139 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Enterprise Products Partners L.P., and Enbridge Inc. Docket No. OR12-4-000

ORDER ON APPLICATION FOR MARKET POWER DETERMINATION

(Issued May 7, 2012)

1. On December 2, 2011, Enterprise Products Partners L.P. (Enterprise) and Enbridge Inc. (Enbridge), referred to collectively as Enterprise/Enbridge or Applicants, filed an application for authority to charge market-based rates on a planned reversal of the Seaway Crude Pipeline Company system (Seaway). The new reversed line will be referred to as the "Reversed Seaway Pipeline." The reversal is anticipated to occur in the second quarter of 2012, and the applicants request that the Commission rule on the instant application by March 31, 2012, in order to allow the filing of initial market-based rates on the Reversed Seaway Pipeline.

2. Twenty parties filed motions to intervene. Six parties filed substantive comments protesting the request for market-based rate authority for the origin and destination points on the Reversed Seaway Pipeline.[1] Generally, protestors focused on these key arguments to support denial of market-based rates in this instance: (1) the application failed to comply with the Commission's regulations governing initial rates for a new service and should be summarily dismissed; (2) the application failed to justify an overly-broad definition of the product market and the origin market; (3) the application failed to

[1] The protestors are: (1) Suncor Energy Marketing Inc., Canadian Natural Resources Limited, Continental Resources, Inc., Denbury Onshore LLC, and Husky Marketing and Supply Company (collectively, "Suncor *et al.*"); (2) the Canadian Association of Petroleum Producers ("CAPP"); (3) Cenovus Energy Marketing Services LTD, Encana Marketing (USA) Inc., and Nexen Energy Marketing U.S.A. Inc. (collectively, "Cenovus *et al.*"); (4) Apache Corporation, Chevron Products Company and Noble Energy, Inc. (collectively, "Apache *et al.*"); (5) the Domestic Energy Producers Alliance ("DEPA"); and (6) the Independent Petroleum Association of America ("IPAA").

demonstrate a lack of market power and fails to sufficiently identify real potential competition; and (4) the application failed to provide the required netback analysis.

3. As discussed below, the Commission denies Enterprise/Enbridge's application for authority to charge market-based rates on the Reversed Seaway Pipeline.

I. Background

4. Enterprise is a publicly traded partnership and provider of midstream energy services to producers and consumers of natural gas, natural gas liquids, crude oil, refined products and petrochemicals in North America. Enbridge, a Canadian company, operates the world's longest crude oil and liquids transportation system. Both entities are common carriers of petroleum products via pipeline, and subject to the Commission's jurisdiction under the Interstate Commerce Act.

5. Seaway currently transports crude oil from origin points on the U.S. Gulf Coast to a destination point in Cushing, Oklahoma. On November 16, 2011, Enbridge announced that it had agreed to purchase ConocoPhillips' share of Seaway, making the ownership of Seaway a fifty/fifty split between Enterprise/Enbridge. Enterprise/Enbridge has announced its intention to reverse the pipeline in order to provide transportation of crude oil from Cushing to the new Enterprise Crude Houston (ECHO) crude oil terminal in Houston, Texas, or via a proposed pipeline extension to the Beaumont-Port Arthur, Texas area. Enterprise/Enbridge requests market-based rates for the origin point and both specified destination points. Applicants state that the Reversed Seaway Pipeline will consist of a 30-inch diameter pipe, and is expected to begin operation in the second quarter of 2012. Applicants further state the initial pipeline capacity will be approximately 150,000 barrels per day depending upon the specific mix of crude oil transported. Enterprise/Enbridge notes the pipeline will undergo several pump additions and modifications by 2013, increasing the capacity to 375,000 barrels per day.

II. Description of the Filing

6. Enterprise/Enbridge seeks market-based rate authority for the interstate transportation of crude oil on the Reversed Seaway Pipeline at its Cushing, Oklahoma origin and its proposed destinations on the U.S. Gulf Coast. Enterprise/Enbridge's application describes market power statistics in the relevant markets, as well as the locations of various other competitors in the region, bolstering its position.[2] Enterprise/Enbridge asserts that market-based ratemaking authority will permit greater flexibility in setting rates than would otherwise be available under the Commission's

[2] Enterprise/Enbridge includes with the application the direct testimonies of Dr. George R. Schink and Mark Hurley to support its position.

indexing and cost-of-service ratemaking regulations, as these ratemaking alternatives would constrain the Reversed Seaway Pipeline's ability to respond appropriately to market forces.

7. Enterprise/Enbridge states that the relevant product market is properly defined as the transportation of crude oil. Applicants state that the Reversed Seaway Pipeline will transport both West Texas Intermediate (WTI) light sweet crude oil and Western Canadian Select (WCS) heavy sour crude, but will be capable of transporting any type of oil.[3] Enterprise/Enbridge asserts that the refineries that could receive any oil transported by the pipeline are capable of processing any type of oil.

