeline Co., LLC*, 154 FERC ¶ 61,070, at P 49 (2016).

[325] 18 C.F.R § 342.2(b); Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, Order No. 561, FERC Stats. & Regs. ¶ 30,985, at 30,960-61 (1993) (Order No. 561).

[326] Staff Reply Br. 19.

[327] Dr. Arthur acknowledged as much at the hearing. *See* Tr. 1281:16-20 (Arthur).

pipeline alternatives here have market power. In fact, Dr. Arthur, when directly asked whether he believed the pipelines in this market are an oligopoly (which, if they are, would undermine use of the assumption), declined to say that they were.[328]

153. As I noted already, the Commission, in explaining why it assumes that "used" alternatives are good alternatives in terms of price for rates that are regulated, and more specifically are cost-based, stated that "[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment."[329] Analogously, where no shipper protests the negotiated rates in the origin market or files a complaint, and the parties contracting for negotiated rates are sophisticated business people, and there is no evidence that the "used" pipelines negotiated unjust rates because they had market power, it is rational to assume that usage can be a "proxy for determining whether an alternative is in fact a good alternative in terms of price."[330]

154. Overall, therefore, I conclude that nothing in the administrative record militates against assuming that these used alternatives are good alternatives in terms of price. Thus, the weight of evidence in this proceeding supports finding that the used pipeline alternatives may be assumed good alternatives in terms of price.

155. Because I have determined that the used alternatives may be considered "good" alternatives in this proceeding, I do not find persuasive Liquid Shippers Group's argument that White Cliffs' application is incomplete because it did not perform a netback analysis. Liquid Shippers Group's argument was premised on its position that used alternatives here should not be considered good alternatives. As already mentioned, the Commission has stated on several occasions that a netback analysis is not necessarily

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[328] Tr. 1149:25-1151:18 (Arthur). His response was somewhat evasive and raised my awareness on this issue.

[329] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,180 (relying on *Tejas Power Corp.*, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

[330] *Seaway I*, 146 FERC ¶ 61,115 at P 56.

required.[331] Accordingly, because White Cliffs' application was premised solely on used alternatives, no netback analysis was required.[332]

3. Are there unused but usable alternatives and, if so, what are they?

156. The next question in identifying all the competitive alternatives here is whether there are any "unused but usable" alternatives. Before addressing this issue, I note that, as I conclude below in the discussion addressing market statistics,[333] even if the market was solely limited to the *used* alternatives that I determine are "good alternatives" in this decision, the market statistics demonstrate that White Cliffs does not possess market power.[334] Nevertheless, because the participants address the unused but usable alternatives and for the sake of completeness, I address them as well.

157. An unused but usable alternative includes an alternative that is available but currently unused by shippers on the applicant pipeline and an alternative that is used by market participants other than current shippers on the applicant pipeline.[335] The Commission has stated that evaluating the price competitiveness of unused but

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[331] *See supra* notes 284-86 and accompanying text.

[332] White Cliffs' reliance on used alternatives was based on its interconnectivity theory, which considerably broadened the geographic market (and which I previously found to be inconsistent with Commission precedent). Thus, it found substantially more used alternatives than I find should appropriately be considered as "used alternatives" in this origin market. I further note that Liquid Shippers Group's argument appears to be a collateral attack on the Commission's Hearing Order. If the Commission had found White Cliffs' Application deficient, it would not have set this matter for hearing.

[333] *See infra* Part IX.A.2.d.

[334] Relying on the used alternatives that I conclude are good alternatives and using Liquids Shippers Group's capacity figures in the market statistics calculations for Grand Mesa, Saddlehorn, White Cliffs, and rail, but further using Liquids Shippers Group's "potential alternatives' unadjusted capacity" for Pony Express NECL and Suncor (which analyzes the same set of alternatives as potential alternatives that I conclude *are* good alternatives), results in an HHI of 2,130, with White Cliffs' market share at 15 percent. *See infra* Part IX.A.2.d.

[335] *See Seaway I*, 146 FERC ¶ 61,115 at P 70.

potentially usable alternatives requires a detailed cost analysis to identify the marginal supplier.[336] In performing a detailed cost analysis, "the competitive price proxy in an origin market analysis will equal the lowest netback provided by used alternatives, also known as the 'marginal netback.'" [337] This is sometimes referred to as the netback of the marginal supplier. The marginal netback is calculated "by ranking the netbacks offered by used alternatives until the lowest is reached. Once the marginal netback is determined, any available alternatives providing a lower netback are analyzed to determine whether a sub-marginal netback is within an acceptable range to still discipline a potential price increase by the applicant pipeline above the competitive level."[338]

158. In this proceeding, two participants—Trial Staff and Liquids Shippers Group—presented competing detailed cost analyses regarding the competitiveness of the unused but potentially usable alternatives. According to Trial Staff's netback analysis, eight unused but usable alternatives exist: the Pony Express Mainline with a receipt point in Guernsey, Wyoming (via the Sinclair Cheyenne System); the Platte pipeline with a receipt terminal in Guernsey, Wyoming; the HollyFrontier Refinery in Cheyenne, Wyoming; three additional Colorado crude oil rail terminals in Hudson, Windsor, and Carr; and two rail terminals in Cheyenne, Wyoming (the Cheyenne Crude Rail Terminal and the Cheyenne Logistics Hub Rail Terminal). Liquids Shippers Group's reevaluation of that analysis, however, shows that none of these unused alternatives are competitively priced and therefore are not usable. In light of these differences, I must examine these two analyses and address the participants' challenges to them, including arguments regarding the appropriate competitive price proxy, before I can assess which, if any, of the proposed unused but usable alternatives are price competitive here. I first describe the two analyses in more detail.

a. Participants' cost analysis methods

159. *Trial Staff's netback analysis.* Trial Staff presented detailed cost estimates for each potential alternative through a comprehensive netback analysis. Trial Staff's netback analysis identified the marginal supplier by choosing the used (pipeline) alternative that offers the lowest netback for shippers in its candidate geographic origin

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

[337] *Seaway I*, 146 FERC ¶ 61,115 at P 69; *accord Guttman*, 161 FERC ¶ 61,180 at P 111.

[338] *Seaway I*, 146 FERC ¶ 61,115 at P 69.

market.[339] This was the Pony Express NECL, with a netback of $54.31 per barrel.[340] Trial Staff then used the marginal supplier's uncommitted tariff rate, $5.41 per barrel, as the competitive rate proxy.[341] Using this competitive rate proxy, Trial Staff looked at the implications of a SSNIP above the competitive level (i.e., performed a SSNIP test) on the various alternatives, using a threshold price increase of 15 percent.[342] Trial Staff's witness Mr. Ruckert also performed a separate netback analysis for high volume shippers.[343] In addition, Mr. Ruckert performed a sensitivity analysis, incorporating 10,000 Monte Carlo simulations of the netback analysis, which confirmed the results of the primary and high volume analyses.[344] This sensitivity analysis also allowed for consideration of non-price factors.[345] Using its netback analysis, Trial Staff determined that the eight unused but usable alternatives listed above were competitive in terms of price.[346]

160. *Dr. Arthur's Long Run Marginal Cost analysis*. In contrast, Liquids Shippers Group's expert Dr. Arthur presented an LRMC analysis to identify a reasonable proxy for

[339] Ex. S-0001 at 63:8-16 (Norman); Ex. S-0023 at 86:7-10 (Ruckert).

[340] Ex. S-0023 at 87:4-10 (Ruckert); Ex. S-0001 at 59:8-10, 64:1-3 (Norman).

[341] Ex. S-0023 at 87:13-22 (Ruckert); Ex. S-0001 at 59:8-12 (Norman).

[342] Ex. S-0023 at 88:1-90:10 (Ruckert); Ex. S-0001 at 59:15-60:9 (Norman). He later ran the analyses with a 10 and a 20 percent threshold price increase. *See* Ex. S-0023 at 101:6-102:7 (Ruckert).

[343] Ex. S-0023 at 90:15-92:4 (Ruckert). He found that it did not yield different results.

[344] *Id.* at 92:8-100:15.

[345] Ex. S-0001 at 64:11-18 (Norman); Ex. S-0023 at 100:19-101:10 (Ruckert) (explaining that he used a 10 and 20 percent threshold price increase per Dr. Norman's instructions).

[346] *See* Ex. S-0023 at 107:5-15 (Ruckert).

a competitive rate.[347] He used an average incremental cost methodology to do so.[348] His analysis resulted in long-run marginal costs in the range of $2.25 to $2.78 per barrel.[349] Using these values, he then replicated Mr. Ruckert's SSNIP test. He did this by substituting the high ends of his estimated long-run marginal costs for Mr. Ruckert's competitive transportation rate proxy, while leaving the other input assumptions and calculations in the SSNIP test unchanged.[350] His SSNIP test reevaluation resulted in post-SSNIP netback values of $57.08 or $56.52 per barrel, which exceeded *all* of the netbacks for Trial Staff's list of "potentially usable alternatives."[351] Based on these results, he concluded that, contrary to Dr. Norman and Mr. Ruckert's analysis, none of these eight potentially usable alternatives were good in terms of price.[352]

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[347] Ex. LSG-0034 at 47:5-76:24 & fig. 5 (Arthur).

[348] *Id.* at 54:3-7.

[349] *Id.* at 80:22-26. These were based on $2.70 to $2.78 per barrel average incremental cost estimates associated with the Pony Express NECL project (including the Platteville Extension) and $2.25 to $2.30 per barrel associated with the Saddlehorn/Grand Mesa UJI pipeline system. *Id.* Dr. Arthur used these as reasonable (conservatively high) estimates of the long-run marginal costs that would be incurred by a hypothetical pipeline company building either a lateral or a completely new pipeline system to serve incremental demand for crude oil transportation capacity from the Wattenberg Field area to Cushing. *Id.* at 80:25-81:2.

[350] *Id.* at 81:9-25 & fig. 6.

[351] *Id.* at 81:19-25 & fig. 6.

[352] Dr. Arthur also compared his results to an analysis that White Cliffs had performed in connection with a proposed 2014 expansion project. *See* Ex. WCP-0048 at 6:9-12 (Minielly) (explaining, in a nonprivileged section of his testimony, what Dr. Arthur had done); *see also* Ex. LSG-0034 at 51:6-16 (Arthur); Ex. LSG-0038. As part of a proposed 2014 expansion project, White Cliffs had modeled a "worst-case scenario" under which White Cliffs could lose uncommitted volumes to a potential competitor. As part of this analysis, White Cliffs calculated the theoretical rate that a future, hypothetical pipeline competitor would have to charge to capture uncommitted volumes. Ex. WCP-0048 at 2:10-7:3 (Minielly).

b. Challenges to these cost analyses

161. Liquids Shippers Group contends that Trial Staff's netback analysis suffers from fatal flaws.[353] In particular, Liquids Shippers Group questions Trial Staff's estimation of a competitive price proxy as well as several netback model inputs.[354] Liquids Shippers Group also asserts that shipper behavior belies the netback results[355] and that Trial Staff's arguments are circular.[356]

162. Trial Staff, in turn, contends that Liquids Shippers Group's proposed competitive price proxy is inconsistent with Commission precedent and, moreover, does not reflect observed market behavior.[357] According to Trial Staff, *it* followed Commission precedent by selecting the marginal supplier's uncommitted tariff rate as the appropriate competitive price proxy.[358]

i. Competitive price proxy issue

163. I first consider the participants' arguments concerning the appropriate competitive price proxy.

164. Liquids Shippers Group, in challenging Trial Staff's competitive price proxy, argues that Trial Staff improperly "assumed that the highest collected tariff rate for transportation from Platteville to Cushing, Oklahoma is a reasonable proxy for a competitive rate for White Cliffs' transportation service."[359] According to Liquids

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[353] LSG Initial Br. 38-54.

[354] Liquids Shippers Group also challenges these unused alternatives on other grounds, such as availability and quality, which are discussed later in this section. *See infra* Part VIII.C.4. Liquids Shippers Group also raises burden of proof concerns. LSG Initial Br. 39. I have already addressed this issue. *See supra* Part IV.

[355] LSG Initial Br. 50-52.

[356] LSG Reply Br. 32-33.

[357] Staff Initial Br. 40-44.

[358] *Id.* at 36-37 (citing *Guttman*, 161 FERC ¶ 61,180 at P 114).

[359] LSG Initial Br. 40.

Shippers Group, assuming that "used" alternatives are behaving competitively or have their rates constrained to competitive levels implicates the "cellophane fallacy."[360] Liquids Shippers Group further argues that "there is no assurance that any of the four pipelines' rates, including White Cliffs' rates, do not already reflect an exercise of market power."[361] According to Liquids Shippers Group, examining the LRMC associated with the four pipeline systems (as well as a theoretical new entrant pipeline), indicates that the prevailing tariff rates of these pipeline systems are "significantly above competitive levels."[362]

165. Trial Staff defends its reliance on the tariff rate of the used alternative providing the marginal netback, asserting that its approach is consistent with Commission precedent.[363] Trial Staff also refers to Commission language indicating that the likelihood that relying on usage as a proxy for the competitive price will result in the cellophane fallacy is "extremely limited."[364] Trial Staff points out that, here, the used pipeline alternatives' rates were agreed to by at least one non-affiliated shipper (i.e., were negotiated rates) and were not subject to complaint or protest.[365] Furthermore, Trial Staff argues, Dr. Arthur's competitive price proxy would result in White Cliffs and the Suncor Refinery being the only competitive alternatives in the market. It would also mean that Saddlehorn, Grand Mesa, and Pony Express NECL are all charging rates over the competitive price.[366]

166. Upon consideration of the evidence and the participants' arguments, I conclude that Trial Staff's methodology for determining a competitive price proxy is reasonable and consistent with Commission precedent. It is therefore appropriate to use it in this proceeding. As an initial matter, I find Trial Staff's cost analysis to be highly credible. Not only was Trial Staff's initial netback analysis extremely thorough and meticulous, it

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[360] *Id.*

[361] *Id.* at 42.

[362] *Id.*

[363] Staff Initial Br. 36-37.

[364] *Id.* at 38.

[365] *Id.*

[366] *Id.* at 40.

included a sensitivity analysis, which allowed testing of the analysis' robustness by "assess[ing] the impact of variability in the parameters."[367] Moreover, in response to concerns raised by Liquids Shippers Group's witnesses, Mr. Ruckert considered several additional factors in his rebuttal testimony, thereby providing even more comprehensive support for the cost analysis' approach and inputs. Mr. Ruckert, the chief author of the netback analysis, was an extremely credible witness.

167. I am unpersuaded by Liquids Shippers Group's challenges to Trial Staff's netback analysis for several reasons. First, Liquids Shippers Group's challenges to Trial Staff's analysis appear to be a rehashing of the very same arguments the Commission found unconvincing in *Seaway II*.[368] I find them unconvincing here as well, for the same reasons described by the Commission. I decline to repeat the Commission's lengthy discussion here. Second, I have already determined that the negotiated rates here are not suspect.[369] They are, in fact, a "form of price regulation" that reduces the likelihood of the cellophane trap.[370] Third, the market statistics do not show a monopoly here.[371] The Commission has said that if there were a cellophane trap, the market statistics would bear out that fact. Such is not the case here. Fourth, contrary to Liquids Shippers Group's challenge to the use of a negotiated rate as a proxy, the Commission has stated that "[t]ariff rates that are negotiated rates or settlement rates have been used as proxies."[372] Fifth, as the Commission stated in *Guttman*, "it is not strictly marginal costs that must be analyzed when determining an appropriate price proxy, but instead who is the marginal supplier."[373] Trial Staff selected the uncommitted tariff rate of what it found to be the

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[367] Ex. S-0023 at 92:8-93:3 (Ruckert). He tested the sensitivity of the model to variations in, among other things, Wyoming Sweet-WTI and Louisiana Light Sweet-WTI benchmark price differentials, trucking, rail, and gathering and treatment costs. *Id*. at 94:6-95:1 & tbl. 17.

[368] *See* 152 FERC ¶ 61,203 at PP 19-35.

[369] *See supra* Part VIII.C.2.

[370] *Seaway II*, 152 FERC ¶ 61,203 at P 27.

[371] *See infra* Part IX.A.2.

