146 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Seaway Crude Pipeline Company LLC Docket No. IS12-226-000

ORDER ON INITIAL DECISION AND REMAND FOR FURTHER ACTION

(Issued February 28, 2014)

1. This order reviews the September 13, 2013 Initial Decision issued in the captioned docket.[1] The Initial Decision addressed the rate structure and rates that Seaway Crude Oil Pipeline Company LLC (Seaway) filed on April 13, 2012 for transport of crude oil from Cushing, Oklahoma to the U.S. Gulf Coast. This order reverses the Initial Decision and remands the proceeding to the presiding Administrative Law Judge for further action consistent with this order.

I. General Background

2. On April 13, 2012, Seaway filed FERC Tariff No. 2.0.0 in order to establish initial rates, effective May 14, 2012.[2] 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, had been agreed to in writing by a non-affiliated shipper who intended to use the service set forth in the tariff.

3. On April 30, 2012, several parties filed motions to intervene in this proceeding, including Apache Corporation, Noble Energy Inc., and Chevron Products Company (jointly "ACN"), Cenovus Energy Marketing Services LTD., 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. Pursuant to

[1] *Seaway Crude Pipeline Company LLC*, 144 FERC ¶ 63,026 (2013) (Initial Decision).

[2] Seaway Crude Pipeline Company LLC, FERC Oil Tariff, Tariffs – LLC; Rates, Rules, & Regs, FERC No. 2.0.0, 2.0.0.

section 343.3 of the Commission's regulations, five protests were filed by various interested parties.

4. On May 11, 2012, the Commission accepted and suspended Seaway's tariff records, subject to refund and conditions, and established hearing procedures to address all issues raised by the filing.[3] In the Hearing Order, the Commission found that Seaway had complied with the Commission's regulations in establishing initial rates (18 C.F.R. § 342.2(b)). However, the fact that protests had been filed meant that Seaway had to submit cost-of-service data in accordance with section 342.2(a) of the Commission's regulations, 18 C.F.R. § 342.2(a), and Order No. 561. The Commission concluded that there was insufficient data in Seaway's filing to resolve the issues raised by Seaway's filing. The Commission therefore established a hearing to investigate all issues raised by the filing, including but not limited to, those initially raised by the protesters.

5. On December 12, 2012, in Docket No. OR13-10-000, Seaway filed a petition for declaratory order (PDO) requesting the Commission declare the tariff rates for committed shippers be governed by Transportation Service Agreements (TSAs) entered into by committed shippers during an open season. On March 22, 2013, the Commission effectively clarified the proceeding as requested, but denied issuance of a declaratory order, because Seaway had failed to follow the Commission's administrative process, and seek relief from the Presiding Administrative Law Judge in the first instance.[4]

6. Specifically, while forswearing a declaratory order, the Commission nevertheless clarified that the terms of a Transportation Service Agreement (TSA) would govern the determination of committed rates over the term of the TSA. The Commission also re-affirmed that if an uncommitted rate is protested, that uncommitted rate must be supported by cost data pursuant to Part 346 of the Commission's regulations. Finally, the Commission affirmed that this policy of honoring the terms of a TSA applied to the subject proceeding in Docket No. IS12-226-000.[5]

7. On September 13, 2013, the Initial Decision issued. Among other things, the Initial Decision ruled that Seaway's committed shipper rates, as established in TSAs, were unjust and unreasonable.

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[3] *Seaway Crude Pipeline Company LLC*, 139 FERC ¶ 61,109 (2012) (Hearing Order).

[4] *Seaway Crude Pipeline Company LLC*, 142 FERC ¶ 61,201 (2013) (Order on PDO).

[5] Order on PDO, 142 FERC ¶ 61,201 at P 13.

8. On October 15, 2013, Briefs on Exception were filed. Concerning the issue of committed rates, Seaway argued that the Initial Decision's ruling was directly contrary to Commission policy as clarified in the March 22, 2013 Order on PDO. Further, Seaway argued that the provision in the TSA allowing for governmental modification is not a basis for lowering the committed contract rates in the TSAs to a cost-of-service level.