A. Origin Market

8. Enterprise/Enbridge states that the Reversed Seaway Pipeline's origin market includes Cushing, Oklahoma, as well as production areas in Oklahoma, Kansas, and Northwest Texas that are linked by pipeline to Cushing. The crude oil that will be transported on the Reversed Seaway Pipeline can be sourced from the production areas surrounding Cushing in the Rocky Mountain Area (including the Bakken production in North Dakota), the Western Canada Area, and the New Mexico-Texas Permian Basin Area. Enterprise/Enbridge states that since crude oil can be supplied to Cushing from remote areas outside of the local production area, such as the Rocky Mountain, Western Canada, and Texas-New Mexico Permian Basin areas, competitors located in these remote areas also should be taken into account.

9. Enterprise/Enbridge offers evidence that the market power within the origin market is diluted, making the market highly competitive. Enterprise/Enbridge states that alternative sources of competition at the origin market include: (1) refineries in the origin market that use local production; (2) pipelines able to transport crude oil out of the origin market; (3) water carriers such as barge and tankers that transport crude oil out of the origin market; and (4) other methods of export from the origin market, such as truck and rail transportation. Applicants note that currently in Cushing, there are three additional crude oil pipelines that transport oil out of the market. There are also eight refineries owned by five different companies that process the crude oil produced in the area.

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[3] Enterprise/Enbridge notes in its filing that references to sweet and sour in describing crude oils are references to their specific sulfur content, with sweet oils containing less than 0.5 percent sulfur, and sour oils having 0.5 percent sulfur or more. Sulfur is a key characteristic of crude oil, since it is an impurity that could cause environmental issues when burned, which affects the value of oil. Generally, a crude oil pipeline can transport many different types of crude oil, segregated into batches, just as a refined products pipeline can transport gasoline of different grades, diesel fuel of differing qualities, and differing types of jet fuel segregated into batches.

Enterprise/Enbridge alleges producers have viable alternatives for moving product from production areas to suitable refineries outside of the origin market. Production outside of the origin market also transports a substantial amount of oil supply into Cushing for processing.

10. The Commission generally calculates market power through the Herfindahl-Hirschman Indexes (HHI) of market concentration for the markets to be served by the Reversed Seaway Pipeline.[4] Additionally, two statistics can be calculated to measure the amount of excess capacity in the markets: (1) the excess capacity ratio; and (2) the ratio of excess capacity held by the applicant pipeline's competitors to the volumes transported by the applicant oil pipeline.[5] The results for Enterprise/Enbridge's application are summarized below.

11. Dr. Schink, Enterprise/Enbridge's expert witness, analyzed the origin market to look at potential changes to the competitive market, and determined that the market would remain competitive in the future. Dr. Schink noted that competition is expected to increase significantly with the rapid expansion of rail car loading facilities and refinery capacity around Cushing, mainly due to the Bakken oil shale development.

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[4] HHI equals the sum of the squared market shares of all competitors in the market. The statistic takes into account the number and relative size of the market. A market that is a monopoly, for example, has an HHI of 10,000.

[5] The excess capacity ratio measures the total capacity available in the market relative to the total demand capacity in a market. An excess capacity ratio of 1.2 or higher indicates substantial excess capacity, which in turn implies that it is highly unlikely that the applicant pipeline could profitably sustain a tariff rate above competitive levels. The "excess capacity held by others" ratio measures capacity of the market and the unutilized capacity present. For the "excess capacity held by others" ratio, given that the pipeline in question is not yet operational and its future capacity utilization is unknown, the alternative calculation was done based on an assumption that the pipeline would be 90 percent utilized.

Definition of Origin Market	Number of Pipelines Including Reversed Seaway	HHI (adjusted capacity)	Reversed Seaway Market Share (%)	Excess Capacity Ratio	Excess Capacity Held by Others Ratio
Cushing Origin Market: Local Crude Oil Production Only	4	909	18	3.84	4.45
Cushing Origin Market: Production and Deliveries	4	1,003	18	1.31	1.34

B. Destination Market

12. The Applicants state that the Enterprise ECHO terminal in Houston will be where the Reversed Seaway Pipeline will connect to the Magellan Texas City crude oil pipelines. The Applicants then state that crude oil can be delivered via pipeline connections from the Enterprise ECHO terminal to refineries throughout the greater Houston area and to Houston and Texas City barge/tanker docks for waterborne transportation to refineries throughout the Gulf Coast.

13. The Beaumont/Port Arthur area delivery point requested by Enterprise/Enbridge is connected by pipeline to Lake Charles, Louisiana, and Houston. Generally, the Applicants note that barges from Beaumont/Port Arthur also can supply refineries throughout the Gulf Coast. Further, the application notes that the refineries located in PADD III, the U.S. Gulf Coast area supplied by the Reversed Seaway Pipeline, are large, state-of-the-art refineries capable of efficiently processing a wide variety of crude oils. Applicants state that the refineries in the Houston area account for 29 percent of the U.S. Gulf Coast refinery capacity, and a large share of crude oil supply for the Gulf Coast refineries is delivered by tankers from foreign crude oil production areas.