[372] *Seaway I*, 146 FERC ¶ 61,115 at P 50 n.56.

[373] *Guttman*, 161 FERC ¶ 61,180 at P 114; *see also Seaway II*, 152 FERC ¶ 61,203 at P 30 (stating that the competitive price is the marginal cost of the marginal supplier).

marginal supplier here. Trial Staff's approach is, therefore, entirely consistent with Commission precedent.

168. Turning to Liquids Shippers Group's methodology for determining a competitive price proxy, I conclude that it would not be appropriate to use it in place of Trial Staff's for a number of reasons. Although the Commission has suggested that the "actual marginal costs of every market participant" may also be used (in lieu of using the marginal netback),[374] it has not found that Dr. Arthur's average incremental cost methodology sufficiently, adequately, or appropriately calculates the *actual* marginal costs.[375] Dr. Arthur's average incremental cost methodology, in fact, *estimates* marginal costs.[376]

169. Furthermore, Dr. Arthur's average incremental cost methodology has several drawbacks. As other experts have testified, it is sensitive to inputs and prone to error.[377] Dr. Webb, in fact, made three adjustments he believed appropriate, and this significantly altered the result.[378] Dr. Webb also discussed a number of flaws at length.[379] Additionally, Dr. Norman pointed out that Dr. Arthur used cost data from White Cliffs' annual and quarterly FERC Form No. 6 (Form No. 6) and Form No. 6-Q (Form No. 6-Q) filings in his average incremental cost analysis but that such data is difficult to rely on

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

[375] As Trial Staff points out, although Dr. Arthur has advocated his average incremental cost methodology in previous proceedings, the Commission has not relied upon the methodology in developing a competitive price proxy. Staff Initial Br. 42 (citing Tr. 1289:2-6 (Arthur) and Ex. S-0070 at 25-26 (Arthur Dep. Tr. excerpts)).

[376] Ex. LSG-0034 at 47:5-22 (Arthur); Ex. S-0069 at 16:14-18 (Norman).

[377] Ex. WCP-0050 at 71:3-16 (Webb) (explaining that if any costs are left out, the result will likely be an underestimate), 72:11-73:4 (noting complexities in attempting to use such a model), 86:1-87:15 (explaining that changing three inputs significantly changed the outcome, thereby demonstrating the sensitivity of the method); Tr. 884:7-18 (Norman) (explaining how sensitive LRMC analyses are).

[378] Ex. WCP-0050 at 86:1-87:10 (Webb).

[379] *Id.* at 73:6-77:7, 80:19-85:19.

because there are some aggregation and temporal issues associated with it.[380] The Commission has acknowledged some difficulties in relying on certain Form No. 6 cost information, noting that it may contain merged data.[381] Overall, I find Dr. Webb's and Dr. Norman's testimony regarding the problems with Dr. Arthur's analysis credible and persuasive.

170. It is unsurprising that Liquids Shippers Group's methodology suffers from these difficulties. The Commission has noted such problems when it approved the marginal netback approach, explaining that identifying the marginal netback is reasonable because it may be difficult to acquire "the data required to determine *actual marginal costs* of every market participant."[382]

171. The record evidence also suggests that the cost estimates derived from Liquids Shippers Group's average incremental cost methodology are flawed. According to Liquids Shippers Group's proposed competitive proxy, Saddlehorn, Grand Mesa, and Pony Express NECL are all charging rates above the competitive price.[383] The evidence, however, suggests otherwise, implying that Liquids Shippers Group's method is flawed.[384] As Trial Staff points out, these are all "pipelines without market-based rate authority, without market shares greater than 30 percent, and that have not been subject to a shipper rate complaint."[385]

172. For all these reasons, I conclude that Dr. Arthur's methodology for determining a competitive price proxy is unreliable. It therefore would not be appropriate to use it in place of Trial Staff's comprehensive and credible netback analysis.

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[380] *See* Ex. S-0069 at 24:12-25:10 (Norman).

[381] *See Guttman*, 161 FERC ¶ 61,180 at P 118 (noting that revenue data is reported on a system-wide basis).

[382] *Id.* P 114. Again, Dr. Arthur's method *estimates* costs.

[383] *See* Tr. 1163:12-17 (Arthur) (acknowledging that his analysis yields such a result).

[384] *See, e.g.*, JSF 113-114; Tr. 1167:7-1168:8 (Arthur).

[385] Staff Initial Br. 40.

173. In sum, upon consideration of the participants' arguments and review of the record, I conclude that the preponderance of the evidence supports using Trial Staff's proposed competitive price proxy in this proceeding. Trial Staff's method, which is consistent with the Commission's approach and its focus on the marginal netback, is more appropriate to use than Liquids Shippers Group's method, which estimates costs. Importantly, Trial Staff's analysis uses actual market data and information, not estimates, to investigate the existing market dynamics as a whole, whereas Dr. Arthur's analysis does not.[386]

ii. Other challenges to Trial Staff's netback analysis

174. Liquids Shippers Group also challenges Trial Staff's netback analysis on several other grounds. Liquids Shippers Group first contends that the results of the netback analysis are inconsistent with shippers' behavior, thereby casting doubt on Trial Staff's model.[387] They point out that the netbacks for certain alternatives, such as the HollyFrontier Refinery and the Platte Pipeline, yield substantially better profits than do the Platteville pipelines, yet there is no evidence that producers/shippers have recently used these alternatives.[388] Liquids Shippers Group similarly point to a number of rail terminals that yielded good netbacks for which there is no evidence of recent use or that have only been used sporadically.

175. I do not find Liquids Shippers Group's argument on this point persuasive. In his rebuttal testimony, Mr. Ruckert explained that there are a number of other factors that can influence a shipper's behavior. Relying on the testimony of other witnesses, he pointed to scalability, reliability, and contractual arrangements.[389] He also cites data supporting

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[386] Liquids Shippers Group makes much of White Cliffs' hypothetical pipeline entrant analysis. The weight of the evidence, however, shows that a number of inputs are either questionable, outdated, or missing. Ex. WCP-0048 at 2:18-3:1, 3:4-7, 7:4-8:18, 9:3-9:16 (Minielly); Ex. WCP-0050 at 77:8-80:8 (Webb); *see also* Ex. LSG-0038 at 3-30, 35, 40; Ex. WCP-0049 at 9 (LTAR Model); Tr. 145:3-149:12, 153:10-158:15 (Minielly). Significantly, the documents at issue were prepared six years ago, in 2012, and, as Mr. Minielly points out, do not capture the capital costs that would be required to build a pipeline today. Ex. WCP-0048 at 9:9-10 (Minielly). Consequently, its utility is highly suspect. For these reasons, I find it unreliable and give it no weight.

[387] LSG Initial Br. 50.

[388] *Id.* at 50-52.

[389] Ex. S-0074 at 27:19-28:10 (Ruckert) (citing Mr. Kittrell's and Dr. Arthur's

these factors as potentially influencing shipper decisions.[390] Thus, the fact that shippers are not *currently* using the unused alternatives does not mean that the netback analysis is flawed. Furthermore, as I noted below, some record evidence suggests that at least one of the "unused" alternatives, the HollyFrontier Refinery, may be being used by Wattenberg Field shippers.[391] The evidence also indicates that rail is being used, at least at the Plains Tampa Rail Terminal, **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[392]

176. Liquids Shippers Group also questions several netback model inputs. First, Liquids Shippers Group criticizes Mr. Ruckert's use of the "Wyoming Sweet" price as a proxy for prices at the HollyFrontier refinery, suggesting that he should have used Mercuria Energy's price listing for "Northeast Colorado" crude instead. Liquids Shippers Group asserts that Mr. Ruckert had no basis for his selection and that it was inconsistent with Mr. Skorski's testimony.[393]

177. This argument is unconvincing. Mr. Ruckert credibly explained his use of the Wyoming Sweet price. He explained that "Wyoming Sweet" is a benchmark crude oil reported on Bloomberg, that it is fairly comparable to the crude oil extracted from the DJ Basin, and that the DJ Basin lies partially within Wyoming.[394] He further testified that he "had data indicating that the crude oil prices received by certain shippers very well match

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testimony); *see also id.* at 28:13-30:16.

[390] *Id.* at 28:13-30:2.

[391] I also note that Mr. Ruckert's netback analysis is consistent with **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**. *Id.* at 30:19-31:2; Ex. S-0023 at 84:8-85:10 (Ruckert) (citing Ex. S-0032).

[392] Ex. S-0023 at 45:3-8 (Ruckert); Ex. S-0032; Ex. WCP-0087 at 9, 11; Tr. 922:20-924:3 (Kittrell).

[393] LSG Initial Br. 53 & n.209.

[394] Ex. S-0023 at 56:3-12 (Ruckert); Tr. 643:1-4, 678:16-18 (Ruckert). He also explained that he did not know how Mercuria determines its prices. Tr. 675:22-24, 677:24-678:1, 678:16-17 (Ruckert).

up with the price of the Wyoming sweet."[395] Moreover, as Trial Staff points out, "prices developed by Mr. Ruckert's netback analysis using the publicly-available Wyoming Sweet benchmark as a proxy are consistent with shipper data."[396] Finally, Mr. Ruckert also provided a credible explanation for why Mr. Skorski used a different light crude price.[397]

178. Liquids Shippers Group also questions Mr. Ruckert's use of the most recent year of data to estimate the price differential between Louisiana Light Sweet (LLS) and the WTI benchmark. Liquids Shippers Group contends that he should have instead used the last five years of data.[398] This argument is unavailing. Not only is Mr. Ruckert's analysis consistent with the Commission preference for using recent information in market evaluations,[399] but it also used consistent time periods for all the inputs.[400] Using a five-year data set for certain prices when the remaining inputs are for a one-year period without explanation would be both illogical and inappropriate.[401]

179. In sum, I find Trial Staff's netback analysis extremely credible and its argument in support of its use persuasive. I therefore rely on it (and not Liquids Shippers Group's

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[395] Tr. 643:4-9, 676:12-15 (Ruckert).

[396] Ex. S-0023 at 84:6-85:7 (Ruckert) (citing Ex. S-0032); Ex. S-0074 at 30:22-31:2 (Ruckert); Tr. 643:4-9, 645:13-19, 652:2-8 (Ruckert).

[397] Tr. 643:15-644:3 (Ruckert).

[398] LSG Initial Br. 53-54.

[399] *SFPP*, 84 FERC ¶ 61,338 at 62,498 & n.24 (citing *1992 DOJ-FTC Merger Guidelines* § 3.2 and emphasizing, several times, that "current" information be used); *see also Seaway III*, 163 FERC ¶ 61,127 at PP 59-60 (holding that reliance on evidence that barges had been used a few years prior to the period in question was not appropriate).

[400] *See* Tr. 733:6-7 (Ruckert) (explaining that analysis was for the 12-month period from September 2017 to August 2018), 741:1-742:11 (explaining that using a five-year time period for the LLS-WTI differential would require updating all of the other pricing variables in his netback analysis to reflect the same period).

[401] *See* Tr. 741:1-742:11 (Ruckert).

alternate analysis) in making my factual determinations concerning the unused but usable alternatives.

c. Factual findings regarding unused alternatives that Trial Staff found are usable

180. I next consider the unused alternatives that Trial Staff found to be usable. I then consider the remaining unused alternatives.

i. HollyFrontier Refinery in Cheyenne, Wyoming

181. HollyFrontier Refinery, located in Cheyenne, Wyoming, has a capacity of 48 MBPD under normal operating conditions and 52 MBPD under optimal conditions.[402]

182. HollyFrontier has a long-term, minimum volume commitment on the Cheyenne Pipeline of over 35 MBPD.[403] In 2017, Cheyenne Pipeline LLC delivered 47.14 MBPD of crude oil from Guernsey, Wyoming, to Cheyenne, Wyoming; 4.59 MBPD continued to move further on connecting carriers.[404] Thus, an average of 42.54 MBPD was delivered to Cheyenne, Wyoming. HollyFrontier is the only refinery in Cheyenne.[405] From these facts, I infer that in 2017 HollyFrontier accepted a significant amount of the crude oil that was delivered to Cheyenne on the Cheyenne Pipeline (and that did not move further on reported connecting carriers), most likely between 35 MBPD and 42.54 MBPD.

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[402] JSF 57; *see also* Ex. S-0019 at 17:4-5 (Skorski); Ex. S-0022 at 17 (HollyFrontier's website reporting a crude oil capacity of 52,000 BPD, apparently per stream day). For additional factual information about the HollyFrontier Refinery, see the previous discussion in Part VI.B.2.a.

[403] Ex. LSG-0048 (press report noting 35,000 BPD commitment); Ex. LSG-0049 (noting increased commitment, but no specific volume mentioned).

[404] Ex. LSG-0034 at 94:19-95:5 (Arthur) (relying on Ex. LSG-0050 (Form No. 6, fourth quarter of 2017, end-of-year totals)). Unlike the cost data contained within FERC Form No. 6, where the Commission has identified concerns on use that I detailed earlier, no party has shown such concern on these volumetric figures. As such, I have used them here for analysis of capacities among the alternatives.

[405] *Id.* at 95:2-3.

183. HollyFrontier's two refineries, including the one in Cheyenne, refined 34 percent "sweet crude" in 2017 and 39 percent in 2016.[406] HollyFrontier purchases some of its crude oil from "local producers" as well as importing it via pipeline.[407] Crude oil is transported to HollyFrontier from several locations, including Colorado, via common carrier pipeline and truck.[408]

[406] Ex. S-0022 at 18 (excerpt from HollyFrontier's annual report). I have no reason to disbelieve HollyFrontier's annual report. I thus find these facts credible. I note, however, that the report does not separately list the types of crude refined by each of the two refineries.

[407] Ex. S-0022 at 17 (statement from HollyFrontier's website). I have no reason to disbelieve HollyFrontier's own website. I thus find these facts credible.

[408] Ex. S-0072 at 3 (excerpt from HollyFrontier's annual report). Liquids Shippers Group questions this statement, arguing that, if this was true, "it is inconceivable that HollyFrontier would not be interacting with and sourcing from the largest producers in the Wattenberg Field such as Kerr McGee and [Noble], yet HollyFrontier is doing no such thing." LSG Initial Br. 50 n.202. Again, I have no reason to disbelieve HollyFrontier's own annual report. Despite Liquids Shippers Group's arguments to the contrary, it is possible that smaller producers that are not part of Liquids Shippers Group are shipping volumes to HollyFrontier. I thus find these facts credible.

184. The minimum distance between Wattenberg Field county wellheads and the HollyFrontier is 20 miles, the maximum distance is 157 miles, with an average of 71.[409] I find that 20, 71, and 157 miles are "relatively short distances."[410]

185. One producer in the Wattenberg Field reported sending the crude oil it produced in Lucerne, Weld County, to the HollyFrontier Refinery via rail.[411] HighPoint, in its

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[409] Ex. S-0046 at 1 (trucking distance calculations); Ex. S-0023 at 71:1 (Ruckert) (Table 11). To calculate these trucking distances, Mr. Ruckert "measured the distance to each distant alternative from each of the 6,273 actively producing oil wells in the six counties in Trial Staff's candidate geographic origin market," which resulted in 119,187 calculated distances. He then calculated the average, the maximum, and the minimum distance to each distant alternative from the 6,273 separate wells. Ex. S-0023 at 69:15-19 (Ruckert). Mr. Kittrell testified that the Wattenberg Field is located "about 70 miles" from the HollyFrontier Refinery in Cheyenne, Wyoming. Ex. LSG-0001 at 7:11-13 (Kittrell). As this was a general statement, it is unclear whether Mr. Kittrell was referring to the average distance between the two or the distance between a more central location within the Wattenberg Field and the refinery. To the extent that Mr. Kittrell's testimony is inconsistent with Mr. Ruckert's, I find Mr. Ruckert's more detailed and systematic analysis of distances, which I just described, more credible.

[410] *See Seaway III*, 163 FERC ¶ 61,127 at P 29 (noting that trucking is 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"). In *Seaway III*, trucking to an alternative was relied upon where crude oil was trucked throughout the State of Oklahoma. I take administrative notice that the width of Oklahoma is approximately 230 miles.

