146 FERC ¶ 61,148
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Enbridge Pipelines (FSP) LLC | Docket No. OR14-5-000

DECLARATORY ORDER

(Issued February 28, 2014)

1. On October 22, 2013, Enbridge Pipelines (FSP) LLC (Enbridge FSP) filed a Petition for Declaratory Order (Petition). Enbridge FSP seeks approval of the proposed rate structure, storage-in-transit right, contract extension right, and prorationing policy applicable to its planned Flannagan South Pipeline Project (Project) that is expected to commence service in the third quarter of 2014. Enbridge FSP requests Commission approval of its proposals by March 1, 2014.

2. As discussed below, the Commission grants the requested rulings.

Background and Requested Rulings

3. Enbridge FSP states that the Project is designed to provide new pipeline capacity to transport crude petroleum from Flanagan, Illinois, to the U.S. Gulf Coast. According to Enbridge FSP, the Project has two principal elements: (a) a new 580-mile, 36-inch diameter pipeline segment from Flanagan to Cushing, Oklahoma, and (b) a lease of capacity on the Seaway Crude Pipeline Company LLC pipeline (Seaway Pipeline) from Cushing to Houston, Texas. According to Enbridge FSP, the estimated capital cost of the Project is $2.65 billion (exclusive of lease costs). Enbridge FSP adds that the completed Project is expected to have an initial annual transportation capacity of 430,000 barrels per day (bpd) and a peak annual average capacity of up to approximately 600,000 bpd.[1]

4. Enbridge FSP explains that the Flanagan-Cushing segment of the Project will parallel the existing Spearhead Pipeline, which is owned by CCPS Transportation, LLC.

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[1] Enbridge FSP states that the background of the Project and the key terms of the tariff structure are described in the Affidavit of Vince Paradis, attached to its Petition as Attachment A (Paradis Affidavit).

Further, states Enbridge FSP, the owners of the Seaway Pipeline are building a second line between Cushing and the Gulf Coast that will substantially increase the capacity of the current line and that under its pipeline capacity lease with Seaway Pipeline, Enbridge FSP will pay a monthly rental payment for access to varying portions of the Seaway Pipeline capacity over a lease term of up to 40 years.[2] Enbridge FSP emphasizes that it could have built a new pipeline from Cushing to the Gulf Coast, but that the timing of the Seaway Pipeline expansion makes it economically more efficient to build one new pipeline to serve the needs of both Seaway and Enbridge FSP.

5. Enbridge FSP asserts that the Project will provide additional capacity to transport increased North American crude oil production to refinery hubs on the Gulf Coast, particularly for production from the Bakken Formation in Montana/North Dakota, the Illinois Basin, and Western Canada. Enbridge FSP explains that the Project will interconnect at Flanagan with the Lakehead System, which has access to those upstream producing areas.[3]

6. Enbridge FSP states that because of the substantial capital investment necessary to complete the Project, it conducted two widely-publicized open seasons seeking term and volume commitments by shippers in return for a specified tariff rate structure and certain other rights.[4] Enbridge FSP emphasizes that all interested parties had an equal opportunity to participate in the open seasons and that shippers willing to commit to the Project executed TSAs. Enbridge FSP maintains that without the revenue and planning assurances provided by the Committed Shippers, the Project would not be economically feasible.

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[2] Enbridge FSP asserts that relevant precedent has treated a lease agreement for capacity in an oil pipeline as creating an interest equivalent to direct ownership of the pipeline facilities in that the lessee becomes a common carrier distinct from the lessor. Enbridge FSP cites, *e.g. Phillips Pipe Line Co. v. Diamond Shamrock Refining and Marketing Co*., 50 F.3d 864 (10th Cir. 1995); *Oxy Midstream Strategic Development, LLC*, 141 FERC ¶ 61,005 (2012).

[3] Enbridge FSP states that the Lakehead System is the U.S. portion of the integrated Enbridge Mainline System, which has receipt points in Western Canada for Canadian production and in the U.S. for production from the Bakken region in Montana/North Dakota. According to Enbridge FSP, the Lakehead System is owned and operated by Enbridge Energy, Limited Partnership (Enbridge Energy).