14. Enterprise/Enbridge argues that the Reversed Seaway Pipeline's destination market is appropriately defined geographically as the entire Gulf Coast refining area, including offshore and onshore production - Corpus Christi, Texas to Mobile, Alabama. Enterprise/Enbridge goes on to state that, "even if the Commission were to define the destination market more narrowly, the smallest appropriate definition of the destination market would be the Houston to Lake Charles area" of Texas.

15. Enbridge/Enterprise further argues that the Houston to Lake Charles geographic definition used here is the same definition the Commission accepted for Mobil Pipe Line Company's Pegasus pipeline destination market, and includes both onshore and offshore development.[6] Enterprise/Enbridge states that, for "either of the alternative geographic definitions of the destination market, local crude oil production plus waterborne crude oil deliveries exceed the total quantity of crude oil processed by the refineries located in the market…ensur(ing) that the destination market is highly competitive." Additionally, the application notes there are four additional pipelines in the Gulf Coast definition and six additional pipelines in the Houston/Lake Charles definition of destination market. The proposed reversal of Shell Pipeline Company L.P.'s Houma-to-Houston, Ho-Ho Pipeline System, would also provide an additional pipeline connection from Houston to Beaumont/Port Arthur to Lake Charles.[7] Applicants note the Houston to Lake Charles destination market contains about 53 percent of the total Gulf Coast refining capacity.

Definition of the Destination Market	**Number of Pipelines including Reversed Seaway**	**HHI**	**Reversed Seaway Market Share (%)**	**Excess Capacity Ratio**	**Excess Capacity Held by Others Ratio**
Gulf Coast Area	5	26	4.6	1.23	4.41
Houston to Lake Charles Area	7	169	6.5	1.53	5.78

[6] Application at p. 9, *citing Mobil Pipe Line Co.*, 121 FERC ¶ 61,268, at P 16 (2007).

[7] *See* Shell Pipeline Company LP's Petition for Declaratory Order, filed March 30, 2012, in Docket No. OR12-11-000.

III. Interventions and Protests

16. Pursuant to 18 C.F.R. section 348.2(g) (2011) of the Commission's regulations, interventions or protests to Enterprise/Enbridge's application were required to be filed by January 31, 2012. After requests to extend the time frame from several protestors, protests were due on February 15, 2012. Twenty parties filed motions to intervene, and six parties filed substantive comments.

17. Protestors urge the Commission to dismiss the application as facially deficient. Protestors request in the alternative that the Commission set the application for hearing.

18. Protestors generally state that the application fails to comply with the Commission's regulations governing initial rates for a new service. Under 18 C.F.R. § 341.2, a "carrier must justify an initial rate for new service by filing cost, revenue, and throughput data supporting such rate as required by Part 346 of this chapter…." In the alternative, section 342.2 allows an alternative method of establishing initial rates where the rate is agreed to by at least one non-affiliated shipper. Protestors assert that Enterprise/Enbridge did not provide adequate justification of a waiver of the requirements in this case. Further, in Order No. 561-A, the Commission explicitly rejected the use of market-based rates to justify an initial rate, stating "market-rates may only be charged after the Commission has determined that such ratemaking methodology is appropriate and lawful. Until such time, a pipeline must show some other basis for its rates, such as costs or compliance with the indexed ceiling."[8]

19. Protestors argue that the requested waiver of the above Commission regulations is premature and should be denied. Cenovus Energy Marketing Services LTD *et al.* take issue with the two Commission orders used as support for the waiver request—*Longhorn Partners Pipeline, LP*[9] and *Wolverine Pipe Line Company*.[10] Specifically, in *Longhorn*, the waiver of the requirement to file initial rates was granted after, not before, the Commission had granted the application for market-based rates. In *Wolverine*, the Commission granted the requested waiver while an application for market-based authority was still pending, but only after finding that the requested waiver and the tariff filing reflecting the requested waiver had not been protested. Cenovus asserts that neither circumstance exists here.

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[8] *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000, at 31,106 (1994).

[9] *Longhorn Partners Pipeline, L.P.*, 83 FERC ¶ 61,345 (1998).

[10] *Wolverine Pipe Line Co.*, 90 FERC ¶ 61,001 (2000).

20. Cenovus *et al.* states that the application should be evaluated based on the factors and methodology used to evaluate market power that was relied upon in *Mobil Pipe Line Company (Mobil)*.[11] Cenovus *et al.* caution that the fact that a pipeline would undertake the time, effort, and expense of preparing and prosecuting an application for market-based rate authority is presumptive evidence that the pipeline itself believes that such authority would enable it to increase its rates above what would otherwise be justified on a cost-of-service basis.[12] Cenovus *et al.* state that, since only two crude oil pipeline applications requesting market-based rate authority have been filed with the Commission, and both have been unsuccessful, the need for close scrutiny is critical.