[411] Ex. S-0057 at 2 (August 13, 2017, Greeley Tribune article). Liquids Shippers Group disputes this information, alleging that it may be factually incorrect. LSG Initial Br. 50 n.202; *see also* Tr. at 684:9-692:14 (cross-examining Mr. Ruckert about the possibility that the article is inaccurate). I do not find its argument persuasive. A local newspaper reported the challenged information in an article about Weld County crude oil production and its destinations. Extraction Oil & Gas, a producer that was interviewed for the article, explained its crude oil transportation operations, stating as follows: "From Weld, oil is sent to Platteville or Lucerne. From Platteville, oil travels to Cushing, Okla[homa], via a crude pipeline; from Lucerne, Extraction ships oil to refineries by rail — either to Suncor in Commerce City, or the Frontier Refinery in Cheyenne, Wyo[ming]." *Id*. These statements were not generalized conclusions by the reporter, which could potentially be more susceptible to error or misunderstanding. Instead, they

Corporate Update, stated that "local refineries" provide additional outlets for the crude oil it produces in the Wattenberg Field.[412] The Suncor and HollyFrontier refineries are the closest refineries to Weld County.[413]

186. Kerr McGee has never moved Wattenberg Field area production directly to HollyFrontier's Cheyenne, Wyoming refinery.[414] It has sold light crude to "Holly Frontier" but is unaware where it was ultimately sent or if it went to the HollyFrontier refinery in Cheyenne.[415] For several reasons, it is unlikely that these referenced volumes were sold to the HollyFrontier refinery in Cheyenne.[416]

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were specific statements made by an interviewee. It is highly unlikely that the producer mistakenly reported its operations or the destinations to which it shipped its own crude oil production. As Mr. Ruckert pointed out at the hearing, there could be contractual or other reasons why the producer uses rail rather than truck. I find this information credible. Interestingly, this information suggests that the HollyFrontier Refinery may, in fact, be a "used" alternative.

[412] Ex. S-0058 at 20; Ex. S-0023 at 83:8-16 (Ruckert) (citing Exhibit Nos. S-0057 at 2 and S-0058 at 20).

[413] Ex. S-0023 at 83:18-20 (Ruckert).

[414] Ex. LSG-0001 at 10:8-9 (Kittrell). **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]** *See* Ex. S-0032 at 8. Based on Mr. Kittrell's testimony that Kerr McGee trucked some of its product to Cheyenne, Wyoming, and delivered these volumes to the Bridger Swan Station facility where they ultimately were transported via the Sinclair pipeline, Ex. LSG-0001 at 10:1-8 (Kittrell), I infer that **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]** *See* Tr. 633:18-634:2 (Ruckert); *see also* Tr. 229:1-17 (Webb) (citing Ex. WCP-0021 at 1, 3); Ex. WCP-0026.

[415] Ex. LSG-0025 at 1. I note that this exhibit was not claimed privileged.

[416] Ex. LSG-0001 at 10:11-19 (Kittrell).

187. HollyFrontier's two refineries in the Rocky Mountain region, one of which is the "Cheyenne" refinery, had an average utilization rate of 79.8 percent in 2017.[417] PADD IV refineries, however, had an average of 89.6 percent utilization.[418] Multiplying the 79.8 percent utilization figure by the Cheyenne refinery's total capacity of 52.0 MBPD yields an average crude input into the Cheyenne refinery of 41.50 MBPD.[419] This figure is less than the average amount of crude oil delivered to Cheyenne per day. Assuming that all of the 42.54 MBPD went to HollyFrontier, HollyFrontier would have available capacity.

188. HollyFrontier Refinery in Cheyenne, Wyoming, produces a "positive"[420] netback of $56.23 per barrel for Wattenberg Field producers moving their volumes to the refinery by truck.[421]

189. I find that, given HollyFrontier's positive netback price and the relatively short trucking distances between the HollyFrontier Refinery and Wattenberg Field counties' wellheads, producers/shippers could use the HollyFrontier Refinery as an alternative to White Cliffs in the event of a SSNIP by White Cliffs.

190. *Summary of factual findings and conclusions*. Based on the preponderance of the evidence, I conclude that the HollyFrontier Refinery is competitive in terms of price. Thus, the HollyFrontier Refinery is an unused but usable alternative. The evidence also suggests that some Wattenberg Field shippers, in fact, may be using the HollyFrontier

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[417] Ex. S-0019 at 17:8-11 (Skorski); Ex. S-0022 at 18. Using the normal operating capacity of 48 MBPD and doing this simple math yields an average crude input into the Cheyenne refinery of 38.3 MBPD. The other included refinery is Woods Cross. Ex. S-0022 at 18.

[418] Ex. S-0072 at 1.

[419] Ex. LSG-0002 at 95:8-10 (Arthur).

[420] Trial Staff deemed any proposed alternative with a netback greater than or equal to that of White Cliffs' post-SSNIP netback of $53.50 per barrel to be competitively priced. Ex. S-0023 at 89:7-9 (Ruckert). I refer to this result as a "positive" netback. Those netbacks lower than $53.50 per barrel are not competitively priced and are referred to as "negative" netbacks.

[421] *Id.* at 82:5 (Table 13) (showing crude oil delivery costs and positive netback calculation for the HollyFrontier Refinery); Ex. S-0056 at 1.

Refinery.[422] Nonetheless, I keep this refinery as an unused (but usable) alternative for purposes of this decision.

ii. Three rail terminals in Colorado

191. The Hudson Terminal Railroad has a crude oil loading terminal in Hudson, Colorado (Hudson Rail Terminal).[423] The Hudson Rail Terminal is accessible to Wattenberg Field producers via truck.[424] The average trucking distance between wellheads in the Wattenberg Field counties and the Hudson Rail Terminal is 32 miles, with a minimum and maximum distance of 2 and 107 miles, respectively.[425] I find these to be relatively short distances.

192. The Hudson Rail Terminal produce positive netbacks of $55.13 per barrel for Wattenberg Field producers moving their volumes to the terminals by truck.[426]

193. The Musket Corporation has a crude oil rail loading terminal in Windsor, Colorado (Musket Rail Terminal).[427] The Musket Rail Terminal is accessible to Wattenberg Field producers via truck.[428] The average trucking distance between wellheads in the Wattenberg Field counties and the Musket Rail Terminal is 32 miles, with a minimum and maximum distance of 1 and 115 miles, respectively.[429] I find these to be relatively short distances.

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[422] Ex. S-0057 at 2.

[423] Ex. S-00023 at 62:8 (Ruckert) (Table 9); Ex. S-0040 at 1.

[424] Ex. S-0023 at 68:10, 71:1 (Ruckert) (Tables 10 and 11); *see also* Ex. S-0046 at 1.

[425] Ex. S-0046 at 1.

[426] Ex. S-0023 at 82:5 (Ruckert) (Table 13) (showing crude oil delivery costs and netback calculations); Ex. S-0056 at 1.

[427] Ex. S-00023 at 62:8 (Ruckert) (Table 9); Ex. S-0040 at 1.

[428] Ex. S-0023 at 68:10, 71:1 (Ruckert) (Tables 10 and 11); *see also* Ex. S-0046 at 1.

[429] Ex. S-0046 at 1.

194. The Musket Rail Terminal produce positive netbacks of $55.11 per barrel for Wattenberg Field producers moving their volumes to the terminals by truck.[430]

195. The Plains All American Pipeline has a crude oil rail loading terminal in Carr, Colorado (Niobrara Crude Rail Terminal).[431] The Niobrara Crude Rail Terminal is accessible to Wattenberg Field producers via truck.[432] The average trucking distance between wellheads in the Wattenberg Field counties and the Niobrara Crude Rail Terminal is 59 miles, with a minimum and maximum distance of 9 and 143 miles, respectively.[433] I find these to be relatively short distances.

196. The Niobrara Crude Rail Terminal produce positive netbacks of $54.47 per barrel for Wattenberg Field producers moving their volumes to the terminals by truck.[434]

197. I find that, given the positive netback price and the relatively short trucking distances between these three Colorado crude oil rail terminals and Wattenberg Field counties' wellheads, producers/shippers could use the Hudson Rail Terminal, the Musket Rail Terminal, and the Niobrara Crude Rail Terminal as alternatives to White Cliffs in the event of a SSNIP by White Cliffs.

198. *Summary of factual findings and conclusions*. Based on the preponderance of the evidence, I conclude that these three Colorado crude rail terminals are competitive in terms of price. Thus, the Hudson Rail Terminal, the Musket Rail Terminal, and the Niobrara Crude Rail Terminal are unused but usable alternatives.

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[430] Ex. S-0023 at 82:5 (Ruckert) (Table 13) (showing crude oil delivery costs and netback calculations); Ex. S-0056 at 1.

[431] Ex. S-00023 at 62:8 (Ruckert) (Table 9); Ex. S-0040 at 1.

[432] Ex. S-0023 at 68:10, 71:1 (Ruckert) (Tables 10 and 11); *see also* Ex. S-0046 at 1.

[433] Ex. S-0046 at 1.

[434] Ex. S-0023 at 82:5 (Ruckert) (Table 13) (showing crude oil delivery costs and netback calculations); Ex. S-0056 at 1.

iii. Two rail terminals in Cheyenne, Wyoming

199. The Watco/Swan Ranch Railroad has a crude oil rail loading terminal in Cheyenne, Wyoming (Cheyenne Crude Rail Terminal) as does the Cheyenne Logistics Hub (Cheyenne Logistics Hub Rail Terminal, and collectively, Cheyenne Rail Terminals).[435] The Cheyenne Rail Terminals are accessible to Wattenberg Field producers via truck.[436] The average trucking distance between wellheads in the Wattenberg Field counties and the Cheyenne Crude Rail Terminal and the Cheyenne Logistics Hub Rail Terminal are 71 miles and 74 miles, respectively, with a maximum distance of 157 and 170 miles, respectively.[437] I find these to be relatively short distances.

200. The Cheyenne Crude Rail Terminal and the Cheyenne Logistics Hub Rail Terminal produce positive netbacks of $54.19 and $54.11 per barrel, respectively, for Wattenberg Field producers moving their volumes to the terminals by truck.[438]

201. I find that, given the Cheyenne Rail Terminals' positive netback price and the relatively short trucking distances between the Cheyenne Rail Terminals and Wattenberg Field counties' wellheads, producers/shippers could use the Cheyenne Crude Rail Terminal and the Cheyenne Logistics Hub Rail Terminal as alternatives to White Cliffs in the event of a SSNIP by White Cliffs.

202. *Summary of factual findings and conclusions*. Based on the preponderance of the evidence, I conclude that the Cheyenne Rail Terminals are competitive in terms of price. Thus, the Cheyenne Crude Rail Terminal and the Cheyenne Logistics Hub Rail Terminal are unused but usable alternatives.

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[435] Ex. S-00023 at 62:8 (Ruckert) (Table 9); Ex. S-0040 at 1.

[436] Ex. S-0023 at 68:10, 71:1 (Ruckert) (Tables 10 and 11); *see also* Ex. S-0046 at 1.

[437] Ex. S-0046 at 1.

[438] Ex. S-0023 at 82:5 (Ruckert) (Table 13) (showing crude oil delivery costs and netback calculations); Ex. S-0056 at 1.

iv. Pony Express Mainline with receipt point in Guernsey, Wyoming

203. The Pony Express Mainline transports crude oil from Guernsey, Wyoming, to Cushing, Oklahoma.[439] Pony Express' interstate tariff states that shippers may transport volumes from three locations: (1) Platteville, Colorado (via the NECL Platteville Extension); (2) other points in Weld County, Colorado (via the NECL); and (3) in Guernsey, Wyoming (directly into the main line of the system).[440]

204. The Pony Express Mainline is accessible to Wattenberg Field producers by truck[441] and by a third-party pipeline (the Sinclair Cheyenne System).[442] The Pony Express Mainline using this third-party pipeline produces a positive netback of $53.53 per barrel.[443] The minimum trucking distance between wellheads in the Wattenberg Field counties and the Pony Express Mainline is 114 miles, the average is 178 miles, and the maximum is 264.[444] I find these to be relatively short distances. Accessing the Pony Express Mainline by truck produces a negative netback of $51.92.[445]

205. I find that, given the Pony Express Mainline's positive netback price using the Sinclair Cheyenne System, producers could use the Pony Express Mainline via this third-party pipeline as an alternative to White Cliffs in the event of a SSNIP by White Cliffs. I further find that producers would not use the Pony Express Mainline via truck as an alternative because of the negative netback.

206. *Summary of factual findings and conclusions*. Based on the preponderance of the evidence, I conclude that the Pony Express Mainline using the Sinclair Cheyenne System is competitive in terms of price. Thus, the Pony Express Mainline via this third-party

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[439] Ex. S-0023 at 62:1 (Ruckert) (Table 8).

[440] Ex. S-0038 at 28-36; Ex. S-0023 at 43:16-20 (Ruckert).

[441] Ex. S-0023 at 68:10 (Ruckert) (Table 10); Ex. S-0046 at 1.

[442] Ex. S-0023 at 44:13-15, 106:8-117:11 (Ruckert).

[443] Ex. S-0059 at 3; *see also* Ex. S-0023 at 106:8-117:11 (Ruckert).

[444] Ex. S-0046 at 1 (line 4).

[445] Ex. S-0023 at 82:5 (Ruckert) (Table 13); Ex. S-0059 at 2.

pipeline is an unused but usable alternative. I also conclude that accessing the Pony Express Mainline by truck is not a competitively priced alternative and thus is not an unused but usable alternative.

v. Platte Pipeline with receipt point in Guernsey, Wyoming

207. The location of the Platte pipeline system was previously described.[446] A Platte pipeline receipt point is located in Guernsey Station, Wyoming, which is within the DJ Basin Origin Market.[447] The Platte pipeline is accessible to Wattenberg Field producers by truck.[448] The average trucking distance between wellheads in the Wattenberg Field counties and the Platte pipeline receipt point in Guernsey is 178 miles, with a minimum distance of 114 miles and a maximum of 264.[449] I find these to be relatively short distances. The Platte pipeline provides a positive netback of $54.34 per barrel for Wattenberg Field producers moving their volumes to Guernsey by truck.[450]

208. I find that, given the Platte pipeline's positive netback price when accessed by truck and the relatively short trucking distances between the Platte pipeline and Wattenberg Field counties' wellheads, producers could use the Platte pipeline as an alternative to White Cliffs in the event of a SSNIP by White Cliffs.

209. *Summary of factual findings and conclusions*. Based on the preponderance of the evidence, I conclude that the Platte Pipeline is competitive in terms of price. Thus, the Platte Pipeline is an unused but usable alternative.

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[446] *See supra* Part VI.B.2.a; *see also* JSF 37.

[447] Ex. S-0023 at 62:1 (Ruckert) (Table 8); Ex. WCP-0032 at 1.

[448] Ex. S-0023 at 68:10 (Ruckert) (Table 10); Ex. S-0046 at 1.

[449] Ex. S-0046 at 1.

[450] Ex. S-0023 at 82:5 (Ruckert) (Table 13) (showing crude oil delivery costs and netback calculations); Ex. S-0056 at 1.

d. Factual findings and conclusions regarding other alternatives

210. White Cliffs includes two other pipelines—the Rangely Pipeline and the Frontier Aspen Pipeline—as competitive alternatives to the White Cliffs Pipeline. White Cliffs also lists three additional refineries—the Par Pacific Refinery and two Sinclair Oil Refineries—as competitive alternatives to White Cliffs Pipeline. Finally, White Cliffs also refers to other rail terminals.

211. *Frontier Aspen Pipeline*. The Frontier Aspen Pipeline transports crude oil from its origin point in Casper, Wyoming, to Frontier Station, Utah.[451] It is owned by HollyFrontier Corporation.[452] The Frontier Aspen Pipeline is accessible to Wattenberg Field producers via truck.[453] The Frontier Aspen Pipeline produces a negative netback of $49.34 for Wattenberg Field producers moving their volumes by truck to Casper, Wyoming.[454]

212. *Rangley Pipeline*. The Rangely Pipeline transports crude oil from Rangely Station, Colorado, to Salt Lake City, Utah.[455] The Rangely Pipeline is owned by Chevron Pipe Line Company.[456] The Rangely Pipeline is accessible to Wattenberg Field producers via truck.[457] The Rangely Pipeline produces a negative netback of $46.95 for

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[451] Ex. WCP-0032 at 1; *see also* Ex. WCP-0013 at 2. Mr. Ruckert included the SLC Pipeline tariff which connects Frontier Station with Salt Lake City, Utah. Ex. S-0023 at 61:5-13 (Ruckert).