[4] Committed Shippers are shippers that execute Transportation Services Agreements (TSA). Uncommitted Shippers are those that do not execute TSAs.

7. According to Enbridge FSP, the first open season for the Project commenced on October 3, 2011, and concluded on November 2, 2011, while the second open season commenced on January 4, 2012, and concluded on February 17, 2012. Enbridge FSP states that the shippers that signed TSAs during the first open season committed sufficient volumes to allow Enbridge FSP to proceed with the Project. However, Enbridge FSP states that it made several adjustments to the Project as a result of the additional committed volumes secured during the second open season, including increasing the upstream segment of the Project from a 30-inch pipeline with a capacity of 350,000 bpd to a 36-inch pipeline with a peak annual average of up to approximately 600,000 bpd. Enbridge FSP further states that it increased the Project's pumping power to accommodate the increased throughput. Enbridge FSP states that a total of 14 shippers made ship-or-pay commitments for volumes aggregating up to a peak of 537,000 bpd over terms ranging from 10 to 20 years.

8. Enbridge FSP seeks approval of the following aspects of its proposed tariff and rate structure:

a. That Enbridge FSP can implement a tariff rate structure that provides different rates for Committed and Uncommitted Shippers' volumes;

b. That the Committed Shippers will pay the joint rates for committed volumes during their contract terms, as provided in the TSAs;

c. That the committed rates provided in the TSAs may be treated as the equivalent of settlement rates, both initially and during the terms of the TSAs, pursuant to section 342.4(c) of the Commission's regulations;

d. That Committed Shippers can be afforded a defined storage-in-transit right with respect to their committed volumes. In other words, to the extent a Committed Shipper has arranged with a third party for storage at Cushing, it may park in-transit volumes for temporary storage and request that the barrels be re-injected within six months for transportation to the Gulf Coast, subject to available capacity;

e. That Committed Shippers can be provided the right to extend the initial term of their TSAs for one or two successive five-year terms, as provided in the TSAs;

f. That Enbridge FSP can implement a prorationing policy under which the volume history of Committed Shippers will be deemed to be the greater of their average actual shipments over the base period or their volume commitments;

g. That Enbridge FSP can implement a prorationing policy under which a New Shipper can become a Regular Shipper by moving oil in each month during a rolling 12-month base period; and

h. That Enbridge FSP can implement a lottery mechanism for allocation of space available to New Shippers to prevent any New Shipper's allocation from falling below the minimum tender volume during periods of prorationing.

9. Enbridge FSP asserts that its proposal is consistent with Commission precedent in that it includes different rates for Committed Shippers and Uncommitted Shippers. Enbridge FSP also states that the rates for committed volumes will be subject to joint tariffs between Enbridge FSP and upstream pipelines[5] and that the joint tariffs will include joint uncommitted rates that are equal to or lower than the sum of the local rates. Additionally, states Enbridge FSP, Committed Shippers that fail to meet their ship-or-pay obligations will be required to pay deficiency rates on unshipped committed volumes and that the deficiency rates will vary by open season and the length of the volume commitment.

10. Enbridge FSP explains that the Committed Shipper rates established in the joint tariffs will consist of two components: (a) a base component covering all costs other than fuel and power, and (b) a power charge covering fuel and power costs. Enbridge FSP adds that the initial base components of the joint committed rates for each volume and term level are established in schedules that are part of the TSAs.[6] According to Enbridge FSP, the initial base components vary by origin point, contract term, committed volume level, and type of crude (light or heavy). Enbridge FSP further states that the base components are subject to an annual inflation adjustment equal to 75 percent of the change in the Canadian Gross Domestic Product at Market Prices (GDPP) index, but only to the extent that the GDPP index is positive.

