

139 FERC ¶ 61,109  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Seaway Crude Pipeline Company LLC

Docket No. IS12-226-000

ORDER ACCEPTING AND SUSPENDING TARIFF FILING, SUBJECT TO REFUND  
AND CONDITIONS, AND ESTABLISHING HEARING PROCEDURES

(Issued May 11, 2012)

1. On April 13, 2012, Seaway Crude Pipeline Company LLC (Seaway) filed FERC Tariff No. 2.0.0 establishing initial rates pursuant to 18 C.F.R. § 342.2 (2011), effective May 14, 2012.<sup>1</sup> Pursuant to 18 C.F.R. § 342.2(b), Seaway filed an affidavit stating that the new rates set forth in Seaway FERC Tariff No. 2.0.0, Item 30, have been agreed to in writing by a non-affiliated shipper who intends to use the service set forth in the tariff.
2. Seaway proposes Uncommitted and Committed Shipper rates in Items 30 and 40, respectively, for light and heavy crude pipeline transportation movements from Cushing (Lincoln County), Oklahoma to Katy (Harris County) and Jones Creek (Brazoria County), Texas. Item 30 of the tariff establishes an initial dollar per barrel rate of \$3.82 for light crude and \$4.32 for heavy crude for uncommitted shippers. Moreover, as detailed in the table below, Seaway proposes in Item 40 Committed Shipper rates for the same pipeline movements based on a contract term of either five or ten years, Committed Volumes, and an additional power charge.

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<sup>1</sup> Seaway Crude Pipeline Company LLC, FERC Oil Tariff, Tariffs – LLC; [Rates, Rules, & Regs, FERC No. 2.0.0, 2.0.0.](#)

Contract Term and Committed Volumes (bpd)		Light Crude		Heavy Crude	
		5 Year (\$/bbl)	10 Year (\$/bbl)	5 Year (\$/bbl)	10 Year (\$/bbl)
0 to 99,999	A	2.75	2.50	3.25	3.00
	B	3.00	2.75	3.50	3.25
100,000 and above	A	---	2.00	---	2.35
	B	---	2.25	---	2.75
	Power Charge	0.07			
A – Base Committed Shipper who has executed a Transportation Service Agreement (TSA) as of November 7, 2011					
B – Incremental Committed Shipper who has executed a TSA as of February 10, 2012					

3. Seaway held two open seasons to contract capacity on the pipeline.<sup>2</sup> Consequently, two thirds of the capacity is committed.<sup>3</sup>

4. FERC Tariff No. 2.0.0 also establishes the Rules and Regulations for the Seaway pipeline. The prorationing policy detailed in Item 17 of Seaway’s proposed tariff establishes that a “Regular Shipper” must be both a Committed Shipper and a Shipper that has actual shipments in each of the twelve months of the Base Period.<sup>4</sup> “New Shippers” are Shippers that have not met both of these criteria. Item 17(b)(i) of the tariff also states that ninety percent of the available capacity will be allocated to Regular Shippers, proportionately based on the lesser of each Regular Shipper’s Average Monthly Volume or its tendered volume, and ten percent of the available capacity will be allocated to New Shippers on a pro rata basis not to exceed the tendered volume.

5. As discussed below, the Commission accepts and suspends Seaway’s tariff records, subject to refund and conditions, and establishes hearing procedures to address all issues raised by the filing.

<sup>2</sup> A “Committed Shipper” is defined in Item 1 as a Shipper that has contracted for transporting a Committed Volume or otherwise paying the applicable Shortfall Payment, pursuant to the terms of a TSA executed by the Shipper during the open commitment periods that commenced on October 30, 2011 and January 4, 2012.

<sup>3</sup> See *Seaway Crude Pipeline Company*, May 7, 2012 Response, at Attachment A.

<sup>4</sup> The “Base Period” is defined as a cumulative rolling period of twelve (12) months ending one month prior to the month of prorationing. See Item 17, FERC Tariff No. 2.0.0.

### The Filing

6. Seaway is owned by Enterprise Products Partners L.P., and Enbridge, Inc. (Enterprise and Enbridge, respectively) in a joint partnership. Previously known as Seaway Crude Pipeline Company, the pipeline transported crude oil from origin points on the U.S. Gulf Coast to Cushing, Oklahoma. According to Enterprise and Enbridge, the pipeline will be reversed on or about May 17, 2012, and will transport crude oil from Cushing, Oklahoma to the U.S. Gulf Coast.

7. On December 2, 2011, Seaway filed an application in Docket No. OR12-4-000 requesting authority to charge market-based rates as the initial rate for the Seaway reversal. The application was protested by numerous entities. On May 7, 2012, the Commission denied this request.<sup>5</sup> In order to have a rate on file for Seaway to meet the expected reversal date of May 17, 2012, Seaway filed the proposed tariff with the agreement of one non-affiliated shipper.