[452] Ex. WCP-0032 at 1.

[453] Ex. S-0023 at 68:10, 71:1 (Ruckert) (Tables 10 and 11); *see also* Ex. S-0046 at 1.

[454] Ex. S-0023 at 82:13 (Ruckert) (Table 13).

[455] Ex. WCP-0001 at 13:14 (Minielly); Ex. WCP-0032 at 1; Ex. S-0023 at 62:1 (Ruckert) (Table 8).

[456] Ex. WCP-0013 at 35-36; Ex. WCP-0032 at 1.

[457] Ex. S-0023 at 68:10, 71:1 (Ruckert) (Tables 10 and 11); *see also* Ex. S-0046 at 1.

Wattenberg Field producers moving their volumes by truck to Rangely Station, Colorado.[458]

213. *Summary of factual findings and conclusions for these two pipelines*. Based on the preponderance of the evidence, I conclude that the Frontier Aspen Pipeline and the Rangley Pipeline are not competitively priced alternatives when accessed via truck from the Wattenberg Field counties and thus are not "unused but usable" alternatives. Thus they may not be used to expand the geographic market nor may they be considered good alternatives to White Cliffs in a market power analysis.

214. *Par Pacific Refinery*. The Par Pacific Refinery is located in Newcastle, Wyoming.[459] The Par Pacific Refinery is accessible to Wattenberg Field producers via truck.[460] The Par Pacific Refinery produces a negative netback of $51.00 for Wattenberg Field producers moving their volumes by truck to the refinery.[461]

215. *Sinclair Oil Refineries.* One of the Sinclair Oil refineries White Cliffs included as a competitive alternative in its analysis is located in Sinclair, Wyoming.[462] The other Sinclair Oil refinery listed by White Cliffs is located in Evansville, Wyoming.[463] These refineries are accessible to Wattenberg Field producers via truck.[464] These Sinclair refineries produces a negative netback of $52.00 and $53.00, respectively, for Wattenberg Field producers moving their volumes by truck to the refinery.[465]

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[458] Ex. S-0023 at 82:13 (Ruckert) (Table 13).

[459] Ex. WCP-0032 at 1 (line 2).

[460] Ex. S-0023 at 68:10, 71:1 (Ruckert) (Tables 10 and 11); *see also* Ex. S-0046 at 1.

[461] Ex. S-0023 at 82:13 (Ruckert) (Table 13).

[462] Ex. WCP-0032 at 1 (line 4).

[463] *Id.* at 1 (line 3).

[464] Ex. S-0023 at 68:10, 71:1 (Ruckert) (Tables 10 and 11); *see also* Ex. S-0046 at 1.

[465] Ex. S-0023 at 82:13 (Ruckert) (Table 13).

216. *Summary of factual findings and conclusions for these two pipelines*. Based on the preponderance of the evidence, I conclude that the Par Pacific Refinery, the Sinclair Oil Refinery in Evansville, Wyoming, and the Sinclair Oil Refinery in Sinclair, Wyoming are not competitively priced alternatives when accessed via truck from the Wattenberg Field counties. Consequently, none are "unused but usable" alternatives, and they may not be used to expand the geographic market. Nor may they be considered good alternatives to White Cliffs in a market power analysis.

217. *Additional rail terminals.* White Cliffs generally included "rail" as a competitive alternative. White Cliffs' expert did not specifically identify the rail terminals that he was including, instead merely stated that two major rail companies operate in the Niobrara Origin Market, BNSF and Union Pacific.[466] Trial Staff, in performing its detailed cost analysis, identified eleven rail terminals in the Niobrara Origin Market that could transport crude oil.[467] Several have already been addressed. The remaining rail terminals are the following: (1) the Casper Crude Oil Rail Terminal in Casper, Wyoming; (2) the Black Thunder Rail Terminal in Gillette, Wyoming; (3) the Upton Logistics Center Rail Terminal in Upton, Wyoming; (4) the Douglas Rail Terminal in Douglas, Wyoming; and (5) the Guernsey Rail Terminal in Guernsey, Wyoming.[468] These rail terminals are all accessible to Wattenberg Field producers via truck.[469] These five rail terminals all produce a negative netback, ranging from $48.21 (Guernsey) to $51.85 (Upton Logistics), for Wattenberg Field producers moving their volumes by truck.[470]

218. *Summary of factual findings and conclusions for these five rail terminals*. Based on the preponderance of the evidence, I conclude that the Casper Crude Oil Rail Terminal in Casper, Wyoming; the Black Thunder Rail Terminal in Gillette, Wyoming; the Upton Logistics Center Rail Terminal in Upton, Wyoming; the Douglas Rail Terminal in Douglas, Wyoming; and the Guernsey Rail Terminal in Guernsey, Wyoming, are not competitively priced alternatives when accessed via truck from the Wattenberg Field counties. Consequently, none are "unused but usable" alternatives, and they may not be

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[466] Ex. WCP-0009 at 55:6-10 (Webb).

[467] Ex. S-0023 at 62:5-6 (Ruckert).

[468] *Id.* at 107:16-27.

[469] *Id.* at 68:10, 71:1 (Tables 10 and 11); *see also* Ex. S-0046 at 1.

[470] Ex. S-0023 at 82:13 (Ruckert) (Table 13).

used to expand the geographic market. Nor may they be considered good alternatives to White Cliffs in a market power analysis.

4. Have certain proposed alternatives been shown to be available and/or of comparable quality?

219. Liquids Shippers Group also challenges several proposed competitive alternatives on the ground that they have not been demonstrated, by a preponderance of the evidence, to be comparable in terms of availability and/or quality.[471]

a. Does the evidence show that the Suncor Refinery, the Pony Express NECL, and the Platte Pipeline are good alternatives in terms of availability and/or quality?

220. Liquids Shippers Group first contends that the evidence demonstrates that shippers could not reliably shift from White Cliffs in response to a rate increase above the competitive level to the Suncor Refinery, the Pony Express Pipeline, and the Platte Pipeline.[472]

i. The Suncor Refinery and Pony Express

221. In contending that the evidence shows that additional volumes could not shift to the Suncor Refinery, Liquids Shippers Group relies on the evidence of its factual witness, Mr. Kittrell.[473] At the hearing, Mr. Kittrell testified that **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**."[474] Mr. Kittrell also testified that, **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section**

[471] LSG Initial Br. 28-38.

[472] *Id.* at 29.

[473] *Id.* at 29-32.

[474] Tr. 939:19-23 (Kittrell).

15(13)].[475] He further testified **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[476]

222. In raising concerns about the availability of the Pony Express Pipeline, Liquids Shippers Group asserts that publicly available evidence shows that the pipeline is currently in prorationing (i.e., the nominations for the transportation of light crude exceed the available capacity in a given month). According to Liquids Shippers Group, "a pipeline in prorationing is not comparable to White Cliffs in terms of availability."[477]

223. In response to these arguments, Trial Staff asserts that Liquids Shippers Group errs both as a matter of law and a matter of fact in excluding the Suncor Refinery and the Pony Express NECL alternatives. Both White Cliffs and Trial Staff argue that, under Commission precedent, *used* alternatives are not excluded from market statistics merely because they may be operating at capacity.[478] Both further argue that this approach is consistent with economic principles and the U.S. Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines* (1992).[479] According to Trial Staff, "even if the Suncor Refinery and the Pony Express NECL were not available to accept

[475] Tr. 941:3-942:23 (Kittrell).

[476] Tr. 942:18-23 (Kittrell).

[477] LSG Initial Br. 33; *see also* LSG Reply Br. 18-20 (citing LSG-0030 at 5:22-6:13 (Kittrell). Liquids Shippers Group claims that Mr. Kittrell testified that a shipper would not be able to reliably shift volumes to either Platte or Pony Express in response to a SSNIP by White Cliffs. LSG Initial Br. 19. Mr. Kittrell's testimony was more limited, however. He testified that he did not "believe that a shipper would be able to reliably use the *Sinclair Pipeline system* to shift volumes to either Platte or Pony Express in response to a price increase on White Cliffs." LSG-0030 at 6:11-13 (Kittrell) (emphasis added). It is not clear what the Sinclair Pipeline system's relationship to the Platte Pipeline alternative is, as the netback calculations were based on trucking to the Platte Pipeline. Furthermore, the Pony Express NECL does not rely on the Sinclair Pipeline system. Without more information to support or clarify his statement, I do not find Mr. Kittrell's statements on this point persuasive.

[478] WCP Initial Br. 45-53; WCP Reply Br. 21-22; Staff Initial Br. 26-31; Staff Reply Br. 24-27.

[479] WCP Initial Br. 45; Staff Initial Br. 31 & n.148; Staff Reply Br. 25-26; *1992 DOJ-FTC Merger Guidelines*.

additional volumes, they still act as a constraint against the exercise of market power and still belong in the market statistics."[480] Both participants also dispute Liquids Shippers Group's factual arguments.[481]

224. In its reply brief, Liquids Shippers Group generally argues that White Cliffs and Trial Staff erred in contending that used alternatives that may be operating at capacity (for light crude) should be included in HHI calculations.[482] Liquids Shippers Group claims that Trial Staff ignored Commission precedent, pointing to Commission language stating that "'[a] good alternative is an alternative that is available soon enough . . . to permit customers to substitute the alternative for [the applicant's] service and that, in order 'to constrain [the applicant's] exercise of market power, the alternative must be available in sufficient quantity to make [the applicant's] price increase unprofitable.'"[483]

225. I turn to the legal issue first as, if Trial Staff and White Cliffs are correct, it would be dispositive. Importantly, as the participants have agreed, the Suncor Refinery and the Pony Express Pipeline are "used" alternatives. Review of recent Commission precedent makes clear that, in oil pipeline market-based rate proceedings, the Commission has authorized inclusion of used alternatives in the market statistics analysis regardless of whether or not they are being fully utilized (i.e., are at capacity).[484] Thus, I am

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[480] Staff Initial Br. 30; Staff Reply Br. 25-26.

[481] WCP Initial Br. 55-57; WCP Reply Br. 23-26; Staff Initial Br. 27, 30, 49-59; Staff Reply Br. 26-28.

[482] LSG Reply Br. 24-26. I note that, in its reply brief, Liquids Shippers Group appears to raise a new argument and cite information that was not included in the administrative record. *See, e.g.*, LSG Reply Br. 26-27 & nn.126-127. Also, to the extent that Liquids Shippers Group is arguing that Dr. Webb's testimony supports its argument, I am unpersuaded. Liquids Shippers Group has taken Dr. Webb's testimony out of context.

[483] LSG Reply Br. 25 (citing *Koch Gateway*, 66 FERC ¶ 61,385 at 62,299).

[484] *Guttman*, 161 FERC ¶ 61,180 at PP 211, 214 (including the Sunoco pipeline as a competitive alternative even though it was alleged to be at capacity); *Seaway III*, 163 FERC ¶ 61,127 at PP 30, 42 (affirming the presiding judge's interpretation of the used alternative test; he had stated that evidence of used alternatives in the origin market met the burden of presenting evidence of good alternatives that are competitive in terms of price and *availability*); *Seaway II*, 152 FERC ¶ 61,203 at App. (including hypothetical pipelines in the HHI calculation that were at capacity (i.e., were fully utilized)).

unpersuaded that language from a 1994 Commission order addressing the availability of capacity in a *gas storage market* should be controlling here.[485] Under Liquids Shippers Group's interpretation, the Commission, in the example it included in *Seaway II*, erred in calculating an HHI of 2,500 for the four pipelines in its hypothetical market because some were at capacity and should have been entirely excluded.[486] Additionally, the Commission has stated that "[t]he HHI index 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.[487] For these reasons, I am unpersuaded that the Suncor Refinery and the Pony Express NECL alternatives are not available based on these legal grounds.

226. Based solely on these legal reasons, I find that the Suncor Refinery and the Pony Express NECL alternatives are good alternatives in terms of availability. Even though this conclusion essentially renders the factual disputes moot, for completeness and because the participants dispute the factual evidence, I address their factual disagreement.

227. Upon consideration of the evidence, I find Liquids Shippers Group's factual arguments about Suncor's availability unconvincing. The only definitive evidence about the Suncor Refinery's operations concern its utilization rate and, to some extent, its current slate of crude. The participants stipulated that Suncor Energy's utilization rate across all three of its refineries in 2017 was 96 percent and its utilization rate in 2018 was

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Significantly, in *Seaway*, one expert put forth the theory that, for the applicant pipeline to demonstrate an alternative's "availability," it had to show how much, if any, of the alternative's capacity was unused. *Seaway ID*, 157 FERC ¶ 63,024 at P 88. This theory was not accepted by the presiding judge and, as noted earlier in this footnote, the Commission affirmed the presiding judge's application of the used alternative test.

[485] Although the Commission did cite *Koch Gateway* favorably in *Seaway I*, 146 FERC ¶ 61,115 at P 45 & n.45, I nevertheless rely on the Commission's approach in the more recent *Seaway* decisions as well as *Guttman*.

[486] *See Seaway II*, 152 FERC ¶ 61,203 at App., para 3.

[487] *Seaway I*, 146 FERC ¶ 61,115 at P 74 n.98 (emphasis added). Liquids Shippers Group's argument appears to be internally inconsistent. If the amount of unused capacity is the critical issue, then only the unused capacities of all the alternatives should be used throughout the HHI calculation, not the full capacities of partially utilized alternatives.

estimated at 90 to 94 percent.[488] Thus, the Suncor Refinery (in Denver) appears likely to have available capacity. In addition, Suncor currently receives approximately half of its crude oil supply from Wattenberg Field production.[489]

228. The remaining evidence regarding the Suncor Refinery, and whether or not it could or would take additional volumes from Wattenberg Field producers in the event of a rate increase by White Cliffs, is largely speculative.[490] As the participants all agree, a refinery is generally capable of processing different grades of crude oil, subject to facility limitations and preferences.[491] Notably, nobody from Suncor testified, nor was any evidence *from Suncor* admitted showing its limitations or preferences. Mr. Kittrell did testify that **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[492] And as mentioned above, he also testified that **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**. But, as White Cliffs points out, at the hearing Mr. Kittrell "confirmed that he had not spoken to any personnel from Suncor as to whether the Suncor Refinery was constrained in the amount of light crude oil that it could purchase from the Wattenberg Field."[493] Relying on one shipper's **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]** does not alone demonstrate unavailability.

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[488] JSF 55 (relying on annual report).

[489] Ex. LSG-0002 at 78:1-4 (Arthur). I note that Mr. Kittrell's testimony is inconsistent with Dr. Arthur's calculation. *See* Tr. 941:12-942:3 (Kittrell). Because Dr. Arthur's calculation is based on information from Suncor, I find his testimony more credible on this point.

[490] *See* Ex. LSG-0001 at 9:11-25 (Kittrell); Ex. LSG-0002 at 76-84 (Arthur); Ex. S-0071 at 8:5-10:6, 11:1-18 (Skorski); *see also* Tr. 480:3-481:10, 503:3-504:4 (Skorski), 939:19-940:14, 940:25-941:4, 941:12-942:3 (Kittrell).

[491] JSF 35.

[492] Ex. LSG-0001 at 9:11-25 (Kittrell).

[493] WCP Reply Br. 25 (citing Tr. 943:3-18 (Kittrell)).

229. Dr. Arthur and Mr. Skorski's dispute about the significance of Suncor's activities in 2016 are even more speculative. Neither witness convinces me that Suncor's activities in 2016 are indicative of how it would act to a small but significant increase in White Cliffs' rate (and the likely resultant small but significant decrease in the Wattenberg Field light crude oil commodity price).[494] In sum, Liquids Shippers Group's factual arguments about Suncor Refinery's availability constraints are largely based on speculation and, as such, do not convince me that the Suncor Refinery is not comparable in terms of availability.

230. Turning to the participants' factual dispute over the Pony Express Pipeline's availability, I also find Liquids Shippers Group's arguments unpersuasive.