9. Also on October 15, 2013, Seaway filed a motion for expedited consideration of the committed rate issue. In addition, October 15, 2013 saw a motion to intervene out of time filed by Plains Marketing LP, a motion to file an amicus brief by the Gas Processors Association (GPA), and a motion to intervene out of time and an amicus brief filed by the Association of Oil Pipelines (AOPL). These filings focused solely on the propriety of the Initial Decision's modification of Seaway's committed rates. Various answers to these motions followed.

10. On November 4, 2013 Trial Staff, Suncor, and Apache/Noble filed Briefs Opposing the Exceptions, including exceptions taken concerning the Initial Decision's treatment of Seaway's committed rates. Suncor argued that the committed rates should be modified because they were inflated by market power and resulted in unjust and unreasonable rates. Apache/Noble claims that a rate that generates excessive returns is a violation of the Interstate Commerce Act's requirement that all rates be just and reasonable. Apache/Noble further claims that it is not possible to calculate cost-based uncommitted rates for Seaway without modifying the committed rates. Trial Staff also argued that Seaway's committed rates violate the just and reasonable requirements of the ICA, that the rates reflect an unjust exercise of market power, and that the TSAs themselves allow for contract modification by the Commission.

II. Discussion

11. The first question addressed in the Initial Decision was whether Seaway's Committed Shipper rates were at issue in the proceeding. The question goes not only to the scope of the proceeding, but to whether, if indeed the committed rates were at issue, rate modification is appropriate. The Initial Decision found that not only were the committed rates at issue, but that these rates were unjust and unreasonable and required substantial modification.

12. The Initial Decision acknowledges that the Commission had made clear in the March 22, 2013 Order on PDO that it was established Commission policy to honor contracts signed by Committed Shippers, and that this policy applied to the instant proceeding.[6] However, the Initial Decision then sets forth arguments to support finding

[6] Initial Decision, 144 FERC ¶ 63,026 at PP 21-22.

that the Committed Rates are at issue in the present proceeding, and finds further that these committed rates must be cost-based rates.[7]

13. The Commission reverses the Initial Decision. As discussed below, the arguments set forth in the Initial Decision for requiring the Committed Rates to be set on a cost basis misconstrue long-held Commission policy, ignore the Commission's pronouncements in the Order on PDO concerning that policy, and are based on a misinterpretation of the Hearing Order. In addition to the just and reasonable level for uncommitted rates, the hearing was intended to explore issues concerning Seaway's rate structure, as well as the open season process in which the negotiations took place. Yet the Commission clearly stated in the Order on PDO, if the process by means of which the contracts were entered into was fair, the Commission will honor those contracts.

A. The Hearing Order

14. The Initial Decision suggests that the Hearing Order required Seaway's committed rates be based on cost-of-service data, and that negotiated rates determined through an open season could give rise to unjust and unreasonable rates absent cost-based support for the committed rates.[8]

15. This interpretation misreads the Hearing Order. While the Hearing Order did require that Seaway provide cost-of-service data to support its tariff filing, it did not require that the committed rates be cost-based. By not first seeking a declaratory order approving its general rate structure prior to filing its tariff, Seaway left the question of rate structure issues, including the open season process for committed shippers, open to litigation.[9] The hearing therefore provided the first opportunity to analyze issues normally addressed in the PDO process. Cost-of-service data is unquestionably necessary in determining the justness and reasonableness of Seaway's uncommitted rates, pursuant to section 342.2.[10] Cost-of-service data may also, in certain instances, be relevant in determining whether certain rate structures proposed by an oil pipeline are just

[7] Initial Decision, 144 FERC ¶ 63,026 at P 26.

[8] *Id.* P 25.

[9] Hearing Order, 139 FERC ¶ 61,109 at P 25.

[10] 18 C.F.R. § 342.2 (2013).

and reasonable.[11] Requiring that an oil pipeline provide cost-of-service data recognizes that such information may be relevant to deciding the issues, but it is not a requirement that all rates must be cost-based rates.