11. Enbridge FPS also explains that the power cost component of the committed rates will be recovered through the separate power cost charge, which will be established in the first year of operations based on a forecast of the power costs expected to be incurred and the volumes anticipated to be transported through the Project (including the leased

[5] Enbridge FSP states that the joint tariffs will include an international joint tariff involving Enbridge Pipelines Inc. (in Canada) and Enbridge Energy (in the U.S.), as well as a domestic joint tariff between Enbridge FSP and Enbridge Energy.

[6] Enbridge FSP states that Exh. 2 to the Paradis Affidavit provides a chart showing the base components of the committed rates at each term and volume level (and for each crude type).

capacity in the Seaway Pipeline) to each delivery point. For each subsequent year, continues Enbridge FSP, the power cost will be trued-up to actuals based on the forecasted power costs and throughput volumes applicable to each delivery point for the prior year. Enbridge FSP also explains that any differences between forecasts and actuals will be rolled into the following year's power cost charge for committed volumes for each applicable delivery point,[7] but at the end of the final year of a Committed Shipper's contract term, the final true-up will be in the form of a refund by Enbridge FSP or a payment by the Committed Shipper for any remaining difference between forecasts and actuals.

12. Enbridge FSP next states that it will establish the uncommitted rates based on the Commission's oil pipeline regulations at the time the Project goes into service and that the initial local uncommitted rates likely will be set by agreement with an unaffiliated shipper. Enbridge FSP adds that the initial local uncommitted rates will be indexed thereafter using the Commission's regulations. Enbridge FSP also states that the initial joint uncommitted rates are likely to be higher than the comparable rates for Committed Shippers.[8]

13. Enbridge FSP contends that the rate structure it proposes is consistent with the non-discrimination provisions of the Interstate Commerce Act because the opportunity to execute a TSA and therefore to participate in the committed rate structure was available to all interested parties.[9] Enbridge FSP asserts that the Committed Shippers

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[7] Enbridge FSP also points out that the TSAs allow it to adjust the power charge for an applicable delivery point at any time if it determines that the actual power costs to that delivery point vary from the forecasted power costs by more than 10 percent.

[8] However, states Enbridge FSP emphasizes that nothing in the TSAs requires the committed rates to be lower than the uncommitted rates if the Commission were to order a decrease in the uncommitted rates. In particular, continues Enbridge FSP, section 6.01(a) of the TSAs provides that

> Carrier agrees not to post a per Barrel Uncommitted Rate for any service that is lower than the per Barrel Committed Rates for the same service unless Carrier is required by any Governmental Authority to file or maintain an Uncommitted Rate that is less than the per Barrel Committed Rates for the same service or as otherwise results from the application of Section 6.06.

[9] Enbridge FSP cites, *e.g.*, *TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at P 22 (2008); *Express Pipeline P'ship*, 77 FERC ¶ 61,188, at 61,756 (1996); *Enbridge Energy Company, Inc.*, 110 FERC ¶ 61,211, at P 36 (2005); *see also Sea-Land Serv., Inc.*, 738 F.2d 1311, 1317 (1984).

that elected to assume substantial long-term obligations are not similarly situated with respect to potential Uncommitted Shippers that remain free to choose whether and to what extent they will utilize the Project.[10]

14. Enbridge FSP further maintains that the Commission's policy is to honor the tariff rates agreed to by shippers that sign contracts in a valid open season. Citing *CenterPoint Energy Bakken Crude Services, LLC*, Enbridge FSP states that Commission policies concerning Committed Shippers' volume commitments and deficiency payment obligations should govern the transportation services provided on the Project because it has offered its committed rates through the open seasons that gave interested shippers notice and opportunity to sign TSA's accepting the proposed committed rate. Enbridge FSP points out that the shippers that might be interested in signing TSAs are sophisticated parties capable of fully understanding the terms and rates being offered in the TSA.[11]

15. Moreover, continues Enbridge FSP, the Commission has accepted contracts signed by committed shippers in approving proposals to file committed rates as the equivalent of settlement rates under 18 C.F.R. § 342.4(c) (2013), finding that policy to be consistent with "the spirit of section 342.4(c)."[12] Enbridge FSP asserts that in such cases, the Commission also has relied on the fact that the committed rates were offered in well-publicized open seasons during which all interested shippers had notice and an opportunity to enter into transportation service agreements.[13]

16. In addition, states Enbridge FSP, the TSAs give each Committed Shipper the right to extend the initial term of its TSA for one or two successive five-year terms at the then-applicable committed rate. According to Enbridge FSP, the provisions of a Committed Shipper's TSA will govern any extension terms. Enbridge FSP contends that the Commission has recognized that contract extension rights give shippers "the

[10] Enbridge FSP cites *Enbridge Pipelines (Illinois) LLC*, 144 FERC ¶ 61,085, at P 24 (2013).