### Notice, Intervention and Protests

8. Pursuant to Rule 214 (18 C.F.R. § 385.214), all timely filed motions to intervene and any unopposed motions to intervene out of time filed before the issuance date of this order are granted. Several parties filed motions to intervene in this proceeding, including Cenovus Energy Marketing Services LTD., Apache Corporation, Noble Energy Inc., Chevron Products Company, Nexen Energy Marketing U.S.A. Inc, MEG Energy Corp., and EnCana Marketing USA. One party, Chesapeake Energy Marketing, Inc., filed a comment in support of the tariff.

9. Pursuant to section 343.3 of the Commission's regulations, five protests were filed by various interested parties. Generally, parties protested that the proposed rates lacked sufficient justification. Parties assert that Seaway must therefore file "cost, revenue, and throughput data supporting such rates as required by Part 346."<sup>6</sup>

10. The Independent Petroleum Association of America (IPAA) argues that, in addition to failing to justify its proposed initial rates in a way that makes it possible for shippers to properly evaluate the proposed rates, the proposed tariff filing includes a

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<sup>5</sup> See *Oil Pipelines - Enterprise Products Partners L.P., and Enbridge Inc.*, 139 FERC ¶ 61,099 (2012).

<sup>6</sup> See Suncor Energy Marketing Inc Canadian Natural Resources Limited, and Denbury Onshore LLC's April 30 Filing at 6; Independent Petroleum Association of America's Filing April 30 at 1; Apache Corporation, Chevron Products Company, and Noble Energy Inc.'s April 30 Filing at 2, citing to 18 C.F.R. § 342.2(a).

number of proposed provisions that appear to be unduly discriminatory or preferential. IPAA cites Item 17 of the tariff as a potential unduly preferential item where Seaway proposes a prorationing provision in case of over-subscription that allocates ninety percent of available capacity to “Regular Shippers” and ten percent to “New Shippers.” IPAA contends that the prorationing provision may be unduly preferential because it is heavily weighted in favor of one class of shippers (Regular Shippers) and heavily weighted against another class of shippers (New Shippers). Further, IPAA takes issue with the minimum tender provision proposed in Item 10(f) of the tariff that gives Seaway the discretion to accept or reject any tender of less than the minimum of 60,000 barrels of crude oil.<sup>7</sup> IPAA states that the minimum tender appears too high and the provision gives Seaway excessive discretion in accepting or rejecting tenders. Furthermore, IPAA maintains that the provisions pertaining to quality specifications, agent appointment, and inline change in ownership appear overly vague.

11. Apache Corporation, Chevron Products Company, and Noble Energy, Inc. (collectively Apache) argue the tariff does not clearly identify which rate on the rate schedule matrix (detailed above) has been agreed to by non-affiliated shippers. Further, Apache contends it is also unclear whether Base Committed Shippers are committed for the five or ten year rate option or whether the commitment is for a certain volume of shipments of light crude or heavy crude.

12. Apache also points out that the intent of footnote 3 of the posted Rates in FERC Tariff No. 2.0.0 (hereafter referred to as “footnote 3”) is unclear. According to Apache, footnote 3 refers to a five-year rate option applicable to “Committed Volume Shippers” who executed agreements under the Gulf Coast Access Project.<sup>8</sup> Apache further contends that footnote 3 states Committed Volume Shippers who executed agreements under the Gulf Coast Access Project are not Committed Shippers for the purposes of Items 8 and 17 of the proposed tariff as it relates to the Seaway reversal. Apache also states that it is unclear how Seaway derived the Uncommitted Rate<sup>9</sup> as there is no reference to a non-affiliated shipper agreeing to a rate for shipment of Uncommitted

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<sup>7</sup> “Minimum volume” is defined as the minimum continuous volume of 60,000 barrels of Crude Petroleum received or delivered at one time. *See* Definitions, Item 1.

<sup>8</sup> The Gulf Coast Access Project, also known as Enbridge’s Flanagan South Project, is a proposed 600-mile, 36-inch diameter interstate crude oil pipeline that will originate in Flanagan, Illinois and terminate in Cushing, Oklahoma. The pipeline will connect to the Seaway system. <http://www.enbridge.com/FlanaganSouthPipeline.aspx>, accessed May 9, 2012.

<sup>9</sup> An “Uncommitted Rate” is the posted transportation rate for service without a contract.

Volumes.<sup>10</sup> Apache asserts the proposed tariff filing is silent as to the cost of service, revenue, and throughput assumptions that underlie the proposed rates. Further, Apache states there is no explanation as to how Seaway designed the Uncommitted Rate in connection with the Committed Rates.