21. Cenovus *et al.* state that under Commission policy, a pipeline must demonstrate that it lacks significant market power in order to qualify for market-based rate authority. Market power has been defined as "the ability to maintain prices above competitive levels for a significant period of time." [13] In the Mobil/Pegasus decision, states Cenovus *et al.*, the presiding judge adopted a two-part framework to evaluate market power: (1) a benchmark should be established to approximate the rates the pipeline would likely be able to charge in a sufficiently competitive environment (such as an established regulated tariff rate) and (2) a netback analysis should be performed to determine whether a grant of market-based rate authority would enable the pipeline to change rates that were more than 15 percent in excess of the pipeline's regulated tariff rate, which was determined to constitute a "small but significant increase in price."[14] A netback analysis requires defining the relevant product and geographic markets and good alternatives available in those markets, then determining the likely rate the pipeline could charge if granted market-based rate authority (determined by calculating the difference between product prices in the origin and destination markets). This result can then be compared to the netback price available using other alternatives, and the regulated tariff rate.[15]

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[11] Cenovus *et al.* Protest at p. 5, *citing Mobil Pipeline Co*., 133 FERC ¶ 61,192 (2010), *vacated, Mobil Pipe Line Company v. Federal Energy Regulatory Commission,* No. 11-1021 (D.C. Cir. Apr. 17, 2012).

[12] Cenovus *et al.* Protest at p. 6, *citing Mobil,* 133 FERC ¶ 61,192 at P 20.

[13] Cenovus *et al.* Protest at p. 6, *citing Mobil*, 133 FERC ¶ 61,192, at P 12, *see also Market-Based Ratemaking for Oil Pipelines,* Order No. 572, FERC Stats. & Regs. ¶ 31,007 (1994), *Midwestern Mach. Co. v. Northwest Airlines*, 392 F.3d 265, 274 (8th Cir. 2004).

[14] Cenovus *et al*. Protest at p. 6, *citing Mobil*, 133 FERC ¶ 61,192 at PP 15-16, 23-24.

[15] Cenovus *et al*. Protest at p. 6, *citing Mobil*, 133 FERC ¶ 61,192 at PP 24-26.

22. CAPP argues that the proposed origin market includes physically feasible alternatives, but not economically good alternatives, understating the market concentration calculation. Further, the proposed origin market is geographically oversized. CAPP takes issue with the lack of supporting explanation and data for several calculations, including the Excess Capacity Ratio, barge rates cited, and discounted versus undiscounted rate cost calculations. CAPP points out that the application contains uncertainties as to the factual context of the pipeline, including questions surrounding prospective competitive circumstances, facilities, and future market developments. Specifically, CAPP draws attention to the Keystone Extension Pipeline data included in the Excess Capacity Ratio, stating that only the volume of capacity under contract is included in the ratio, rather than the physical capacity of the Keystone Extension pipeline into Cushing.

23. IPAA points out that a market share analysis should be based on each market and should take into account the alternatives available to shippers of light versus heavy crude. Protestors state that the application fails to examine these alternatives. Further, the application's definition of the origin market is overbroad, and includes counties in Texas, Oklahoma and Kansas with no evidence that the counties contain a good alternative to Seaway's proposed transportation service out of Cushing.

24. IPAA states that competitive alternatives must be analyzed based on price, availability, and quality.[16] IPAA asserts that the application did not address alternatives in the destination market, and fails to demonstrate that several proposed new pipeline and expansion projects which could serve the origin and destination markets actually do represent adequate alternatives.

25. Apache *et al.* filed comments along the same lines as the above protestors. Apache *et al.* points out that there are no definitive data regarding potential shippers. Further, Apache *et al.* states that it is inconsistent for Enterprise/Enbridge to argue that there are "economic" alternatives when there are no competitive rates included to assess what alternatives qualify as economic.

26. DEPA echoes these arguments. DEPA urges the Commission to recognize that the Reversed Seaway Pipeline at the outset of service will only have one receipt point and one destination point, and that whatever the alleged competitive alternatives may be, none are pipeline transportation between Cushing and the Gulf Coast. Further, other factors, including Seaway as a new entrant, are irrelevant to the market power analysis required in this case.

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[16] *IPAA Protest at p. 6, citing Mobil*, 133 FERC ¶ 61,192 at P 27.

27. Suncor *et al.* filed comments with all of the above arguments. Suncor *et al.* discuss in detail the issues in the proposed product market definition, specifically that the number of alternatives that can transport or process one type of crude (light) will differ from the number of alternatives that can transport or process a different type of crude oil (heavy). Suncor *et al.* reiterates that each alternative must be individually examined to determine whether it meets the criteria of a good alternative in terms of price, availability and service. Though Enterprise/Enbridge stated that the pipeline intends to transport both WTI light sweet crude oil and WCS heavy sour crude oil, the assertion is insufficient to define the product market. Suncor points out that the Commission defined the relevant product market as whether the shippers on the applicant pipeline can switch alternative that could transport or process the specific type of crude oil transported on the applicant pipeline.[17] Since Enterprise/Enbridge failed to examine the alternatives available to shippers of light crude versus alternatives available to shippers of heavy crude, Suncor *et al.* argue the market power analysis submitted was meaningless, and they therefore seek discovery.