[11] Enbridge FSP cites *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130, at P 19 (2013) (*CenterPoint*). *See also Seaway Crude Pipeline Company LLC*, 142 FERC ¶ 61,201, at PP 12-13 (2013) (*Seaway*); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at P 21 (2013).

[12] *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,249, at P 18 (2012); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at P 21 (2012).

[13] Enbridge FSP cites *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130, at P 19 (2013).

ability to adjust to changing market conditions without being locked into a long term contract."[14]

17. Enbridge FSP also states that the Commission previously has accepted provisions allowing a contractual right of first offer (ROFO).[15] Enbridge FSP asserts that the ROFO provision at issue in *Enbridge Southern Lights* granted committed shippers the option to secure additional remaining capacity before the pipeline offered the capacity to all prospective shippers in subsequent open seasons.

18. Enbridge FSP states that the terms of its proposed prorationing policy are established in the *pro forma* rules tariff provided to potential Committed Shippers with the TSA. Enbridge FSP emphasizes that it is not proposing to provide firm service to Committed Shippers. Rather, states Enbridge FSP, it will maintain a traditional history-based proration policy under which 90 percent of available capacity will be made available to Regular Shippers and 10 percent will be reserved for New Shippers.

19. Enbridge FSP explains that a New Shipper can become a Regular Shipper by shipping oil in each month during a rolling 12-months base period beginning when the pipeline goes into service. Further, states Enbridge FSP, when a New Shipper has moved oil in 12 months out of the base period and qualifies to be a Regular Shipper, it generally will receive a share of available capacity equal to its average monthly volume over the base period during times when the pipeline is in apportionment. However, continues Enbridge FSP, if the average monthly volumes of all Regular Shippers exceed the capacity available for those shippers (i.e., 90 percent of the pipeline's total available capacity), all Regular Shippers will be prorated so as not to exceed that percent of the pipeline's total available capacity.

20. Enbridge FSP states that a Committed Shipper automatically qualifies to be a Regular Shipper based on its commitment to ship or pay for its committed volumes during the term of its TSA. Additionally, Enbridge FSP states that because a Committed Shipper may ship volumes in excess of its minimum volume commitment, it is entitled to a share of available capacity equal to the greater of its average monthly volume actually shipped.

21. Enbridge FSP argues that in *Enterprise Liquids Pipeline LLC*, the Commission approved a provision that would allow a committed shipper an allocation based on the

[14] *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130, at P 35 (2013).

[15] Enbridge FSP cites *Enbridge Pipelines (Southern Lights) LLC,* 141 FERC ¶ 61,244, at PP 5-6 (2012) (*Enbridge Southern Lights*).

higher of its volume commitment or its actual volume history.[16] Enbridge FSP also contends that in *TransCanada II*, the Commission held that a similar prorationing provision protects shippers that are financially supporting construction of certain facilities from being shut out of those facilities in the event of prorationing.[17]

22. Enbridge FSP submits that its proposal also is consistent with Commission precedent by ensuring that New Shippers have access to at least 10 percent of total capacity.[18] Enbridge FSP emphasizes that the Commission has determined that reservation of 10 percent of capacity for new shippers is sufficient to provide reasonable access.[19] Enbridge FSP states that the Commission also has upheld prorationing policies that require a new shipper to ship volumes in each month of a 12-month base period to become a regular shipper.[20]

23. As a part of its prorationing policy, Enbridge FSP proposes to implement a lottery mechanism that it asserts is similar to the one accepted by the Commission in *Seaway Crude Pipeline Company LLC*.[21] Enbridge FSP states that if the pro rata allocation in a

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[16] *Enterprise Liquids Pipeline LLC*, 142 FERC ¶ 61,087, at P 28 (2013); *see also TransCanada Keystone Pipeline, LP*, 131 FERC ¶ 61,139, at P 12 (2010) (*TransCanada II*); *Enterprise Liquids Pipeline LLC*, 144 FERC ¶ 61,083 (2013).