16. In their respective Briefs Opposing Exceptions, Apache/Noble and Suncor both argue that the Initial Decision was correct in ruling that the Hearing Order required Seaway's negotiated contract rates to be cost-based. Yet this argument is contradicted by Apache/Noble and Suncor's own witnesses in this proceeding. ACN witness Crowe testified that uncommitted rates must be cost-based, but makes no mention of the same requirement for the committed rates and makes no mention of modifying the committed rates.[12] Suncor witnesses identified what they term a cost over-recovery based solely on committed rates, yet made no argument for modifying the committed rates.[13] It was not until the possibility of contract modification was raised by Trial Staff in its answering testimony that Apache/Noble and Suncor began to argue in support of such an interpretation of the Hearing Order. Apache/Noble's and Suncor's initial understanding of the Hearing Order, as evident in the parties' testimony, was the proper interpretation.

B. Order on PDO

17. Any question as to the scope of the proceeding, and the Commission's policy on committed rates, was resolved when the Commission issued its Order on PDO. In the Order on PDO, the Commission reiterated the well-established policy of honoring negotiated contract rates, as well as the applicability of that policy to this proceeding.

18. The Initial Decision found that the Commission's statements in the Order on PDO were not dispositive of the issue.[14] This argument centers on a provision of the TSA that

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[11] *See Enbridge Pipelines (Southern Lights) LLC*, 144 FERC ¶ 61,044 (2013) (Examining a rate structure proposal where committed rates were to be set at 50 percent of uncommitted rates. Cost-of-service data was relevant to the factual analysis), *see also Express Pipeline P'Ship*, 75 FERC ¶ 61,303 (1996), *order on rehearing and declaratory order*, 76 FERC ¶ 61,245 (1996) (cost-of-service data relevant in review of rates and rate structure, although neither committed nor uncommitted rates were cost based).

[12] Ex. ACN-1.

[13] Ex. SCN-35, Ex. SCN-1.

[14] Initial Decision, 144 FERC ¶ 63,026 at P 22. The Initial Decision first mischaracterized the Order on PDO, stating that in Paragraph 13 the Commission required Seaway to produce cost-of-service data to justify its rates. Paragraph 13 of the Order on PDO clearly states that if an uncommitted rate is protested, the pipeline must comply with section 342.2(b) of the Commission's regulations to support its

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recognizes the Commission's authority to modify rates. The Initial Decision references this provision, specifically section 6.06, as justification for modifying the contract to require cost-based committed rates as a means of honoring the contract. Section 6.06 of the TSA states:

> Government Modifications. Notwithstanding any other provision of this Agreement to the contrary, the Parties acknowledge that the tariff rates payable for all Services are subject to the approval of and modification by the FERC or any other Governmental Authority having jurisdiction.

Citing this provision, the Initial Decision states that the Commission's policy to honor contracts signed by committed shippers is thus reconcilable with requiring modification of those contracts.[15]

19. There is no question that the Commission has the authority to review and, where appropriate, modify committed rates that it finds to be unjust and unreasonable. This authority is found in the Interstate Commerce Act, and is not dependent on an express contractual provision such as section 6.06. The question presented concerns the proper use of that authority. As discussed below, there has been no showing in the present proceeding that the Commission should exercise its statutory authority and modify the negotiated committed rates of Seaway.

20. While the Presiding Judge states that modifying the contracts is consistent with the Commission's Order on PDO, this is only true under the narrow reading of that order set forth in the Initial Decision. In the Order on PDO the Commission not only reiterated its policy to honor contracts; it did much more, and in fact explicitly defined what honoring such a contract entails.[16] The Commission stated that the agreed upon terms of a TSA govern the determination of committed shippers' rates over the term of the TSA, that the contract the Commission was honoring included the commitment to pay for contract volumes and other agreed to charges, and that the TSAs including the agreed to tariff, rate and rate structure would be upheld and applied during the established terms of the agreement. Finally, the Order on PDO explicitly stated that if an ***uncommitted*** rate was protested, it must be supported by cost data. There is no statement in the Order on PDO that committed rates must also be supported by cost data.

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uncommitted rate by filing cost, revenue and throughput data. Paragraph 13 goes on to state that it is the Commission's policy to honor contracts signed by committed shippers, including the commitment to pay the agreed-to contract rates for the term of the contract.

[15] Initial Decision, 144 FERC ¶ 63,026 at P 22.

[16] *Id*. P 23.