28. On February 29, 2012, Enterprise/Enbridge filed a Motion for Summary Disposition and Response to Requests for Summary Disposition. Enterprise/Enbridge insist that Seaway will lack market power in both the proposed origin and destination markets, and assert protestors failed to raise any issue of material fact to the contrary.

IV. Discussion

29. Section 348.1(c) of the Commission's regulations require an oil pipeline seeking a market power determination and the authority to charge market-based rates to (1) define the relevant product and geographic markets, including both destination and origin markets; (2) identify the competitive alternatives for shippers, including potential competition and other competition constraining the pipeline's ability to exercise market power; and (3) compute the market concentration and other market power measures based on the information provided about competitive alternatives.[18]

30. As an initial matter, the Commission acknowledges that its decision in *Mobil* which was relied upon by the protestors, has been vacated by the Court of Appeals and remanded to the Commission.[19] The question becomes what impact, if any, did the court's decision in *Mobil* have on the overall approach developed by the Commission

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[17] Suncor Protest at p. 10, *citing Mobil*, 133 FERC ¶ 61,192 at PP 28-29.

[18] 18 C.F.R. § 348.1(c) (2011).

[19] *Mobil*, supra note 11.

prior to *Mobil*, and how does said impact relate to the present application from Enterprise/Enbridge.

31. In *Mobil*, the court referenced Order No. 572 as the proper framework for considering an application for market-based rate authority.[20] Citing to Order No. 572, the court stated that a pipeline, to qualify for market-based rate authority, must demonstrate that it lacks market power in its product and geographic markets. The court then cited to Trial Staff's definition of the geographic origin market as the "competitive alternatives available to producers and shippers of …crude oil."[21] The court held that the proper question to ask was whether Mobil could profitably raise rates on Pegasus above competitive levels in this geographic market for a significant period of time because of lack of competition.[22] The court recognized the Commission's definition of market power as "the ability profitably to maintain prices above competitive levels for a significant period of time."[23] The court ruled that Mobil could not exercise market power in the origin market because its market share, 66,000 barrels out of 2.2 million, was far too small for Mobil to exert market power over such a large origin market.[24] The court noted that while Mobil could have increased its rates if given market-based rate authority, perhaps substantially, it could not raise rates above the competitive level for a significant period of time.[25]

32. The relevant question to ask, based on the court's decision in *Mobil*, is whether price data remain an essential element of the Commission's market power analysis, when the court based its decision primarily on the miniscule market share of Pegasus and not its ability to raise its rates. The answer is yes, price data remain an indispensible part of the analysis. It is important to note first that the court in *Mobil* did not take issue with the Commission's approach to market power analyses, as set forth in Order No. 572, but instead required that this approach be followed when deciding individual cases.[26] The court also analyzed whether Mobil could raise prices above the *competitive* level, thus

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[20] *Mobil*, No. 11-1021, slip op. at 4.

[21] *Id*. at 6.

[22] *Id*. at 8.

[23] *Id*. at 4.

[24] *Id*. at 10.

[25] *Id*. at 11.

[26] *Id*. at 13.

requiring some proxy of the competitive level.[27] The court held that the proxy for the competitive price level used by the Commission, the regulated tariff rate, was not a proper proxy, but that other price data were more appropriate in analyzing Pegasus' ability to exercise market power in its origin market.[28] However, this does not mean that relevant price data or an adequate proxy for the competitive price are no longer necessary under the Commission's regulations governing market power analyses for oil pipelines. The court's ruling rests primarily on the analysis of market share and market concentration. Yet to get to this stage of the analysis, at least some price data is required. For an alternative to be included in a geographic market, it must be a "good" alternative.[29] A good alternative must be a good alternative in terms of price. *Id*. The origin market analyzed by the court in *Mobil* consisted of those alternatives that the court perceived were good alternatives in terms of price to using the Pegasus pipeline. Thus while the potential price increase for transportation on Pegasus was not the ultimate concern for the court, price was indeed part of the court's review of Pegasus' origin market. Although parties may dispute whether the proxy used by a pipeline adequately reflects the competitive price level, the pipeline must still present such price data in order to determine good alternatives for inclusion in the geographic market. Otherwise, market shares and market concentration measures, such as those relied upon by the court in *Mobil*, simply cannot be calculated.