231. Although the Pony Express NECL has not consistently been in prorationing **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[495]

232. Each month, ten percent of the Pony Express system's capacity is set aside for new shippers (those that have not shipped in each month of a base period), which would be 9,000 BPD (273,000 barrels per month) for the Pony Express NECL.[496] While there is a lottery system, it is only triggered under certain situations.[497] Based on information about the potential shippers in the Wattenberg Field, Mr. Skorski calculated that this would be unlikely for the Pony Express NECL.[498] In addition, existing shippers may remarket their unused allocation to new shippers. As Trial Staff points out, "the Commission has noted that remarketing of capacity is commonplace within the oil

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[494] *See* Ex. LSG-0034 at 92:4-93:7 (Arthur); Ex. S-0071 at 8:10-12:11 (Skorski); *see also* Ex. S-0069 at 40:13-40:20 (Norman) (also addressing Dr. Arthur's argument).

[495] Ex. S-0021 at 10; *see also* Ex. LSG-0015 (Pony Express notice mentioning recent prorationing in May 2018).

[496] Ex. S-0071 at 15:1-4, 10-14 (Skorski).

[497] Ex. S-0071 at 13:3-19 (Skorski).

[498] Staff Initial Br. 55 (citing Ex. S-0071 at 14:21-16:12 (Skorski)).

pipeline industry."[499] On the other hand, under certain circumstances, a new shipper could essentially replace the volumes of another Wattenberg Field shipper with its own. Finally, Pony Express announced an open season in 2018 stating that it plans to expand its pipeline system by an additional 300,000 BPD, with "full-in service" by the third quarter of 2020.[500]

233. Upon review, I conclude that the weight of evidence demonstrates that the Pony Express Pipeline is available. The set-aside capacity for new shippers, the testimony indicating that Pony Express NECL is not always in a prorationing state, the fact that the tariff's lottery allocation method is unlikely to be triggered, and the ability of existing shippers to remarket unused capacity all present real circumstances where Pony Express NECL remains available for use in the event White Cliffs were to impose a supracompetitive transportation rate on its pipeline. Arguments to the contrary are unconvincing. Accordingly, I conclude that the weight of evidence demonstrates that the Suncor Refinery and the Pony Express NECL are available.

ii. Platte Pipeline

234. Similarly, Liquids Shippers Group claims that there is no evidence of reliable, available capacity on the Platte Pipeline because it has been in prorationing.[501] **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[502] According to Trial Staff, walk-up capacity is

[499] *Id.* at 56 (citing *Suncor Energy Mktg., Inc.*, 132 FERC ¶ 61,242, at PP 104, 114 (2010)).

[500] Ex. S-0022 at 12; *see also* Ex. S-0072 at 8-26.

[501] Liquids Shippers Group raises a new theory in its posthearing brief about the upstream portion of the pipeline's potential impact on the downstream portion. *See* LSG Initial Br. 36-37. As this was not raised before or during the hearing or addressed by any of the witnesses, I do not address it here.

[502] Ex. S-0021 at 16, 19-21, 32; Ex. S-0019 at 15:10-13 (Skorski).

available.[503] Platte reserves 5 to 10 percent[504] of total capacity for new shippers, which is up to 14,500 BPD for new shippers.[505]

235. As I just determined, I am not persuaded by the argument that, because a pipeline is, or has been, in prorationing it is somehow completely unavailable for use. This argument ignores the market reality of required walk-up capacity for new shippers in the marketplace for these pipelines. Accordingly, for similar reasons, I conclude that the weight of evidence demonstrates that Platte is available.

b. Does the evidence show that the HollyFrontier Refinery is a good alternative in terms of availability?

236. Liquids Shippers Group also argues that the weight of evidence in the record does not show that the Cheyenne HollyFrontier Refinery is comparable in terms of availability.[506] According to Liquids Shippers Group, there is evidence that volumes produced in the Wattenberg Field would not shift to the HollyFrontier Refinery in response to a rate increase by White Cliffs.[507] Its arguments on this point are entirely unpersuasive.

237. Liquids Shippers Group contends that there is no evidence of actual sales to the HollyFrontier Refinery or that light crude has been trucked there since Grand Mesa and

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[503] Ex. S-0071 at 17:9-18:11 (Skorski); Ex. S-0020 at 65-70.

[504] Ex. S-0020 at 60-70; Ex. LSG-0033 at 3-4 (Platte Prorationing Policy); Ex. S-0019 at 15:19-16:5 (Skorski). Liquids Shippers Group says 5 percent, while Trial Staff says 5 to 10 percent. Mr. Skorski credibly explains the difference. Ex. S-0019 at 15:19-30:5. I note further that Liquids Shippers Group questions Mr. Skorski's credibility. I found that he credibly analyzed the pipeline information and therefore give his testimony significant weight.

[505] Ex. S-0071 at 18:9-11 (Skorski).

[506] LSG Reply Br. 21-23. Liquids Shippers Group also generally asserts that the HollyFrontier Refinery does not meet the "good alternative" prong of "quality," but does not specifically raise any specific claims regarding the HollyFrontier Refinery's quality. *See generally id*. Without more information about the basis of its challenge, I cannot address this issue.

[507] LSG Initial Br. 29.

Saddlehorn were placed into service in early 2017.[508] But I have determined that the HollyFrontier Refinery is unused (but usable), so the fact that none of the shippers in this proceeding have recently used the HollyFrontier Refinery is not surprising. This fact does not cast doubt on the finding that the HollyFrontier Refinery is an unused but usable alternative. Liquids Shippers Group further argues that the evidence shows that in 2017 the HollyFrontier Refinery obtained the vast majority, if not all of its crude oil supply, from production areas other than the Wattenberg Field. Although it may be true, as I find above, that a significant quantity in 2017 was sourced from elsewhere (i.e., via the Cheyenne Pipeline), again the fact that the HollyFrontier Refinery "is not currently obtaining any material supply from the Wattenberg Field"[509] does not mean that, if White Cliffs imposed a SSNIP, a producer would not or could not ship its volumes to the HollyFrontier Refinery. Moreover, none of the evidence indicates that the HollyFrontier Refinery is at capacity, an argument Liquids Shippers Group makes regarding several other alternatives; to the contrary, the evidence indicates that the HollyFrontier Refinery is not fully utilized.[510]

238. In fact, the results of the netback analysis and the fact that the Holly Frontier Refinery used to take light crude in the recent past strongly indicate that this refinery is usable.[511]

239. Liquids Shippers Group also takes issue with Mr. Skorski's statement that "data suggest[s] that the HollyFrontier Refinery processes locally produced crude oil[.]"[512] In particular, Liquids Shippers Group disputes Mr. Skorski's inferences from various HollyFrontier Refinery statements that it refines "sweet crude" and crude oil from

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[508] LSG Reply Br. 21; LSG Initial Br. 37. These arguments suggest that some of the producers/shippers *used* the HollyFrontier Refinery prior to the Saddlehorn and Grand Mesa Pipelines going on line. This indicates that the HollyFrontier previously accepted Wattenberg Field light crude oil and shippers previously sent their light crude oil there. From a logical perspective, it is not altogether clear why, if White Cliffs raised its prices through a SSNIP, these same shippers would not likely resume shipping their light crude oil to the HollyFrontier Refinery, as Liquids Shippers Group implies.

[509] LSG Reply Br. 22.

[510] *See* Ex. S-0019 at 17:8-11 (Skorski); Ex. S-0022 at 18; Ex. S-0072 at 1.

[511] And as I have already noted, may in fact be a "used" alternative.

[512] LSG Reply Br. 23 (citing Ex. S-0071 at 7:1-2 (Skorski)).

Colorado. I agree with Mr. Skorski that these statements, taken together, suggest that the HollyFrontier Refinery is available. Moreover, the fact that one local producer, in an interview, reported shipping light crude oil from the Wattenberg Field to the HollyFrontier Refinery also suggests that the HollyFrontier Refinery is available. Liquids Shippers Group also claims that the HollyFrontier Refinery's statements that it takes crude from oil producers cannot refer to the Wattenberg Field as "it is not in the local area of the refinery."[513] Mr. Ruckert's trucking distance calculations, which calculated a minimum distance of twenty miles (and an average distance of seventy-one miles) between the HollyFrontier Refinery and the Wattenberg Field counties' wellheads, belie that argument.[514] I therefore conclude that the preponderance of evidence demonstrates that HollyFrontier Refinery is available.

c. Does the evidence show that rail is a good alternative in terms of availability and quality?

240. Liquids Shippers Group also claims that White Cliffs failed to show by a preponderance of the evidence that rail is comparable in terms of availability and quality.[515] I also find this argument unpersuasive.

241. In connection with its argument, Liquids Shippers Group acknowledges that "[a]ll of the participants attribute some takeaway capacity to rail for [HHI] purposes."[516] In fact, Liquids Shippers Group's expert Dr. Arthur, although referring to the "limitations regarding the ability to shift volumes in and out of rail transportation,"[517] included the capacity he estimated for the Plains Tampa Rail Terminal in his HHI calculation.[518] This

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[513] LSG Reply Br. 23.

[514] Liquids Shippers Group relies on Mr. Kittrell's statements that the Wattenberg Field is located about 70 miles from Cheyenne, Wyoming. LSG Reply Br. 23 n.113. As I stated above, to the extent that Mr. Kittrell's statements are inconsistent with Mr. Ruckert's more detailed analysis of the distances between the wellheads and the alternatives, I found Mr. Ruckert's testimony more credible.

[515] LSG Initial Br. 37-38.

[516] *Id.* at 38.

[517] Ex. LSG-0002 at 84:18-21 (Arthur); *accord id*. at 75:13-20.

[518] *See* LSG-0002 at 92:4 (Arthur) (Figure 6).

leads me to conclude that, despite his reservations about rail transportation, they were not significant enough to warrant leaving this alternative out of the HHI calculation on the grounds that such transportation is not of sufficient availability or quality.

242. Moreover, the evidence in this case indicates that rail transportation is and has been used. For example, **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[519] At the hearing, Mr. Kittrell testified that **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)].**[520] And, as Mr. Ruckert noted, "the Plains rail terminal in Tampa is accessible to Wattenberg Field shippers via the Anadarko Petroleum Corporation's (Anadarko) Gathering System."[521]

243. Based on the fact that all the participants, including Liquids Shippers Group, included rail transportation as a competitive alternative in their analyses and in light of the evidence showing that rail transportation is and has been used, I find that the preponderance of the evidence demonstrates that rail transportation is a good alternative in terms of availability and quality. Any concerns regarding rail transportation's availability and/or quality are insignificant enough that they do not warrant excluding rail from being considered a "good alternative" or from being included in the HHI calculation.[522]

5. Conclusion

244. In sum, I find that the following alternatives are competitive alternatives to White Cliffs in the geographic origin market:

- Saddlehorn Pipeline;
- Grand Mesa Pipeline;

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[519] Ex. S-0023 at 45:13-16 (Ruckert).

[520] Tr. 923:25-924:3 (Kittrell); *see also* Ex. WCP-0087 at 6.

[521] *See* Ex. S-0023 at 45:10-12 (Ruckert).

[522] This discussion relates to the rail terminals that I have found to be used as well as those I found to be unused but usable.

- Pony Express NECL;
- Pony Express Mainline (accessible through the Sinclair Logistics, LLC Pipeline);
- Platte Pipeline;
- Suncor Refinery;
- HollyFrontier Refinery;
- Plains Tampa Rail Terminal;
- Hudson Rail Terminal;
- Musket Rail Terminal;
- Niobrara Crude Rail Terminal;
- Cheyenne Crude Rail Terminal; and
- Cheyenne Logistics Hub Rail Terminal

IX. Issue IV: What Are the Market Power Measures for the Geographic Origin Market?

245. I must next consider the appropriate market power measures that should be used in this proceeding to assess market power.

246. The Commission's regulations require an oil pipeline applicant seeking market-based rate authority to include the calculation of the HHI in its application.[523] The applicant must also include its market share if the HHI is not based on that figure.[524] In addition, the applicant pipeline may include "other market power measures" in its

[523] 18 C.F.R. § 348.1(c)(7); Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,192.

[524] 18 C.F.R. § 348.1(c)(7); Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,192.

application.[525] Thus, the primary market power measures the Commission relies upon to determine market power are the HHI and the applicant's market share.[526] Secondary market power measures that the Commission has considered include the presence of excess capacity among good alternatives in the origin market and potential competition.[527] The Commission has indicated that it typically looks at these other measures when the HHI and market share present a close case.[528]

247. In this proceeding, the participants calculated HHIs and the applicant's market share. They also provided some secondary market statistics. I consider these in turn.

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[525] 18 C.F.R. § 348.1(c)(7); Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,192.

[526] *See, e.g.*, *Seaway III*, 163 FERC ¶ 61,127 at P 81 (affirming the finding that the HHI calculation demonstrate that the origin market is not so highly concentrated to be susceptible to market power); *SFPP*, 84 FERC ¶ 61,338 at 62,494 & n.8 (focusing on HHIs and market shares).

[527] *See, e.g.*, *Seaway III*, 163 FERC ¶ 61,127 at PP 82, 93 (discussing excess capacity and potential competition); *Explorer Pipeline Co.*, 87 FERC ¶ 61,374, 62,390 (1999) (considering excess capacity ratios); *Kaneb Pipeline Operating P'ship, L.P.*, 83 FERC ¶ 61,183, at 61,761 (1998) (considering excess capacity); Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,192-93 (discussing potential competition, other market power measures, and other factors).

[528] *See, e.g.*, *Seaway III*, 163 FERC ¶ 61,127 at P 93 (noting that information regarding potential competition "is only used when the application presents a close case"); Opinion No. 529, 146 FERC ¶ 61,157 at P 54 (affirming presiding judge's conclusion, where presiding judge determined that excess capacity and potential competition are considered only in "close calls," (citing *Enterprise TE Prods. Pipeline Co.*, 141 FERC ¶ 63,020, at PP 341, 359 (2012) (*Enterprise TEPPCO ID*)); *see also, e.g.*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,669 (considering the quality of the transportation alternatives and the amount of excess capacity where the HHI of 2,102 with market share of 43.7 percent was a "close call").

A. HHI and market share calculations

1. Participants' calculations and positions

248. *White Cliffs*. White Cliffs' expert witness Dr. Webb performed several market statistic calculations. Although he initially calculated an HHI of 1,273 for the Niobrara Origin Market (and for a product market of all crude oil)[529] using the FERC Staff Method (i.e., the "effective" capacity method),[530] Dr. Webb revised this calculation in his rebuttal testimony, deriving an HHI of 1,455.[531] In revising this figure, he decreased White Cliffs' capacity to 95,000 BPD, the capacity expected upon completion of the conversion project. He also increased the Pony Express capacity figures to 400,000 BPD based on Pony Express' announcement that it expected to have such capacity by the end of 2018.[532] Dr. Webb initially calculated White Cliffs' capacity-based market share as 13 percent,[533] but his revised calculations yielded a 6.5 percent market share.[534]

249. In his supplemental direct testimony, Dr. Webb also used the "DOJ Method" to calculate the HHI, deriving a value of 961.[535] White Cliffs points out that both the DOJ Method and the FERC Staff Method HHI calculations are below 1,800 and 2,500, which

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[529] *See* Ex. WCP-0009 at 88:6-7 (Webb).

[530] Ex. S-0001 at 68:18-19 (Norman). The "effective" capacity method is "based on the capacity share of a given facility relative to the total capacity in the market, unless that particular facility has more capacity than the total market production of crude." *Id.* at 68:19-21 (citing *Guttman*, 161 FERC ¶ 61,180 at P 256; *Buckeye Linden Pipe Line Co. LLC*, 160 FERC ¶ 61,021, at P 25 (2017)).

[531] Ex. WCP-0050 at 104:5-13 (Webb); *see also* WCP Initial Br. 61-62 (citing Ex. WCP-0084).

[532] Ex. WCP-0050 at 104:5-10 (Webb); Ex. WCP-0084.

[533] Ex. WCP-0009 at 88:15 (Webb); Ex. WCP-0042.

[534] *See* Ex. WCP-0084.