21. How the Initial Decision defines honoring a contract is irreconcilable with the Commission's policy. The fact that the Commission has the authority to modify contract rates does not mean that an exercise of this authority is a means of "honoring" that contract. Given the clear recitation of policy in the Order on PDO, it is simply untenable to find, as the Initial Decision does, that the policy of honoring contracts set forth in that order could be satisfied by completely disregarding the negotiated rate, and instead requiring the rate be cost-based. Such a holding cannot stand if it is shown that the committed rate structure was reasonably offered in a well-publicized way to all potential shippers that might have wished to enter into a Committed Rate TSA.

C. Commission Policy on Committed Rates Established by Contract

22. In addition to arguing that the Hearing Order in this proceeding required Seaway's rates to be cost-based, both the Initial Decision and the Briefs Opposing Exceptions of Apache/Nobel, Suncor, and Trial Staff rest on the argument that any negotiated rate that exceeds a pipeline's cost of service is inherently unjust and unreasonable. This is erroneous, and contradicts the multitude of Commission orders addressing negotiated rates.

23. The Initial Decision states that failure to adjust downward Seaway's committed rates will result in a substantial over-recovery of its cost of service.[17] While the revenue earned from the committed rates may exceed Seaway's cost of service, the use of the term "over-recovery" in the pejorative sense is not appropriate. As discussed above, the Commission does not require a negotiated rate to be justified according to a pipeline's cost of service. The revenues earned through committed rates will be those that the pipeline and shippers agreed would be the value of the committed service.

24. In ensuring that rates are just and reasonable, the Commission is not bound to one ratemaking methodology, and is certainly not bound to cost-of-service ratemaking.[18] In response to the Energy Policy Act of 1992, the Commission comprehensively revised its regulation of the oil pipeline industry. In Order No. 561, the Commission set forth several means by which oil pipeline rates could be established and/or changed while

[17] Initial Decision, 144 FERC ¶ 63,026 at P 26.

[18] *Morgan Stanley Capital Group*, 554 U.S. 527, 532 (2008), *see also Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1501 (D.C. Cir. 1984) (FERC is not required to adhere rigidly to a cost-based determination of rates, much less one that base[s] each producer's rates on his own costs) (internal quotes omitted).

maintaining the statutory mandate that rates be just and reasonable.[19] The methodologies with which a pipeline may set just and reasonable rates include indexing, cost-of-service, market-based rates, and settlement or negotiated rates. Order No. 561 established that settlement or negotiated rates further the policy of encouraging settlements, and the Commission approved the use of negotiated rates as a just and reasonable ratemaking methodology separate and distinct from cost-of-service ratemaking. To argue that the negotiation process results in unjust and unreasonable rates merely due to a divergence between these and cost-based rates is to attack the Commission's entire ratemaking regime. Such collateral attacks do not demonstrate the need to modify Seaway's committed rates. As the Court stated in *Morgan Stanley*:

> A presumption of validity that disappears when the rate is above marginal cost is no presumption of validity at all, but a reinstitution of cost-based rather than contract-based regulation. In no way can (circumstances for modifying a contract) be thought to refer to the mere exceeding of marginal cost.[20]

25. As the Commission held in *Marathon Oil*, there are legitimate reasons why a shipper may pay a negotiated rate above a cost-based recourse rate.[21] This decision, stated the Commission, is that of the customers, and will be considered reasonable. Absent a compelling reason, it would be improper to second guess the business and economic decisions made between sophisticated businesses when entering negotiated rate contracts. There is no evidence that committed shippers are not sophisticated or business savvy; they would have been aware that a cost-based alternative was available and instead made the business decision to become sign TSAs and become committed shippers. Rates that may seem excessive to one party may be acceptable to another. Once these rates are negotiated and accepted, any divergence between the rates and cost-of-service rates is not an issue of over-recovery, no more than negotiating committed rates below cost-of-service rates could properly be termed an under-recovery.

26. The issue raised in this proceeding concerning a divergence between a negotiated rate and a pipeline's cost of service is not unique. In most, if not all, prior proceedings involving a committed and uncommitted rate structure, there is such a divergence. In this case, the negotiated rate is above a cost-of-service rate, whereas in other cases the

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[19] *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. ¶ 30,985, at 30,940 (1993) *aff'd sub nom. Assoc. of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

[20] *Morgan Stanley*, 554 U.S. at 550-51 (internal quotes omitted).