33. The Commission has reviewed the information filed by Enterprise/Enbridge and finds that the evidence presented is insufficient to permit a determination that the proposed Reversed Seaway Pipeline lacks market power in its contested origin and destination markets. The burden of proof is on the pipeline to establish that it lacks significant market power in the relevant origin and destination markets through its petition, and when necessary, through the presentation of evidence at trial.[30] However, even if this proceeding were set for hearing, Enterprise/Enbridge could not meet its burden of proof concerning the absence of market power because, as the applicant concedes, the required information simply does not yet exist.[31]

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[27] *Id*. at 4.

[28] *Id*. at 11.

[29] *Magellan Pipeline Co., L.P.*, 132 FERC ¶ 61,016, at P 33 (2010).

[30] *Market-Based Ratemaking for Oil Pipelines*, Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,187 (1994), *see also* 18 C.F.R. § 348.1 (2011), *Mobil*, 133 FERC ¶ 61,192 at P 7.

[31] Application at A-7, n.7.

34. The Commission is concerned the proposed Reversed Seaway Pipeline may have market power in both its proposed origin and destination markets. The protestors have raised material issues of fact regarding the origin and destination markets, including but not limited to the following: (1) the lack of an existing tariff rate, or acceptable proxy for a competitive rate, with which a market power analysis can be conducted; (2) the appropriate netback analyses for ascertaining the level of competition in the markets; (3) the absence of existing shipper behavior with which a determination of the product market could be achieved; and (4) the viability of alternative options available to shippers, including potential competition, for the distribution of petroleum products.

35. An oil pipeline does not have the automatic right to charge market-based rates. Rather, an oil pipeline must present empirical proof that it is not a monopoly so that the Commission can ensure that *presumed* market forces are not the basis of effective rates for the transportation of oil.[32] If a protest raises reasonable doubt about the adequacy of a pipeline's showing with respect to a particular geographic market, as has occurred here, the applicant must provide a detailed justification for the relevant market, including a demonstration that all of the alternatives within the market are good alternatives in terms of price.[33]

36. The evidence provided by Enterprise/Enbridge in its application includes the calculation of an effective capacity-based HHI[34] of 1,126 and an adjusted capacity-based

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[32] *Market-Based Ratemaking for Oil Pipelines*, Docket No. RM94-1-001, Order No. 572-A, 69 FERC ¶ 61,412 at 62,500 (1994). In other words, it is incumbent on the pipeline to affirmatively prove it lacks market power in a particular market, so that the Commission can find *actual* market forces exist that will constrain the pipeline from charging other than just and reasonable rates rather than merely presuming such a market exists.

[33] *Mobil*, 121 FERC ¶ 61,268 at P 20, *citing Shell Pipeline Co., L.P.*, 103 FERC ¶ 61,236, at 61,901 (2003).

[34] The Herfindahl-Hirschman Index (HHI) measures the likelihood of a pipeline exerting market power in concert with other sources of supply. One derives an HHI by squaring the market shares of all the firms competing in a particular geographic market and adding them together. The HHI can range from just above zero, where there are a very large number of competitors in the market, to 10,000, where only a single monopolist serves the market. A high HHI indicates significant concentration. A high HHI also suggests a pipeline may exercise market power either unilaterally or through collusion with rival firms in the market. An HHI of 1,800 would reflect a market served by between five and six equally sized competitors. An HHI of 2,500 would indicate a market served by four equally sized competitors. *Magellan Pipeline Company, L.P.*, 132 FERC ¶ 61,016, at P 7 n.6 (2010).

HHI of 909 in its proposed origin market.[35] Enterprise/Enbridge argues that these measures alone indicate that the origin market is highly competitive and that the pipeline could not profitably charge rates above competitive levels.[36] Protestors, however, strongly challenge these calculations. Suncor argues that "[p]ractically speaking there are no true alternatives to Seaway."[37] CAPP argues that the HHI in the origin market is significantly above 2,500, and likely over 5,000.[38] In reviewing prior applications for market-based rate authority where an applicant's alleged HHI calculations were factually challenged by protestors raising similar concerns, the Commission has required the applicant to justify the facts on which its proposed geographic market and alleged alternatives were based, and to provide a detailed cost analysis.[39]

37. In Order No. 572, the Commission did not require that good alternatives be justified in any particular way. However, the Commission suggested that comparative costs could be an effective means of justifying good alternatives to the pipeline's service. Order No. 572 sets the stage by pointing out that, in general, it is delivered price, not transportation rates, which must be compared. The Commission stated that:

> Where competitive alternatives constrain the applicant's ability to raise transport prices, the effect of such constraints are ultimately reflected in the price of the commodity transported. Hence, the delivered commodity price (relevant product price plus transportation charges) generally will be the relevant price to be analyzed for making a comparison of the alternative to the pipeline's services.[40]

38. In *Colonial*, [41] the Commission clarified that the question to ask in defining origin markets was "what are the 'good' economic alternatives to shippers that would be putting products on the pipeline at each of Colonial's origin terminals for shipment to destination terminals by Colonial?" Thus, the Commission placed the focus on whether a shipper

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[35] Application at I-31.