13. MEG Energy Corp. (MEG) filed a limited protest stating it contracted with the joint owner of Seaway, Enbridge Pipelines (FSP) LLC (Enbridge), to ship crude oil on Enbridge's Gulf Coast Access Project for service from Flanagan, Illinois to Cushing, Oklahoma and on to the Texas Gulf Coast, pursuant to an executed Transportation Services Agreement (MEG TSA) (effective December 12, 2011). According to MEG, the MEG TSA obligates Enbridge to arrange with Seaway to permit MEG to ship volumes up to MEG's volume commitment under the MEG TSA on Seaway's Cushing to Texas Gulf Coast leg, until the full Gulf Coast Access Project is in service.

14. MEG charges that the proposed tariff filing effectively abrogates this obligation of Enbridge. MEG contends that for the first time in footnote 3, Seaway/Enbridge disclose that shippers who nominate volumes on Seaway on an interim basis pursuant to Gulf Coast Access Project TSAs will have the lowest priority for their volume nominations under the prorationing scheme outlined in Item 17 of the proposed tariff rather than having the same priority as contract Committed Shippers. MEG goes on to state the allocation scheme identified in Item 17 of the instant tariff effectively abrogates MEG's right to ship volumes on Seaway prior to the in-service date of the Gulf Coast Access Project by denying MEG's volumes equal priority to other similarly situated shippers.

15. Suncor Energy Marketing Inc., Canadian Natural Resources Limited and Denbury Onshore LLC (collectively Suncor), also protested the proposed tariff stating Seaway failed to produce any justification for the proposed rates and failed to demonstrate the proposed rates are just and reasonable. Suncor included an affidavit to its filing which contained a preliminary analysis suggesting the proposed Committed and Uncommitted Rates appear to generate revenue in excess of Seaway's estimated cost of service, depending upon the mix of light and heavy crude volumes and the volumes that flow at specific Committed Rates.

16. Suncor also takes issue with the prorationing scheme detailed in Item No. 17 of the proposed tariff, stating it is overly vague and does not give New Shippers a reasonable opportunity to become Regular Shippers. Suncor points out that the minimum batch sizes required could also prevent New Shippers from shipping on Seaway. Suncor notes the prorationing policy appears to deem certain volumes to have been shipped by Committed Shippers even if such shipments have not occurred, rendering the policy

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<sup>10</sup> "Uncommitted Volumes" are requested volumes for transportation that are not under a transportation contract.

potentially unduly preferential. Suncor also asserts other proposed rules, including the treatment of inline change in ownership and specifications to quality contain charges that appear unsupported and vague and may be unjust and unreasonable.

17. The Canadian Association of Petroleum Producers (CAPP) also filed a motion to intervene and protest. CAPP protests the proposed rates for Uncommitted service (Item No. 30). CAPP states there is no pipeline service that would compete directly with Seaway and one cannot presume crude oil shippers have competitive alternatives in the setting of negotiated rates for transportation services from Cushing, Oklahoma's bottleneck to Seaway's proposed destination markets. Further, CAPP asserts the single non-affiliated shipper for Seaway may or may not have agreed to a just and reasonable rate.

#### Answer

18. Seaway filed a response to the motions to intervene and protests. Seaway responds that the filed tariff fully complies with Commission regulation and precedent. Further, Seaway states that the Commission should dismiss MEG's protest as well as Suncor's and IPAA's challenges to the non-rate issues in Seaway tariffs.<sup>11</sup>

19. Seaway asserts that it is prepared to justify its proposed rates under Part 346 of the Commission's regulations if necessary at the appropriate time, but states that Commission precedent requires the pending market-based rate request to be settled first. Seaway argues that Suncor's and IPAA's protests of non-rate matters should be dismissed. Seaway further asserts that even if Suncor's and IPAA's protests were found to meet the threshold filing requirements, they nevertheless lack merit because generalized allegations of harm and hypothetical scenarios regarding how Seaway's policies could be misapplied fail to provide any valid ground to challenge Seaway's proposed rules.

20. Additionally, Seaway states that MEG's protest is without merit and should be dismissed because MEG's claim involves a contractual dispute between MEG and Enbridge FSP and should not be included in a protest of Seaway's tariff. Seaway notes that nothing in the Interstate Commerce Act (ICA) or FERC precedent requires a carrier to give shippers that have committed to move volumes on another pipeline the same rights as the carrier's own committed shippers. Further, Seaway notes that it is not under the control of Enbridge FSP, MEG's contractual partner in this matter. Seaway further

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<sup>11</sup> Seaway also requested that the investigation of Seaway's rates should be held in abeyance pending the outcome of the market-based rate application in Docket No. OR12-4. The Commission's rejection of Seaway's application in that docket renders this request moot.

clarifies that Enbridge FSP is owned by Enbridge Inc., and Enbridge Inc. owns 50 percent of Seaway. Thus, Seaway concludes, as a subsidiary of a non-majority owner of Seaway, Enbridge FSP has no authority to contractually bind Seaway.