[535] Ex. WCP-0009 at 88:6-7 (Webb); *accord* WCP Initial Br. 61-62 (citing Ex. WCP-0084); *see also* WCP Reply Br. 36.

it contends are thresholds that the Commission has found to be indicative of a competitive market.[536]

250. Dr. Webb provided two alternative market power analyses in his supplemental direct testimony: one "based on the geographic origin market that consists of only the DJ Basin area" and a second "based on a geographic origin market that consists only of the Wattenberg Field."[537] In his first alternative scenario, he removed three refineries that he had included in his Niobrara Origin Market, the Par Pacific Refinery and the two Sinclair refineries. He also excluded two pipelines (the Rangely Pipeline and the Frontier Aspen Pipeline), but added one pipeline (Sinclair's pipeline system extending from Guernsey, Wyoming, to Evansville, Wyoming).[538] Based on this scenario, he calculated an HHI of 1,554 using the FERC Staff Method and a capacity-based market share of 15.1 percent.[539] In his second alternative scenario (the Wattenberg Field), he only included six separate competitors: four pipelines (White Cliffs, the Pony Express Lateral, Saddlehorn, and Grand Mesa), one refinery (the Suncor Refinery), and crude oil rail facilities. Based on this scenario, he calculated an HHI of 2,000 using the FERC Staff Method and a capacity-based market share of 24.8 percent.[540]

251. In his rebuttal testimony, Dr. Webb stated that "in an effort to reduce the number of controversies between the parties in this proceeding, [he] believe[d] it appropriate for the Commission to accept the origin market proposed by [Trial] Staff."[541] He further testified, however, that he believed two adjustments to Trial Staff's calculation were appropriate: (1) the inclusion of 400,000 BPD for the Pony Express, which includes "the entire capacity of the Pony Express system;" and (2) the substitution of his original rail

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[536] WCP Initial Br. 62; WCP Reply Br. 36; *see* Ex. WCP-0009 at 88:6-9 (Webb).

[537] Ex. WCP-0009 at 89:13-20 (Webb); *see also* Ex. WCP-0044 (alternative analysis for the DJ Basin); Ex. WCP-0046 (alternative analysis for the Wattenberg Field).

[538] Ex. WCP-0009 at 90:12-91:1 (Webb). He explained that he had not included this pipeline as a competitive alternative originally because it was located entirely within the Niobrara Shale Region market. Now, that the movement of crude from Guernsey to Evansville leaves the market, it may be included. Ex. WCP-0009 at 91 n.68 (Webb).

[539] Ex. WCP-0009 at 91:11-12 (Webb) (Table 4); Ex. WCP-0044.

[540] Ex. WCP-0009 at 92:12-14 (Webb) (Table 5); Ex. WCP-0046.

[541] Ex. WCP-0050 at 104:18-21 (Webb).

figures (34,370 BPD) for the rail capacity.[542] Using Trial Staff's origin market definition—the DJ Basin Origin Market—but making these two capacity adjustments to Trial Staff's volumes, Dr. Webb recalculated an HHI of 1,935.[543] White Cliffs argues that this recalculation of Trial Staff's HHI "supports the conclusion that the market is workably competitive."[544]

252. *Trial Staff*. Trial Staff's expert Dr. Norman also performed a number of calculations. She first calculated an HHI and market share using Trial Staff's proposed geographic origin market (the counties encompassing the tight oil portion of the DJ Basin) and product market (all crude oil). According to her calculations, the effective capacity-based HHI is 1,556 and White Cliffs' effective capacity-based market share is 10.9 percent.[545]

253. In its HHI calculation, Trial Staff included the entire capacity (i.e., total market share) of each alternative it deemed to be a "good alternative."[546]

254. Trial Staff also calculated alternative scenario market statistics, using some of Liquids Shippers Group's inputs instead of Trial Staff's.[547] Significantly, Dr. Norman testified that using Liquids Shippers Group's product market (i.e., light crude oil), geographic market (Wattenberg Field Origin Market), and capacity figures, but adding in

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[542] Ex. WCP-0050 at 104:21-105:10 (Webb).

[543] Ex. WCP-0050 at 105:10-11 (Webb); Ex. WCP-0085.

[544] WCP Initial Br. 62; WCP Reply Br. 36; *accord* Ex. WCP-0050 at 105:10-16 (Webb) (citing Ex. WCP-0085).

[545] Ex. S-0001 at 66:3-4 (Norman) (Table 2), 69:10-12, 19-20. The differences between Trial Staff's HHI calculation and White Cliffs' recalculation of Trial Staff's HHI are addressed below.

[546] Staff Initial Br. 25; *see* Ex. S-0001 at 68:7-69:13 (Norman) (describing Trial Staff's approach); *see also* Ex. S-0001 at 73:3-75:2 (Norman) (explaining impact of including currently unused capacity instead of total capacity).

[547] *See* Ex. S-0085 (providing various iterations of the HHI under different assumptions); *see also, e.g.*, Ex. S-0074 at 14:4-13, 25:19-26:26 (Ruckert) (discussing results of the alternatives).

the Pony Express NECL and the Suncor Refinery, leads to an HHI of 2,130 and a market share for White Cliffs of 15 percent.[548]

255. Trial Staff argues that the results of its multiple scenarios shows that the primary driver of the differences in market statistics is the inclusion (by White Cliffs) or exclusion (by Liquids Shippers Group) of certain alternatives.[549] In fact, according to Trial Staff, the data suggests that the key drivers of HHI differences are the removal of the Pony Express pipeline system and the Suncor Refinery.[550] Trial Staff also states that a secondary driver of these differences is the different capacities used by the participants, although it points out that, in most instances, the capacity differences did not have a material impact on the HHI results.[551] For example, Trial Staff determined that removing all rail terminals except the Plains Tampa Rail Terminal changes the HHI it had calculated from 1,556 to 1,561, an "immaterial" difference.[552]

256. *Liquids Shippers Group*. Liquids Shippers Group's expert Dr. Arthur calculated an HHI using his proposed Wattenberg Field Origin Market, which contains the six counties comprising the Wattenberg Field production area. His calculation yielded an HHI of 3,414.[553] As Table 1 indicates, he included four alternatives: White Cliffs Pipeline, Saddlehorn, Grand Mesa, and the Plains Tampa Rail Terminal.[554] He explained that he included "all alternatives with available capacity that could provide netback prices that would be competitive with White Cliffs if the pipeline alternatives were to charge a

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[548] Ex. S-0001 at 76:1-2 (Norman) (Table 3), 4-7.

[549] Staff Initial Br. 61.

[550] Staff Reply Br. 2; Ex. S-0001 at 75:12-19 (Norman).

[551] Staff Initial Br. 61.

[552] *Id.* at 63-64 (citing Ex. S-0074 at 25:16-26:6 (Ruckert)). Mr. Ruckert used the term "immaterial" to describe this HHI change (of five) based on Dr. Arthur's statement that, in his opinion, moving the HHI by a "handful of points" is immaterial. *See* Ex. S-0074 at 25:16-26:6 (Ruckert) (citing Ex. S-0075 at 2 (Arthur deposition Tr. 61:15-20)).

[553] *See* Ex. LSG-0002 at 91:14-92:8 & fig. 6 (Arthur). For completeness, I note that Dr. Arthur did not amend his calculation in his cross-answering testimony. Ex. LSG-0034 at 101:15-102:1 (Arthur).

[554] Ex. LSG-0002 at 92, fig. 6 (Arthur).

competitive rate tied to the long-run marginal cost of transportation from the Wattenberg Field area to Cushing, Oklahoma."[555] He testified that the high HHI statistic he calculated strongly indicates that "White Cliffs possesses market power over shipments of light crude oil from its Platteville, Colorado receipt point."[556]

257. In its HHI calculation, Liquids Shippers Group included the entire capacity of the alternatives it deemed to be a "good alternatives": Grand Mesa and Saddlehorn pipelines and the Plains Tampa Rail Terminal. Liquids Shippers Group did not include any capacity for the other pipelines (such as Pony Express or Platte) because of availability and other concerns. And, because of comparability concerns, it did not include capacity at local refineries (Suncor or HollyFrontier).[557]

258. Relying on Dr. Arthur's testimony, Liquids Shippers Group asserts that the HHI statistic of 3,414 is "a reasonable estimate of the competitive alternatives in the [Wattenberg Field] origin market capable of disciplining a rate increase above the competitive level by White Cliffs."[558] Liquids Shippers Group state that this figure is well over 2,500, the threshold level of concern,[559] and is evidence of a concentrated market. Thus, according to Liquids Shippers Group, if White Cliffs were granted market-based rate authority, it would have the ability to exercise significant market power.[560]

2. Discussion

259. Upon review of the evidence and the participants' arguments, I determine that the HHI for the origin market is 1,556 and that White Cliffs' market share is 10.9 percent. My reasons follow.

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[555] Ex. LSG-0034 at 101:15-19 (Arthur).

[556] *Id.* at 102:1-3.

[557] Ex. LSG-0002 at 73:1-84:12, 87:8-88:12, 91:14-92:4 & fig. 6 (Arthur); *see also* Ex. LSG-0034 at 101:12-102:7 (Arthur) (noting in his cross-answering testimony, that he did not change his HHI statistics based on Trial Staff's testimony or netback analysis).

[558] LSG Reply Br. 37; LSG Initial Br. 55.

[559] LSG Reply Br. 38.

[560] LSG Initial Br. 55-56.

a. Commission guidance

260. The Commission has explained that the HHI is derived "by summing the squares of individual market shares of all the firms in the market."[561] In the oil pipeline context, the term "firms" refers to the applicant pipeline and the good alternatives,[562] and "market" refers to the markets being analyzed in this proceeding.[563] The Commission has considered "readily-available pipeline capacity data as indicative of market shares."[564]

b. Analysis

261. Applying these principles here, I note that, as an initial matter, several sets of the participants' market statistics may be dismissed from consideration because they rely on an inappropriate market. In Part VII, I determined that the appropriate geographic market here is the DJ Basin Origin Market and not the Niobrara Origin Market or the Wattenberg Field Origin Market. As indicated above, White Cliffs calculated several of its HHI figures by using the Niobrara Origin Market as the geographic market, and Liquids Shippers Group calculated its HHI using the Wattenberg Field Origin Market as the geographic market. White Cliffs also calculated one of its HHIs using the Wattenberg Field Origin Market as the geographic market. Because these calculations are based on inappropriate geographic markets, they are flawed and would not yield correct HHIs for the origin market in this case and would not accurately provide the basis for any other market statistic measures. Consequently, I decline to adopt them and do not consider them further.[565]

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[561] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,185 n.3292.

[562] *See, e.g.*, *Seaway III*, 163 FERC ¶ 61,127 at PP 80-81 (affirming the initial decision's alternative HHI analysis which summed squares of the applicant pipeline's and good alternatives' individual market shares (citing *Seaway ID*, 157 FERC ¶ 63,024 at P 159)).

[563] *See SFPP*, 84 FERC ¶ 61,338 at 62,495 (discussing the *1992 DOJ-FTC Merger Guidelines* and the Commission's oil pipeline market analyses); *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,661-70 (discussing methodology and its application in that case).

[564] *Seaway III*, 163 FERC ¶ 61,127 at P 61 (footnotes omitted); *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,662 (discussing market shares and capacity in depth).

[565] *See Seaway ID*, 157 FERC ¶ 63,024 at P 154 (considering only those HHI

262. Two participants—Trial Staff and White Cliffs—did calculate an HHI in the appropriate market. Their HHI values for the DJ Basin Origin Market, however, are not the same: Trial Staff's HHI calculation is 1,556, while White Cliffs' HHI calculation is 1,935.[566] This is due to differences in the capacity figures they used for the Pony Express Pipeline, the HollyFrontier Refinery, the Suncor Refinery, and rail transportation.[567] In order to determine an appropriate HHI calculation, I must resolve the factual discrepancies over these capacity figures.

c. Factual issues

263. *Pony Express Pipeline capacity difference*. As Table 1 indicates, the Pony Express Pipeline capacity figures that Trial Staff and White Cliffs use in their HHI calculations for the DJ Basin Origin Market differ substantially. This is because Trial Staff only uses Pony Express Pipeline's capacity accessible via the NECL at Platteville, Colorado (80,000 BPD), and the portion of Pony Express Pipeline's capacity accessible via Sinclair's Cheyenne System (50,000 BPD), which totals 130,000 BPD,[568] whereas

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calculations consistent with other findings and conclusions the Presiding Judge had made with respect to the origin market). As an aside, I note that the Commission has not accepted the DOJ methodology, *see Guttman*, 161 FERC ¶ 61,180 at P 256; *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,665-66, which White Cliffs used in one of its alternate HHI calculations. For this reason as well, I do not adopt any of White Cliffs' DOJ Method HHI calculations here.

[566] I refer to Dr. Webb's rebuttal calculation in this discussion because White Cliffs relies on Dr. Webb's revised calculation in its posthearing briefs. *See* WCP Initial Br. 62; WCP Reply Br. 36. Because White Cliffs relies on Dr. Webb's rebuttal HHI calculations, I do not consider further the DJ Basin Origin Market statistic calculations he included in his supplemental direct testimony.

[567] Dr. Arthur's rail transportation capacity figure is different from both of theirs as well, but his figure was calculated for a different geographic market, the Wattenberg Field production area, so this difference might be expected and is not relevant for the DJ Basin.

[568] Ex. S-0023 at 106:4-17 (Ruckert); Ex. S-0063 at 1 & n.2; *see also* Ex. S-0019 at 10:18-19 (Skorski) (listing NECL capacity of 80,000 BPD from Platteville and 90,000 BPD further downstream); Ex. S-0022 at 3-4, 10.

White Cliffs uses Pony Express Pipeline's total capacity (400,000 BPD).[569] Using the Pony Express Pipeline's total capacity necessarily includes all volumes entering the system via the Guernsey origin point.[570]

264. White Cliffs' expert Dr. Webb discussed his rationale for using 400,000 BPD for the Pony Express Pipeline capacity in his rebuttal testimony. He explained that, in recalculating the HHI for the DJ Basin, he had included the entire capacity of the Pony Express system in his market statistics because "all of the origin points on Pony Express are within the DJ Basin Origin Market."[571]

265. Trial Staff witness Mr. Ruckert discussed Trial Staff's Pony Express Pipeline capacity selection in his answering testimony. He testified that, in his initial netback analysis, he had determined that the Pony Express Pipeline system was only competitively priced when using the NECL lateral at Platteville, Colorado.[572]

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[569] Ex. WCP-0085 at 1. As previously noted, in his revised calculations, Dr. Webb used a capacity figure of 400,000 BPD for the Pony Express Pipeline to reflect the pipeline's planned expansion by the end of 2018. Ex. WCP-0050 at 104:8-11 (Webb); *accord* Ex. WCP-0084 at 1 n.3 (explaining capacity changes to HHI calculations in Niobrara Origin Market, which also carried over to the DJ Basin calculation); Ex. WCP-0085 (listing DJ Basin Origin Market capacities); *see also* Ex. S-0019 at 13:11-12 (Skorski) (noting planned transportation expansion by the end of 2018). Participants previously listed Pony Express Pipeline's total capacity as 320,000 BPD. *See* Ex. WCP-0009 at 55:2-3 (Webb) (Table 3); Ex. S-0023 at 106:16 (Ruckert). Because I find that Trial Staff's capacity figure, which uses only a portion of the Pony Express Pipeline total capacity, is the proper value here, I need not decide whether 320,000 or 400,000 BPD would be the appropriate total capacity for the Pony Express Pipeline in an HHI calculation for this market.

[570] *See* Ex. S-0023 at 43:16-20, 106:11-18 (Ruckert) (explaining the capacities for various receipt points on the Pony Express Pipeline); *see also* Ex. S-0019 at 10:7-11:4 (Skorski) (describing Pony Express Pipeline); Ex. S-0038 at 28-36 (Pony Express Pipeline tariff). For a map of the Pony Express Pipeline including receipt points and terminals, see Exhibit No. S-0022 at 10.

[571] Ex. WCP-0050 at 105:4-6 (Webb).

[572] Ex. S-0023 at 106:4-8 (Ruckert); *see also* Ex. S-0059 at 2-3 (tables showing SSNIP tests, regular and high volume, for a number of alternatives, including shipping on the NECL lateral and via truck to the Pony Express Pipeline in Platte County, Wyoming).