[36] Application at I-31-32. *See also* Enterprise/Enbridge Motion for Summary Disposition at 14.

[37] Suncor Protest, Aff. of John Vay Heyst at 2.

[38] CAPP Protest, Aff. of Dr. John R. Morris at 3.

[39] *Mobil*, 121 FERC ¶ 61,268 at P 23.

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

[41] *Colonial Pipeline Co.*, 92 FERC ¶ 61,144, at 61,532 (2000).

had "good" alternatives for getting the product out of a particular location or disposing of the product elsewhere. Accordingly, for origin markets it is the netback to the shipper (price to shipper after all costs of delivery) that should be compared in determining whether proposed alternatives are good alternatives in terms of price.[42] In order to justify its origin market, Enterprise/Enbridge must show that each alternative outlet is an alternative in terms of price for each shipper in the market.[43] By Enterprise/Enbridge's own admission, however, such an analysis cannot be conducted.

39. Enterprise/Enbridge acknowledges that in the most recent case involving a crude oil pipeline, *Mobil*, the Commission evaluated competitive alternatives using a netback analysis.[44] Enterprise/Enbridge admits that "it is not possible to perform such an analysis" in this proceeding because it does not have rates on file.[45] Enterprise/Enbridge goes on to state that such an analysis would not be useful, as the competitive alternatives are clear. Enterprise/Enbridge thus fails to provide any proxy for a prevailing price for use in a market power analysis, fails to provide a netback analysis, and fails to provide any other means for evaluating alternatives in terms of price. The Commission has been clear when addressing recent market-based rate applications that in the absence of a rational or workable means to evaluate competitive choices, a netback analysis is required.[46] Enterprise/Enbridge has provided neither.

40. The necessity of identifying an appropriate proxy for the competitive price is central to the entire market power analysis. Order No. 572 defines market power as the ability profitably to maintain prices above competitive levels for a significant period of time.[47] To evaluate whether an oil pipeline has market power, the Commission considers whether a pipeline, if granted market-based rate authority, could profitably sustain a "small but significant and non-transitory increase in price" (the SSNIP test).[48] The

[42] *Id*.

[43] *Mobil*, 121 FERC ¶ 61,268 at P 23; *Magellan Pipeline Company, L.P.*, 132 FERC ¶ 61,016, at P 36 (2010).

[44] Application at A-7, *citing Mobil*, 133 FERC ¶ 61,192.

[45] Application at A-7.

[46] *Mobil*, 133 FERC ¶ 61,192 at P 43, *see also Colonial*, 92 FERC ¶61,144 at 61,532.

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

[48] *Mobil*, 133 FERC ¶ 61,192 at P 12, *see also Colonial*, 92 FERC ¶ 61,144 at 61,536-537.

Commission has approved the 15 percent threshold price increase as the appropriate test for purposes of a market power analysis.[49] Without a proxy for the competitive price, however, such a test cannot be performed.

41. Several protestors identify Enterprise/Enbridge's failure to provide an appropriate proxy for the competitive price as a "fatal flaw" in the application. Apache argues that the failure to provide either a competitive price proxy or a netback analysis is a "fatal omission" and grounds for dismissal.[50] In cases where, as here, there is insufficient evidence in the application to make a market power determination, the issue of whether the proposed Reversed Seaway Pipeline lacks market power in the origin or destination markets would normally be set for hearing.[51] However, as Suncor points out, the "fatal deficiencies of the application cannot be cured with hearing evidence."[52] Suncor is correct. A hearing would not be productive where, as even the applicant acknowledges, a fundamental element required to demonstrate a lack of market power cannot be provided. Accordingly, the application can only be denied.

42. Order No. 572 places the burden of proof on the applicant seeking market-based rate authority,[53] and the Commission is not compelled to hold a hearing if such additional process is unwarranted.[54] As set forth in Order No. 572, upon examination of the pipeline's application, the Commission will issue an order in which it may rule on the application or, if appropriate, establish additional procedures and the scope of any investigation. Full and adequate process may or may not involve a hearing before an administrative law judge.[55] An applicant or protestants may request a hearing before an ALJ, but are not entitled to one.[56]

43. The pipeline as well as several protestors filed motions for summary disposition. While the Commission's denial of the application is based on its insufficiency and

[49] *Id.* P 24.

[50] Apache Protest at 9.

[51] *Magellan*, 132 FERC ¶ 61,016 at PP 33-36.

[52] Suncor Protest at 7.

[53] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,182.

[54] *Id*. at 31,182.

[55] *Id*. at 31,194.

[56] *Id*. at 31,196.

current incurability, and not pursuant to Rule 217 which requires that there are no issues of material fact in dispute, the Commission will address certain arguments set forth in the various motions for summary disposition as they relate to the denial of Enterprise/Enbridge's application. Specifically, the Commission addresses the arguments raised by Enterprise/Enbridge concerning the necessity for detailed cost data in its application.