[17] Enbridge FSP cites *TransCanada Keystone Pipeline, LP*, 131 FERC ¶ 61,139, at P 12 (2010).

[18] Enbridge FSP cites *Sunoco Pipeline L.P.*, 139 FERC ¶ 61,259, at PP 9-11, 14 (2012).

[19] Enbridge FSP cites *Shell Pipeline Company, L.P.*, 141 FERC ¶ 61,017 (2012); *TransCanada Keystone Pipeline, LP*, 131 FERC ¶ 61,139 (2010); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,249 (2012); *Enterprise Liquids Pipeline, LLC*, 142 FERC ¶ 61,087 (2013). *CCPS Transportation, LLC*, 122 FERC ¶ 61,123, at P 14 (2008).

[20] Enbridge FSP cites *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,249, at PP 24, 30 (2012); *Kinder Morgan Pony Express Pipeline LLC*, 141 FERC ¶ 61,180, at PP 28, 32, and 40; *Seaway Crude Pipeline Co. LLC*, 143 FERC ¶ 61,036, at P 8 (2013).

[21] *Seaway Crude Pipeline Co. LLC*, 143 FERC ¶ 61,036 (2013). Enbridge FSP also cites *Enbridge Pipeline (North Dakota) LLC*, 140 FERC ¶ 61,193 (2012); *CCPS Transportation, LLC*, 139 FERC ¶ 61,125 (2012); *Enbridge Pipelines (Illinois) LLC*, 144 FERC ¶ 61,085 (2013).

month based on the number of New Shippers making nominations results in no New Shipper being allocated the minimum tender volume, then it will administer a lottery using a software-generated random process for the total of monthly minimum volume allocations available to New Shippers. Enbridge FSP also explains that a New Shipper will not be allocated capacity through the lottery process if it is either an affiliate of a Regular Shipper or an affiliate of another shipper that received an allocation through the lottery process. Enbridge FSP adds that the proposed lottery process is designed to ensure that pro rata allocations to New Shippers do not become so fractional that each shipper fails to meet the minimum tender volume and therefore would receive zero capacity.

24. Enbridge FSP asserts that in *Seaway*, the Commission found the lottery provision reasonable and observed that "[g]iven that all New Shippers will be subject to the same lottery system, and therefore treated equally, there is no issue of undue discrimination."[22] Additionally, Enbridge FSP states that the Commission recognized that the proliferation of new shippers engaging in speculation was causing "difficult apportionment problems" on the Seaway pipeline[23] and determined that the lottery provision would discourage speculation because "if such an entity wins the lottery it will need to deliver volumes equal to the minimum tender or pay the tariff charge related to the amount of its allocation."[24] Enbridge FSP maintains that it intends to replicate the provisions accepted in *Seaway* in its initial tariff filing in order to avoid the same problem of new shipper proliferation and speculation that has become more prevalent in recent years.

Public Notice and Interventions

25. Notice of the filing was issued October 23, 2013, with interventions and protests due November 22, 2013. Pursuant to Rule 214 of the Commission's regulations,[25] all timely-filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not delay or disrupt the proceeding or place additional burdens on existing parties. The Petition is unopposed.

[22] *Seaway Crude Pipeline Co. LLC*, 143 FERC ¶ 61,036, at P 21 (2013).

[23] Enbridge FSP cites *Seaway Crude Pipeline Co. LLC*, 143 FERC ¶ 61,036, at P 16 (2013).

[24] Enbridge FSP cites *Seaway Crude Pipeline Co. LLC*, 143 FERC ¶ 61,036, at P 19 (2013).