### Discussion

21. The Commission finds that, as an initial matter, Seaway complied with the Commission's regulations in establishing initial rates (18 C.F.R. § 342.2(b)). However, as multiple protesters pointed out, even one protest to the tariff filing triggers an obligation that Seaway to produce a cost of service justification for its rates in accordance with Commission rule 342.2(a), 18 C.F.R. § 342.2(a), and Order No. 561.<sup>12</sup>

22. Accordingly, Seaway must provide cost-of-service data so that the Commission may determine whether the proposed rates are just and reasonable. Further, the Commission is concerned that the prorationing policy as identified in Item 17 of the proposed tariff may result in disparate treatment of similarly situated shippers, as Suncor and others have pointed out.

23. The Commission concludes there is insufficient data in Seaway's filing to resolve these and any other issues raised by the filing. Therefore, the Commission will establish a hearing to investigate all issues raised by the filing, including but not limited to, those initially raised by the protesters.

24. The Commission will not dismiss the so-called "non-rate" challenges raised by Suncor and IPAA. Although Seaway argues these challenges lacked specificity, the challenges were specific enough for Seaway to spend a significant portion of its answer arguing that they lacked merit. The Commission will, however, dismiss the limited protest of MEG. MEG claims that Seaway's tariff violates Commission rules or regulations only in relation to MEG's contractual relationship with Seaway concerning a separate project, the Gulf Coast Access Project. MEG argues that the provisions of the Seaway tariff may adversely affect this contractual relationship. While MEG may in its role as intervenor raise arguments concerning whether the proposed tariff is

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<sup>12</sup> *Revisions to Oil Pipeline Regulations pursuant to Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs., Regulations Preambles Jan. 1991-June 1996 ¶ 30,985 (1993), *order on reh'g and clarification*, Order No. 561-A, FERC Stats. & Regs., Regulations Preambles, Jan. 1991-June 1996 ¶ 31,000 (1994), *aff'd*, *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

discriminatory under section 3(1) of the ICA, a tariff protest is not the proper forum to raise solely contractual issues between the parties.<sup>13</sup>

25. In the initial proceeding in which the Commission considered rate structure proposals such as that present by Seaway, *i.e.*, contracts for committed service of varying terms, quantities, and crude quality at discounted rates from service for uncommitted service, the Commission stated:

The Commission finds, in the exercise of its discretion, that, as a general matter, in order to provide definitive guidance for all interested parties, it would be appropriate to address oil pipeline ratemaking issues, such as those raised by the petition of Express, in the context of a petition for declaratory order proceeding. It is better to address these issues in advance of an actual tariff filing than to defer, as the protesters urge, until the rate filing is made, when the decision making process would be constrained by the deadlines inherent in the statutory filing procedures. The public interest is better served by a review of the issues presented before a filing to put the rates into effect. [The protestants' reason for deferring consideration until the filing of a tariff was that the proposed rates could not be evaluated until actually proposed in a tariff; the Commission, however, never addressed rates in the declaratory order proceeding but only the nature of the overall rate structure proposed.]<sup>14</sup>

The Commission, of course, cannot require the filing of a petition for declaratory order nor prevent the filing of a tariff proposing to implement service under section 15(7) of the ICA. Such a tariff filing is wholly within the rights of a carrier. Likewise, the Commission has the authority to suspend and investigate such a filing. We have ordered an investigation and hearing here into all the issues raised by the filing and the pleadings in protest. It is likely that given sufficient time to evaluate, such as in response to a petition for declaratory order, the Commission would have been able to address and resolve most, if not all, of the non-rate issues raised. Here, however, constrained as we are by the deadlines inherent in the statutory filing procedures, we must establish the hearing procedures described in this order.

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<sup>13</sup> 18 C.F.R. § 343.2(c)(3) (2011).

<sup>14</sup> *Express Pipeline P'ship*, 75 FERC ¶ 61,303, at 61,967 (1996).

The Commission orders:

(A) Pursuant to the authority contained in the Interstate Commerce Act, Seaway's FERC Tariff No. 2.0.0 is accepted and suspended, effective May 14, 2012, subject to refund and conditions.

(B) Pursuant to the authority contained in the Interstate Commerce Act, particularly sections 15(1) and 15(7) thereof, and the Commission's regulations, a hearing is established to address the issues raised by Seaway's filing.

(C) A Presiding Administrative Law Judge (ALJ) to be designated by the Chief Administrative Law Judge, for the purpose pursuant to 18 C.F.R. § 375.302 (2011), shall convene a prehearing conference in this proceeding to be held within 20 days of the issuance of this order in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. The prehearing conference shall be held to clarify positions of the participants, and for the ALJ to establish any procedural dates for the hearing. The ALJ is authorized to conduct further proceedings pursuant to this order and the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.