44. Enterprise/Enbridge, in its Motion for Summary Disposition, identifies several cases that, in Enterprise/Enbridge's opinion, demonstrate that a detailed cost analysis is not necessary for an approval of an application for market-based rates. The cases cited by Enterprise/Enbridge, however, are distinguishable from the present application. Enterprise/Enbridge cites *Sunoco Pipeline L.P*.[57] as a case where the Commission summarily granted a challenged market-based rate application without a netback analysis.[58] In *Sunoco*, the Commission did in fact review detailed cost analyses in approving a contested geographic market, using data provided by a protestor.[59] The Commission found that even when using the cost analysis provided by the protestor, the market shares and HHI were within acceptable levels.[60] No such data, from either the applicant or a protestor, is available here. Further, the applicant in *Sunoco* sought authority to charge market-based rates within certain BEAs.[61] In Order No. 572, the Commission stated that it expected pipelines would use BEAs as their geographic markets.[62] In subsequent cases, such as *Sunoco*, the Commission held that when an applicant was proposing a geographic market including alternatives outside of a BEA, detailed cost data was necessary to establish the appropriateness of these alternatives.

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[57] *Sunoco Pipeline L.P.*, 114 FERC ¶ 61,036 at PP 79-81; 85-86 (2006).

[58] Enterprise/Enbridge Motion for Summary Disposition at 19.

[59] *Sunoco,* 114 FERC ¶ 61,036 at PP 78-79.

[60] *Id.* P 80.

[61] Each BEA is an "Economic Area" defined by the Bureau of Economic Analysis of the U.S. Department of Commerce. BEA's economic areas define the relevant regional markets surrounding metropolitan or micropolitan statistical areas. They consist of one or more economic nodes--metropolitan or micropolitan statistical areas that serve as regional centers of economic activity--and the surrounding counties that are economically related to the nodes. The Bureau redefined these areas in 2004 to reflect more current commuting and trading patterns, which resulted in an increase in the number of BEAs from 172 to 179. *Magellan,* 132 FERC ¶ 61016 at P 5, n.5.

[62] Order No. 572 at 31,188.

While the Commission in *Sunoco* found that the BEAs appropriately defined the geographic markets, it declined to include alternatives outside of the BEA because the applicant failed to provide sufficient price data that would demonstrate such external alternatives were in fact "good" alternatives.[63] In the present proceeding, Enterprise/Enbridge did not propose to use a BEA as the geographic market. Therefore, every alternative the pipeline proposes is outside of a BEA and must be supported by detailed cost data, which as even the pipeline recognizes does not exist.

45. Enterprise/Enbridge also cites *Colonial Pipeline Co. (Colonial),*[64] as a case where the Commission summarily granted market-based rates for challenged destination markets.[65] *Colonial* is another case, unlike the present case, which involved the use of BEAs as geographic markets. There, the Commission required applicants "to justify alternatives *outside the boundary of the BEA* containing a delivery terminal by comparative delivered price studies showing that these external alternatives are good alternatives in terms of price."[66] The Commission went on to explain that using a detailed costs analysis for alternatives external to a BEA was beneficial in that it ensured that actual costs, rather than mileage, were used to reflect transportation costs, and that it accounted for the importance of the price of a product in determining whether an external source was a "good" alternative.[67] Finally, in *Colonial* the applicant did in fact provide a cost study, in supplemental testimony, to justify external alternatives beyond the BEA,[68] an option that according to its application is not available to Enterprise/Enbridge. The Commission ultimately held that "if Colonial wants to use relevant markets containing alternatives external to a BEA, Colonial must demonstrate that the external sources are indeed good alternatives based on cost studies."[69]

46. In the two other cases cited by Enterprise/Enbridge, *Explorer Pipeline Company*[70] and *Longhorn*,[71] the applicants also based their geographic market definitions on BEAs,

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[63] *Sunoco,* 114 FERC ¶ 61,036 at PP 32-35.

[64] *Colonial*, 92 FERC ¶ 61,144.

[65] Motion for Summary Disposition at 20.

[66] *Colonial,* 92 FERC ¶ 61,144 at 61,534 (emphasis added).

[67] *Id*.

[68] *Id*.

[69] *Id.* at 61,537.

[70] *Explorer Pipeline Co.,* 87 FERC ¶ 61,374 (1999).

and no protest concerned the appropriateness of these definitions.[72] Enterprise/Enbridge has failed to demonstrate how any of the above precedent supports its application for market-based rate authority.

47. In sum, denial of Enterprise/Enbridge's application is appropriate given the applicants' failure to provide detailed cost data, a fundamental element of a market power analysis, which Enterprise/Enbridge acknowledges cannot be provided at this time.

The Commission orders:

The subject application is denied, for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[71] *Longhorn Partners Pipeline, L.P.*, 83 FERC ¶ 61,345 (1998).

[72] *See TE Products Pipeline Co., L.P.*, 92 FERC ¶ 61,121, at 61,466-67 (2000).

Document Content(s)