[25] 18 C.F.R. § 385.214 (2013).

Commission Analysis

26. The Commission will grant the rulings requested in the Petition. Granting these rulings will provide regulatory certainty for a significant infrastructure project that will transport crude petroleum from Flanagan, Illinois to Houston, Texas with a peak annual average capacity of up to approximately 600,000 bpd. The Project will provide access to Gulf Coast refinery hubs for additional crude oil production from the Bakken Formation in Montana/North Dakota, the Illinois Basin, and Western Canada. As Enbridge FSP has demonstrated, Commission precedent supports granting the rulings it seeks.

27. Specifically, Enbridge FSP's proposed rate structure and other tariff provisions are consistent with those approved by the Commission for other pipelines. Enbridge FSP will offer 90 percent of the capacity of the Project to Committed Shippers that will ship or pay for the volumes established in their TSA's. Committed Shippers that commit to greater volumes and longer terms receive further reduced rates. Additionally, Enbridge FSP has proposed to charge different rates for the volumes of Committed Shippers that have made ship-or-pay commitments and the Uncommitted Shippers that did not make such commitments. However, Enbridge FSP's proposed reservation of 10 percent of the Project's capacity will allow Uncommitted Shippers sufficient access to the Project, although at rates likely higher than those paid by the Committed Shippers.

28. Enbridge held two public open seasons, which gave all prospective shippers the opportunity to decide whether to become Committed Shippers. As part of the open seasons, Enbridge offered Committed Shippers a storage-in-transit right. This right permits Committed Shippers to divert and park in-transit barrels at Cushing for temporary third-party storage and then to re-originate those barrels into the Project pipeline for final transportation to the Gulf Coast. As Enbridge FSP has stated, the Commission considers uncommitted shippers that do not enter into agreements for committed service, but instead take service on a walk-up basis, are not similarly situated with committed shippers that provide financial support for a proposed pipeline project.

29. Further, Enbridge's proposed allocation methodology is reasonable and not unduly discriminatory. Enbridge proposes a history-based proration policy under which 90 percent of available capacity will be available to Regular Shippers that transport oil in each month of a rolling 12-month period. If the average monthly volume of the Regular Shippers exceeds the 90 percent available to them, all Regular Shippers will be prorated to accommodate their 90 percent of available space. The remaining 10 percent of available capacity will be reserved at all times for New Shippers that have not moved oil on a sufficient basis to become Regular Shippers. Further, while a Committed Shipper automatically qualifies as a Regular Shipper, a New Shipper can also qualify as a Regular Shipper by moving oil in each month during a rolling 12-month period.

30. Consistent with its decision in *Seaway*,[26] the Commission also will accept Enbridge FSP's proposal to implement a lottery mechanism for allocating the total number of monthly minimum volume allocations available to New Shippers. The proposed lottery is intended to ensure that pro-rata allocations to New Shippers do not become so fractional that each shipper fails to meet the minimum tender volume.

31. The Commission also grants Enbridge FSP's request, consistent with precedent, that the Commission treat the Committed Rates as if they were settlement rates under section 342.4(c) of the Commission's regulations, upon the start-up of the Project. Enbridge FSP will however, set and be prepared to support the initial rates for the Uncommitted Shippers at the time the pipeline goes into service, consistent with section 342.4(a) the Commission's regulations.

32. Finally, the Commission approves Enbridge FSP's proposal that, at the end of the initial term of a Committed Shipper's TSA, that shipper will have the opportunity to extend the term of its TSA for an additional five years at the then-applicable committed rate. Additionally, the Commission will approve Enbridge FSP's proposal that a Committed Shipper electing to commit to a 20-year term and agreeing to a committed volume that will be equal to or greater than 100,000 bpd prior to the end of the initial term shall have the right to extend the term of the TSA for a second successive five-year term.

<u>The Commission orders</u>:

The Petition is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[26] *Seaway Crude Pipeline Co. LLC*, 143 FERC ¶ 61,036, at P 16 (2013).