Federal Energy Regulatory Commission
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Open Commission Meeting
Staff Presentation
Item G-2

"Good Morning Madame Chairman and Commissioners. We are here to present the draft Order on Rehearing concerning a request by Enterprise Product Partners and Enbridge for market-based rate authority for the Seaway pipeline.

"Beginning with the issuance of Order No. 572 in 1994, the Commission has provided a generally-applicable methodology with respect to applications from oil pipelines seeking permission to charge market-based rates. The Commission defines market power as the ability of a pipeline to profitably maintain prices above competitive levels for a significant period of time. The Commission has applied the general methodology of Order No. 572 on a case-by-case basis.

"In December of 2011, Enterprise and Enbridge filed an application seeking the authority to charge market-based rates for initial rates on its reversed Seaway pipeline, a crude oil pipeline transporting oil from Cushing, OK to the Gulf Coast. The Commission denied this application in May of 2012, citing a lack of cost data in the application which Enterprise and Enbridge acknowledged could not be provided because the application concerned initial rates for a pipeline not yet providing service. Enterprise and Enbridge sought judicial review of the denial.

"Prior to the Commission's denial, in April of 2012, the Court of Appeals for the District of Columbia Circuit issued an order in Mobil Pipeline Co. v. FERC, which directly addressed the Commission's approach to reviewing market-based rate applications for oil pipelines, and the generally-held principles developed and utilized in prior cases. Consequently, in order to properly analyze the impact of the court's then-recent decision, the Commission granted rehearing of its denial of Seaway's application, for the purpose of seeking comments from all interested entities on the proper interpretation of the Mobil decision. Numerous pipeline and shipper entities submitted comments, each presenting its own interpretation of how Mobil did or did not affect the Commission's market-based rate regime for oil pipelines. The ultimate question concerning the Mobil decision was whether the methodology as set forth in Order No. 572 was still valid, or if the issue was the proper application of these methods.

"The draft Order on Rehearing sets forth the Commission's assessment of the impact of Mobil on its policies and procedures for reviewing an application from an oil pipeline seeking a market-power determination, including the application from Enterprise and Enbridge. First, the draft order concludes that the Mobil decision did not fundamentally alter the methodologies set forth in Order No. 572; in fact the court supported the principles established in Order No. 572. The draft order also concludes that the Mobil court found the approaches taken in market-based rate proceedings subsequent to the issuance of Order No. 572 cannot be rigidly applied in all cases. The primary issue in Mobil was that of price, specifically what price should be the focus of the market-power analysis. Up to the Mobil case, the analysis had centered on the applicant's tariff rate, and whether the pipeline could maintain a rate above that level for a significant period of time. In Mobil, the court found that it was improper to focus on Mobil's tariff rate because the rate was below, perhaps far below, the competitive level. It was the potential for rate increases above the competitive level, said the court, which should be the proper focus of a market power analysis.

"The draft Order on Rehearing provides a methodology for conducting a price analysis in oil pipeline market-based rate proceedings that focuses on the competitive realities of the market, and not solely on the tariff rate of the applicant pipeline. By examining the behavior of market participants, including pipelines and shippers, the draft order predicts that a more complete and accurate picture of competitive price levels and competitively-priced alternatives will be developed. The draft order suggests that such an approach will avoid the concerns raised in Mobil about whether the analysis is truly answering the fundamental question of whether a pipeline applicant could raise its rates above the competitive level. The draft order upholds Order No. 572's principles while developing new methods for measuring competition consistent with Mobil, provides guidance on how oil pipelines can demonstrate a lack of market power, and allows an accurate determination of the competitive factors relevant in assessing oil pipeline markets.

"The draft order also affirms the May 2012 order's denial of Enterprise and Enbridge's waiver requesting market-based rates be allowed to serve as Seaway's initial rates for the reversed pipeline. The draft order notes that Seaway is a new entrant into a market, and does not possess data on usage and market participation necessary to conduct a proper market power analysis consistent with Mobil and the draft order. It is noted that Seaway is in service and is presently shipping under cost-based and negotiated rates subsequent to its initial application for market-based rates. Seaway may make a new request for market-based rate authority using current data.

"This completes our presentation. We would be happy to answer any questions."