Subsequently, upon analyzing the Sinclair Cheyenne System, he found that "shipping crude oil to Pony Express's Guernsey origin point via Sinclair's Cheyenne System does appear to be a competitively priced alternative."[573] For this reason, he added the portion of the Pony Express capacity accessible via Sinclair's Cheyenne System (50,000 BPD) to the NECL lateral capacity figure for a total "competitively priced capacity" of 130,000 BPD.[574] He further noted that the Pony Express Pipeline's total capacity could be included "if accessing Pony Express' Guernsey origin through trucking was a competitively priced alternative."[575] As I already found, however, such alternative is ***not*** competitively priced.[576]

266. Upon reviewing the Pony Express Pipeline capacity evidence, I conclude that Trial Staff's rationale is more persuasive than White Cliffs' and that the preponderance of the evidence weighs in favor of excluding additional Pony Express Pipeline capacity beyond the amount Trial Staff used in its calculations. As Dr. Norman pointed out, Dr. Webb "does not offer detailed analysis of netback prices to support his . . . recalculation of the DJ Basin market."[577] Instead, Dr. Webb appears to have assumed that the Guernsey origin point is price competitive because it is located in the DJ Basin Origin Market. While such an assumption may be reasonable in certain circumstances, here it has been rebutted by the detailed price analysis Trial Staff performed, and upon which I have relied, that demonstrates that trucking volumes to the Guernsey receipt point is *not* a competitively priced alternative.[578] For these reasons, I find that the appropriate capacity to use for the Pony Express Pipeline is 130,000 BPD.

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[573] Ex. S-0023 at 106:9-11 (Ruckert); *see also* Ex. S-0059 at 4 (table showing SSNIP test for alternatives including shipment on Pony Express Pipeline via Sinclair Cheyenne System).

[574] Ex. S-0023 at 106:12-15 (Ruckert).

[575] *Id.* at 106:15-18.

[576] *See supra* Part VIII.C.3.c.iv; *see also* Ex. S-0023 at 106:4-8 (Ruckert); Ex. S-0059 at 2-3 (tables showing SSNIP tests, regular and high volume, for a number of alternatives, including shipping via truck to the Pony Express Pipeline in Platte County, Wyoming); Ex. S-0074 at 24:5 (Ruckert) (Table 2) (SSNIP test results with additional variability including accessing Pony Express at Guernsey via truck).

[577] Ex. S-0001 at 15:14-18 (Norman).

[578] And as I already mentioned, I found Mr. Ruckert, who performed the netback

267. *HollyFrontier and Suncor Refineries capacity differences*. As Table 1 indicates, White Cliffs and Trial Staff used slightly different capacities for the HollyFrontier and Suncor Refineries. I address these next.

268. For the HollyFrontier Refinery's capacity, White Cliffs used 49,400 BPD and Trial Staff used 48,000 BPD. Trial Staff based its figure on the capacity reported in the EIA Refinery Capacity Report for the HollyFrontier Refinery in Cheyenne, Wyoming, as of January 1, 2018.[579] This EIA report lists the capacity of operable petroleum refineries in each state.[580] White Cliffs based its figure on the *Oil and Gas Journal* Worldwide Refining Survey.[581] Importantly, the participants stipulated that the HollyFrontier Refinery in question can process 48,000 BPD.[582] In light of the participants' stipulation, which is consistent with the EIA data, I find that the HollyFrontier Refinery capacity figure is 48,000 BPD.

269. For the Suncor Refinery's capacity, White Cliffs used 98,000 BPD and Trial Staff used 103,000 BPD. Trial Staff again based its capacity figure on the information listed in the EIA Refinery Capacity Report,[583] and White Cliffs again based its figure on the *Oil and Gas Journal* Worldwide Refining Survey.[584] In their Joint Statement of Stipulated

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analysis, to be a highly credible witness.

[579] Staff Initial Br. 24 n.112 (citing Ex. S-0022 at 14).

[580] Ex. S-0022 at 14.

[581] Ex. WCP-0031 (referring to 2018 Worldwide Refining Survey, *Oil and Gas Journal*, http://www.ogj.com/content/ogj/en/downloadables/survey-downloads/worldwide-refining/2017/2017-worldwide-refining-survey.pdf). The survey was included as Exhibit No. WCP-0034, and is actually dated in 2017. HollyFrontier Cheyenne's refining capacity is listed on page 14 as 48,000 BPD.

[582] JSF 56-57.

[583] Staff Initial Br. 24 n.113 (citing Ex. S-0022 at 14).

[584] *See* Ex. WCP-0031 (referring to 2018 Worldwide Refining Survey, *Oil and Gas Journal*, http://www.ogj.com/content/ogj/en/downloadables/survey-downloads/worldwide-refining/2017/2017-worldwide-refining-survey.pdf). The survey was included as Exhibit No. WCP-0034. For the Suncor Refinery's capacity, see Ex. WCP-0034 at 11.

Facts, the participants stipulated that the Suncor Refinery can process 103,000 BPD under optimal conditions and 98,000 BPD under normal conditions.[585] Based on the EIA information, the *Oil and Gas Journal* survey, and the participants' stipulation, I find that the Suncor Refinery's capacity is 98,000 BPD (at normal conditions) and up to 103,000 BPD (at optimal conditions). No participant provided any basis to select one of these values over the other in this proceeding. Nonetheless, because the HollyFrontier Refinery capacity I found appropriate here is based on the EIA data, also using the EIA data for the Suncor Refinery's capacity would be a more consistent approach in deriving an HHI that takes into account both of these refineries. I therefore find it appropriate to rely on 103,000 BPD for the Suncor Refinery's capacity in performing the HHI calculation.[586]

270. *Rail transportation capacity differences*. White Cliffs and Trial Staff also used different rail transportation capacities in calculating the HHI for the DJ Basin Origin Market. As noted above, White Cliffs used 34,370 BPD, whereas Trial Staff used 11,968 BPD.

271. In its HHI computation, Trial Staff based its estimates on the capacity of six rail facilities: four in Weld County, Colorado, and two in Cheyenne, Wyoming, that it had found to be competitive in terms of price.[587] For the four rail terminals in Weld County, Trial Staff used Dr. Arthur's figure for crude oil movements originating in Colorado (10.4 MBPD), noting that the only crude rail terminals in Colorado *are* the four terminals in Weld County.[588] Trial Staff then calculated capacity for the two Cheyenne, Wyoming

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[585] JSF 54.

[586] I note that, because the difference between the two referenced Suncor Refinery capacity values is small (5,000 BPD) as compared to the total capacities listed in the participants' calculations, using 98,000 or 103,000 BPD (or any value in between) is unlikely to have a significant enough impact on the HHI in this case to change my conclusion in Part X that White Cliffs does not have market power. I base this assumption on Trial Staff's determination that changing the rail terminal capacities by 1,558 BPD led to a change in the HHI calculation from 1,556 to 1,561 (i.e., an HHI change of 5). *See* Ex. S-0074 at 25:20-26:4 (Ruckert); S-0085 at 1-2. The participants are free, of course, to brief the Commission on the precise impact of these differences on the market statistics in any briefs on exceptions that they file.

[587] *See* Ex. S-0023 at 107:14-15 (Ruckert); *see also* Ex. S-0063.

[588] Ex. S-0023 at 108:7-9 (Ruckert). Dr. Arthur, using publicly available data, had

rail terminals using Dr. Arthur's methodology, which resulted in an estimate of 1.6 MBPD for the daily crude oil movements from those rail terminals.[589] Trial Staff added this amount to the daily Colorado rail volumes to obtain its total estimated rail volumes from the DJ Basin of approximately 12 MBPD.[590]

272. White Cliffs' expert Dr. Webb, in adjusting Trial Staff's HHI calculation for the DJ Basin, substituted his original rail transportation capacity figure of 34,370 BPD for that of Trial Staff's. Dr. Webb explained that he made this adjustment because he "believe[d] this is a reasonable estimate of the use of rail and is supported by evidence produced in this proceeding."[591] He did not further explain his rationale for amending Trial Staff's DJ Basin rail transportation capacity figure.[592]

"conservatively" calculated that crude oil rail movements originating in Colorado were 31 percent of total PADD IV movements in 2016. He had then estimated the crude oil movements originating in Colorado from May 2017 to April 2018 by multiplying total PADD IV movements of 34.1 MBPD during that period by 31 percent. Ex. LSG-0002 at 91:3-10 (Arthur).

[589] Ex. S-0023 at 108:11-109:3 (Ruckert); *see also* Ex. S-0063. Specifically, Mr. Ruckert first calculated the percentage of crude oil rail movements originating in Wyoming in 2016 in the same way Dr. Arthur had employed for Colorado. He then multiplied this percentage by the crude oil rail movements from PADD IV during the 12-month period ending July 2018. Next, because there are seven crude oil rail terminals in Wyoming, Mr. Ruckert estimated a pro rata share of the two Cheyenne terminals. Ex. S-0023 at 108:11-109:3 (Ruckert).

[590] Ex. S-0023 at 109:3-5 (Ruckert). More specifically, Trial Staff used 11,968 BPD in its calculations. *See* Ex. S-0063 at 1.

[591] *See* Ex. WCP-0050 at 105:6-10 (Webb).

[592] *See id.* at 105:4-16. In another section of his rebuttal testimony, however, Dr. Webb did provide an explanation for why he disagreed with *Dr. Arthur's* rail estimate, ultimately concluding that Dr. Arthur's estimate was "unreasonably low." *See id*. at 91:8-10. In particular, Dr. Webb **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**. *Id.* at 92:2-93:11 (citing Ex. WCP-0031; Ex. WCP-0080; Ex. WCP-0081). Furthermore, Dr. Webb had pointed to other evidence in his supplemental direct testimony that showed a wide range of rail

273. Upon review of the rail terminal capacity evidence, I conclude that the preponderance of the evidence weighs in favor of using Trial Staff's rail transportation capacity figure over that of White Cliffs', keeping in mind, however, that Trial Staff's appears to be a conservative number.

274. As already explained, Dr. Webb's original rail figure was calculated for the Niobrara Origin Market.[593] Thus, it clearly included several rail terminals located outside the geographic market that I have found appropriate here.[594] In fact, it appears that Dr. Webb may have relied on data for rail movements from all of PADD IV, which includes rail from the states of Montana, Idaho, Utah, Wyoming, and Colorado, which is not consistent with the DJ Basin geographic market.[595] Even more important, Trial Staff's

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transportation capacity figures. *See* Ex. WCP-0009 at 63:12-64:2 (Webb) (citing a document mentioning 80,000 BPD), 61:1-6 & fig. 5 (citing another presentation mentioning 150,000 BPD). Because Trial Staff's estimate was based, in part, on Dr. Arthur's estimate, it is possible that Dr. Webb's discussion of Dr. Arthur's rail estimate and/or these other estimates that he had mentioned in his supplemental direct testimony are the supporting "evidence" to which he was referring when discussing Trial Staff's analysis. The record is not clear, however, whether these other discussions (and which ones) did indeed form the basis of his rationale for amending Trial Staff's rail capacity figure. Although I am not clear what evidence he relied on to amend Trial Staff's figure, I do consider this other evidence in my analysis above.

[593] Ex. WCP-0009 at 55:7-10 (Webb); Ex. WCP-0033 at 1 (Niobrara Crude Oil Receipts, noting these are from PADD IV).

[594] *See, e.g.*, Ex. GEO-0001. Trial Staff identified eleven rail terminals in Dr. Webb's Niobrara Shale Region. Ex. S-0023 at 62:5-7 & tbl. 9 (Ruckert). Six were included in Trial Staff's DJ Basin HHI calculation. *See id*. at 107:5-109:5. This suggests that Dr. Webb's rail transportation capacity calculation included at least five additional rail terminals that were outside the DJ Basin.

[595] *See* Ex. WCP-0033 (stating that source of the data is EIA crude rail receipts for PADD IV from May 2017 to April 2018); Ex. S-0023 at 63:14 (Ruckert) (Figure 7) (showing a map of PADD IV); Ex. S-0041 at 2 (same); *see also* Ex. LSG-0002 at 90:11-14 (Arthur) (noting a concern with Dr. Webb's reliance on all of PADD IV). The record does not indicate how many rail terminals, if any, are in Utah, Idaho, or Montana. It does, however, indicate that there are seven rail terminals in Wyoming, only two of which were included by Trial Staff in its calculations. Ex. S-0023 at 108:11-109:3

netback analysis demonstrated that the five rail terminals in the Niobrara Origin Market, but outside the DJ Basin Origin Market, were not competitive in terms of price.[596] Consequently, it would be inappropriate to include their capacities in a market statistics analysis for the DJ Basin Origin Market. Because White Cliffs included these rail terminals' capacities in its rail transportation capacity figures, White Cliffs' figure is clearly flawed and should be given little weight in the market analysis.[597] It may be true, as Dr. Webb asserts, that his estimates, although based on flawed information, are closer to the actual rail transportation capacities in the DJ Basin. But, as discussed in the next paragraph, I do not have sufficient record evidence to make this determination.

275. No such obvious errors are apparent in Trial Staff's analysis. Trial Staff's computation only included capacities for those rail terminals that it found to be price competitive. The evidence does suggest, however, that Trial Staff's analysis is conservative. First of all, Trial Staff relied on Dr. Arthur's conservative estimate and methodology, which appear to rely on an estimate of rail capacity *usage* during the time period that was examined rather than the maximum (or some other degree of) rail capacity.[598] Second, as Dr. Webb pointed out, **[BEGIN CUI//PRIV-HC-Section 15(13)]** [redacted] **[END CUI//PRIV-HC-Section 15(13)]**.[599] Because Dr. Arthur's calculation formed the basis of Trial Staff's, Trial Staff's figure would likewise be an underestimate. Nonetheless, even accepting this as true, no participant submitted evidence recalculating or re-estimating the rail figures in light of this additional information nor did any witness provide additional testimony reconciling this information with the PADD IV data

(Ruckert). Dr. Webb's calculation appears to have included all seven.

[596] *See* Ex. S-0023 at 89:12 (Ruckert) (Table 14), 90:9-10, 107:16-27.

[597] *See Enterprise TEPPCO ID*, 141 FERC ¶ 63,020 at P 361 (giving little weight to statistics relying on flawed information).

[598] *See* Ex. S-0023 at 108:11-109:3 (Ruckert) (discussing methodology based on PADD IV shipment data).

[599] Ex. WCP-0050 at 92:2-93:11 (Webb) (citing Ex. WCP-0031; Ex. WCP-0080; Ex. WCP-0081).

estimates. Thus, the record does not contain sufficient information that could be used to calculate a more precise figure.

276. Third, as Dr. Webb also pointed out, presentations by two of the protester-shippers suggest that the rail transportation capacity may be higher than all the participants' estimates. According to an August 2017 presentation, HighPoint lists "multiple rail facilities" associated with the "DJ Basin Oil Infrastructure" as having a capacity of approximately 150 MBPD.[600] A 2017 Kerr McGee presentation contains a diagram of the "Greater Wattenberg Area" that shows a rail capacity of 80 MBPD out of the Plains Tampa Rail Terminal.[601]

277. These presentations, however, are entitled to little weight. There is no information about the individual who developed them, how the estimates were derived, and to what degree they are consistent with the DJ Basin Origin Market as described in this decision, making them of questionable utility. The HighPoint presentation is problematic in that it merely contains a general illustration of the region and fails to specify which rail terminals are included within those it claims provide 150 MBPD of capacity. Although the Kerr McGee diagram does specify the Plains Tampa Rail Terminal, there is nothing explaining how the 80 MPBD capacity figure was computed and, as this estimate is significantly higher than any other estimate the experts presented in this proceeding, without more explanation, it is difficult to reconcile the information with the bulk of the evidence surrounding this issue.

278. In sum, the evidence in the record demonstrates that Dr. Webb's rail transportation capacity figure included capacity for rail terminals that were shown ***not*** to be competitive in terms of price; thus his estimate has been shown to be flawed. Trial Staff's rail transportation capacity figure, on the other hand, has not been shown to be based on erroneous information. The record does suggest that Trial Staff's estimate may be conservative, but nothing in the record provides definitive information as to how conservative the estimate is or otherwise provides another supportable figure for the rail transportation capacity for the DJ Basin Origin Market. Consequently, the weight of the evidence supports using Trial Staff's conservative figure of 11,968 BPD for the rail transportation capacity.

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[600] *See* Ex. WCP-0009 at 61:1-6 & fig. 5 (Webb) (citing Ex. WCP-0037 at 17).

[601] Ex. WCP-0009 at 63:12-64:2 (Webb) (citing Ex. WCP-0027 at 4). This diagram had initially been in a presentation produced through discovery and claimed as privileged, but the privilege was subsequently lifted, at least as to the diagram itself presented in Dr. Webb's testimony.

d. Conclusion

279. Based on my findings and conclusions, the most appropriate HHI computation for the DJ Basin origin market is as follows:

Table 2: HHI Calculation

Competitive Alternative	Effective Capacity (BPD)	Market Share (%)	HHI
Pipelines:			
White Cliffs	95,000	10.9	118
Saddlehorn	190,000	21.8	474
Grand Mesa	150,000	17.2	295
Pony Express	130,000	14.9	222
Platte	145,000	16.6	276
Subtotal	710,000	81.3	1,385
Refineries:			
HollyFrontier	48,000	5.5	30
Suncor	103,000	11.8	139
Subtotal	151,000	17.3	169
Rail Transportation	11,968	1.4	2
Grand Total	872,968	100.0	1,556

280. Table 2 contains the same information Trial Staff listed in Exhibit No. S-0001 at page 66, table 1.[602] These calculations would apply to a product market of light crude oil in this proceeding as well.[603]

[602] Not all columns have been included. This data may contain deviations based on rounding.

[603] Ex. S-0001 at 45:7-9 (Norman) (stating that "the competitive alternatives, geographic market, and *market statistics* supported by Trial Staff in this proceeding would not vary if [Dr. Norman] supported the narrower product market advocated by

281. Significantly, when the Commission issued Order No. 572, it indicated that it was not establishing any particular HHI level as a screen or presumption.[604] It also stated that "as more experience is gained, precedent can serve as well as presumptions to provide guidance."[605] As some participants point out, the Commission has generally granted market-based ratemaking authority where the HHI is less than 2,500, and has always granted market-based ratemaking authority where the HHI is 1,800 or less.[606] This is consistent with the *2010 DOJ-FTC Merger Guidelines*, which indicate that a 2,500 HHI level or above implies high market concentration,[607] as well as the *1992 DOJ-FTC Merger Guidelines*, which set this level at 1,800 or above.[608]

282. These HHI and market share results—an HHI of 1,556 and a market share of 10.9 percent—demonstrate that the DJ Basin Origin Market is not so highly concentrated that it is susceptible to the exercise of market power by White Cliffs.[609] As I just noted, the Commission has found market measures in this range to demonstrate a lack of market power.[610] Moreover, White Cliffs market share is substantially lower than most applicants' market shares that the Commission has found problematic.

[Liquids Shippers Group]") (emphasis added); Ex. S-0069 at 42:4-8 (Norman) (not recommending any changes to the market statistics presented in her direct and answering testimonies). No participant argues otherwise or presents evidence to the contrary.

[604] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,184; *see also Seaway I*, 146 FERC ¶ 61,115 at P 74 (reaffirming not establishing screens).

[605] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,185.

[606] WCP Initial Br. 60-61 (citing *Seaway ID*, 157 FERC ¶ 63,024 at P 157; *Williams Pipe Line Co.*, 68 FERC ¶ 61,136 at 61,676-78 (1994)); Staff Initial Br. 64 (citing *Seaway ID*, 157 FERC ¶ 63,024 at P 157); *see also* Ex. WCP-0009 at 82-84 (Webb) (describing cases); Ex. S-0001 at 67:3-8 (Norman).

[607] U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 5.3 (Aug. 19, 2010).

[608] *1992 DOJ-FTC Merger Guidelines* § 1.5.

[609] I note that White Cliffs has the smallest market share of any pipeline in this origin market.

[610] *See, e.g.*, *Guttman*, 161 FERC ¶ 61,180 at PP 258-67, 279-82 (finding market

283. I note that, if the market was limited to those competitive alternatives that I found to be "good alternatives" in Part VIII.C.1, and if I use Liquids Shippers Group's capacity figures from its market statistics calculation for Grand Mesa, Saddlehorn, White Cliffs, and rail, and if I further use Liquids Shippers Group's "potential alternatives' unadjusted capacity" for Pony Express NECL and Suncor,[611] the resulting HHI would be 2,130 and White Cliffs' market share would be 15 percent.[612] These market share measures are also

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power where the HHI was between 2,612 and 2,954 and also where the HHI was between 3,588 and 4,997); *Seaway III*, 163 FERC ¶ 61,127 at PP 80-81 (finding HHI of 1,800 and market share of 30.1 percent not so highly concentrated to expect the exercise of market power by the applicant); *Colonial Pipeline Co*., 92 FERC ¶ 61,144, at 61,535 (2000) (finding HHI of 2,347 and market share of 25 percent acceptable); *Kaneb Pipe Line Operating P'ship, L.P*., 83 FERC ¶ 61,183, at 61,761-62 (1998) (*Kaneb*) (finding pipeline did not have significant market power where HHI was 2,742.9 and market share was less than 30 percent); *Williams Pipe Line Co*., Opinion No. 391-A, 71 FERC ¶ 61,291 at 62,134-35, 62,138-39, 62,143-45 (finding markets with HHI of 2,400 and market share of 36 percent, HHI of 1,800 and market share of 49 percent, and HHIs of 2,500 were sufficiently competitive; finding unacceptable only those markets where HHI was 2,897 and 3,500 respectively); *Williams Pipe Line Co*., Opinion No. 391, 68 FERC ¶ 61,136 at 61,677-78, 61,682-86 (finding lack of market power in market with HHI of 2,048 when pipeline's market share is 34 percent); Opinion No. 360, 53 FERC ¶ 61,473 at 62,669, 62,671 (finding lack of market power in markets with HHI over 3,000 with market share of 28.5 percent, and HHI of 2,102 with market share of 43.7 percent); *see also Explorer Pipeline Co*., 87 FERC ¶ 61,374 at 62,390 (noting that the Commission has found unacceptable a combination of a 2,500 HHI and a 46 percent market share); Opinion No. 360, 53 FERC ¶ 61,473 at 62,671 (finding lack of market power with HHI over 3,000 where pipeline's market share is only 28.5 percent).

[611] Liquids Shippers Group's "potential alternatives' unadjusted capacity" refers to the unadjusted capacity figures Dr. Arthur cited for all Liquids Shippers Group's *potential* alternatives from the Wattenberg Field area. *See* Ex. LSG-0002 at 72 fig. 4 (Arthur).

[612] I used Trial Staff's alternate analysis of Wattenberg Origin Market for this HHI calculation, which lists the alternatives that I found competitive and uses Liquids Shippers Group's capacity figures. *See* Ex. S-0001 at 76:1-2 (table 3), 4-7 (Norman).

within the range that the Commission has found to indicate a workably competitive market.[613]

B. Secondary market statistics and other factors

284. As I have just indicated, these HHI and market share figures do not present a close case here. Thus, I do not need to consider secondary market statistics. Nonetheless, because the participants included evidence on secondary market statistics and other factors, I briefly review these below for completeness.

1. Excess capacity ratio

285. *White Cliffs*. In his rebuttal testimony, Dr. Webb recalculated the excess capacity ratio as 2.6.[614] He also recalculated Trial Staff's excess capacity ratio, deriving a value of 2.7.[615] In performing these calculations, he decreased White Cliffs' capacity to reflect the capacity after White Cliffs' conversion project is completed and increased the Pony Express capacity figures to 400,000 BPD.[616] Dr. Webb also included a calculation of the excess capacity ratio relying on Liquids Shippers Group's Wattenberg Field figures, determining it to be 1.68.[617]

286. *Trial Staff*. Using Trial Staff's assumptions, Dr. Norman calculated an excess capacity ratio of takeaway capacity available from the origin market to total production in the origin market of 2.1.[618] Dr. Norman also calculated an alternative excess capacity measure, the ratio of takeaway capacity not owned by White Cliffs or its affiliates and the production level of the origin market, which was 1.8.[619] Dr. Norman testified that Trial

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[613] *See supra* notes 606, 610 and accompanying text.

[614] Ex. WCP-0050 at 104:11-13 (Webb); Ex. WCP-0084.

[615] Ex. WCP-0050 at 105:10-12 (Webb); Ex. WCP-0085.

[616] Ex. WCP-0050 at 104:5-13 (Webb); Ex. WCP-0084.

[617] *See* Ex. WCP-0056.

[618] Ex. S-0001 at 71:12-14 (Norman).

[619] *Id.* at 71:14-16.

Staff's analysis indicates "significant" excess capacity in this market.[620] She also calculated an excess capacity ratio of 1.6 times production when using Liquids Shippers Group's assumptions but adding in the Pony Express NECL and the Suncor Refinery.[621]

287. *Liquids Shippers Group*. In response to these excess capacity figures, Dr. Arthur testified that, "while excess pipeline takeaway capacity could be considered a mitigating factor in many circumstances, the dramatic recent increase in Wattenberg Field production, as well as forecasts of production exceeding pipeline takeaway capacity in the near future, indicate significant market power concerns."[622] He also questioned whether the "true" excess capacity on Saddlehorn and Grand Mesa is known.[623]

288. *Discussion*. Although the excess capacity figures are not as high as in some other Commission proceedings, they also support the conclusion that White Cliffs does not possess market power in the origin market.[624] As I discuss further below, I am not persuaded by the participants' arguments that rely on speculative information regarding future competition and production.[625]

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[620] *Id.* at 70:21.

[621] *Id.* at 76:4-7.

[622] Ex. LSG-0034 at 102:3-7 (Arthur); *accord* Ex. LSG-0002 at 93:3-7 (Arthur); *see also* Ex. LSG-0002 at 96-106 (Arthur).

[623] Ex. LSG-0002 at 97:8-9 (Arthur).

[624] *See, e.g.*, *Explorer Pipeline Co.*, 87 FERC ¶ 61,374 at 62,390, 62,392 (discussing excess capacity ratios of 3.4, 3.6, and 4.3); *Kaneb*, 83 FERC ¶ 61,183 at 61,761 (considering excess capacity ratio of 4.5 times consumption).

[625] Dr. Webb also calculated White Cliffs' receipt-based market share to be 10.7 percent in the Niobrara Origin Market. Ex. WCP-0009 at 88:16 (Webb); Ex. WCP-0040; Ex. WCP-0041. White Cliffs argues that this figure "further supports the conclusion that White Cliffs cannot exercise market power." WCP Initial Br. 63. Because I have determined that the appropriate geographic market is the DJ Basin Origin Market, Dr. Webb's analysis is inapposite here for determining market power.

2. Other market measures or considerations

289. White Cliffs argues that Liquids Shippers Group's claim that Wattenberg Field production is expected to exceed take-away capacity is unsupported. According to White Cliffs, Liquids Shippers Group ignores evidence indicating that a number of market participants intend to expand capacity.[626]

290. Trial Staff states that "entry into this market has been robust in recent years."[627] As an example, Trial Staff points to an earnings call wherein an Executive Vice President of Tallgrass MLP GP LLC stated that the Pony Express NECL has the capability of moving greater volumes than it is currently moving. Trial Staff further notes that Pony Express Mainline is undergoing expansion.[628]

291. Liquids Shippers Group, on the other hand, raises several concerns about the future of this market. According to Liquids Shippers Group, "[a]s there is increasing demand for transportation service out of the Wattenberg Field area, creating transportation constraints and the ability to increase rates without losing volumes as evidenced by nominations exceeding capacity, the ability to exercise market power is enhanced."[629] Liquids Shippers Group points to several factors which it finds concerning: for the last six months of 2018, Wattenberg Field production was substantially higher than projected, suggesting that a "crossover point" between production and capacity may occur sooner than Liquids Shippers Group had previously estimated; certain pipelines are, or may, be in prorationing; it is not clear that refineries will offer an incremental market; and the Pony Express Pipeline's future is "in flux" and thus unclear.[630]

292. *Discussion.* In essence, the participants disagree about future competition and the implications of such competition.[631] Evidence shows that production in the region has

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[626] LSG Reply Br. 37-38.

[627] Ex. S-0001 at 72:5 (Norman).

[628] *Id.* at 72:9-15; *see also* Ex. S-0018 at 7; Ex. LSG-0015.

[629] LSG Initial Br. 57.

[630] *Id.* 57.

[631] *See, e.g.*, Ex. LSG-0002 at 94:7-8 (Arthur) (testifying that the "mere possibility that a rail or pipeline alternative could expand cannot mitigate any market power

been increasing, but it also indicates that capacity is increasing as well. The specifics of these changes are uncertain. The weight of evidence, which is largely speculative and thus unpersuasive, does not sufficiently demonstrate whether production will surpass capacity in the origin market or whether these two economic factors influencing the DJ Basin will keep pace or not. Importantly, the current market statistics, however, show that White Cliffs does not possess market power.

293. The participants have not raised any other factor that is significant enough to consider in this market power analysis.

X. Issue V: Does the Record Show that White Cliffs has the Ability to Exercise Market Power in the Geographic Origin Market?

294. As I have already indicated in Part IX, the preponderance of the evidence demonstrates that White Cliffs does not have the ability to exercise market power in the geographic origin market (i.e., the DJ Basin Origin Market).

XI. Conclusion

295. In accordance with the Interstate Commerce Act and 18 C.F.R. Part 348, this Initial Decision reaches the following key findings of fact and conclusions of law:

a. The relevant product market of the White Cliffs pipeline is the transportation of light crude oil;

b. The relevant geographic origin market of the White Cliffs pipeline is the DJ Basin Origin Market;

c. The origin market of the White Cliffs pipeline is competitive in terms of price and the availability of good alternatives. The competitive alternatives in the origin market are as follows:

- Saddlehorn Pipeline;
- Grand Mesa Pipeline;

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concern."). Dr. Arthur further observes that "[t]he prospect of entry would only mitigate market power concerns if entry will be likely, timely, and of a sufficient magnitude, such that an existing seller in a relevant market could not profitably sustain a small but significant price increase above a competitive level." *Id*. at 94:13-16.

- Pony Express NECL;
- Pony Express (accessible through the Sinclair Logistics, LLC Pipeline);
- Platte Pipeline;
- Suncor Refinery;
- HollyFrontier Refinery;
- Plains Tampa Rail Terminal;
- Hudson Rail Terminal;
- Musket Rail Terminal;
- Niobrara Crude Rail Terminal;
- Cheyenne Crude Rail Terminal; and
- Cheyenne Logistics Hub Rail Terminal

d. Market power analysis shows that the origin market of the White Cliffs pipeline is not so concentrated as to permit White Cliffs pipeline to exercise market power in the market. The HHI calculation is 1,556, and White Cliffs has a market share of 10.9 percent.

296. Accordingly, because the Commission already determined that White Cliffs does not have market power in the destination market, in the opinion of this Presiding Judge, White Cliffs' application for authority to charge market-based rates for crude oil transportation on the White Cliffs Pipeline should be granted.

297. The omission from this Initial Decision of any argument or portion of the record that may have been raised by the participants in their briefs does not mean that it has not been considered. All such arguments have been evaluated and found to either lack merit or significance to the extent that their inclusion would only tend to lengthen this Initial Decision without altering its substance or effect.

XII. Order

298. IT IS ORDERED that, unless exceptions are timely filed under Rule 711[632] or the Commission issues an order staying the effectiveness of the decision pending review under Rule 712,[633] this Initial Decision becomes a final Commission decision 10 days after exceptions are due under Rule 711.[634] If this Initial Decision becomes the final decision, White Cliffs' Application should be GRANTED.

SO ORDERED.

Digitally signed by SUZANNE KROLIKOWSKI
Date: 2019.09.12 14:22:39 -04'00'

Suzanne Krolikowski
Presiding Administrative Law Judge

[632] 18 C.F.R. § 385.711 (2019).

[633] *Id.* § 385.712.

[634] *Id.* § 385.708(d).

Document Content(s)