[21] *Marathon Oil Co. v. Trailblazer Pipeline Co.*, 111 FERC ¶ 61,236 (2005).

negotiated rate is below, but a divergence is present nonetheless. The Commission has not required negotiated rates be modified upwards when below a cost-of-service level, and does not automatically require downward modification either.

27. The Commission's statutory directive to determine whether rates are just and reasonable requires that rates fall within the oft-cited "zone of reasonableness," where rates are neither less than compensatory nor excessive.[22] To adopt the argument that rates must equal the level of a pipeline's cost-of-service rate is to replace the zone of reasonableness with a single point, rendering the other ratemaking methodologies adopted in Order No. 561 unjust and unreasonable. To require rate modification when negotiated rates exceed cost-of-service rates, and not when they are lower, is even more problematic. This approach would define the ceiling of the zone of reasonableness as the pipeline's cost-of-service rate, while completely eliminating the zone's floor. Not only would such a policy be patently unfair, but also finds no support in Commission or court precedent concerning just and reasonable rates.

28. Of course, this is not to say that there are no circumstances where a negotiated rate could be found unjust and unreasonable. When reviewing the justness and reasonableness of a contract rate, it is not primarily to relieve one party or another of what they deem an improvident bargain, especially in negotiations involving sophisticated business entities.[23] However, contract negotiations must be held in good faith and not involve fraud or improper conduct. Further, captive customers may require additional protection from rates that are negotiated with an entity that possesses market power.

29. The Commission has always expressed concern that a pipeline with market power may establish an unjustly high rate through negotiation.[24] The Commission therefore established a requirement that an alternative cost-based rate be available to any shipper unwilling or unable to pay the negotiated rate. While the Commission allows negotiated rates to exceed a pipeline's cost of service, the Commission requires that a cost-of-service alternative be available for any party unwilling to pay the negotiated rate.[25]

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[22] *Farmers Union*, 734 F.2d at 1502.

[23] *Verizon Comm., Inc. v. F.C.C.*, 535 U.S. 467, 479 (2002) .

[24] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,959.

[25] *See Marathon Oil Co. v. Trailblazer Pipeline Co.*, 111 FERC ¶ 61,236 (2005).

30. The need for a negotiated rate payable by all, including third parties not involved in the negotiation process, to be justified on a cost basis upon protest is premised on the concern that potential market power could be exercised against shippers who did not agree to the negotiated rate. For initial rates, the rules require that upon protest, a negotiated rate applicable to all shippers must be justified by a cost-of-service filing to mitigate any market power concerns. The concern over market power is also addressed, and alleviated, with the availability of a cost-based uncommitted rate. The availability of a cost-based uncommitted rate allows for any shipper unwilling to pay the negotiated rate to still acquire service. Thus, the entire premise for the cost-of-service filing requirement set forth in section 342.2, as established in Order No. 561, is equally met by requiring a cost-based uncommitted rate to those shippers unwilling to pay committed rates.

31. The availability of a cost-based uncommitted rate is not only consistent with the protections set forth in section 342.2, but also resembles the Commission's requirement for gas pipelines involving recourse rates.[26] Concerning its policy for gas pipelines, the Commission views negotiated rates, combined with a cost-based recourse rate, as providing flexible, efficient, and just and reasonable rates in situations where market-based rates would not be appropriate.[27] Cost of service recourse rates prevent pipelines from exercising market power by assuring that shippers can fall back to cost-based rates if a pipeline attempts to exercise market power and demand excessive prices.[28] This is especially true with common carriage and the anti-discrimination protections of the ICA, where pipelines must charge the same rate to all shippers utilizing the same service.

32. The market power concerns raised by shippers and staff are remedied by providing a cost-of-service alternative to the negotiated rate. This is why the Commission does not require a demonstration of a lack of market power for negotiated rates. It is only when a pipeline's non-cost based rates will be payable by all shippers, such as when a pipeline is granted market-based rate authority, is there a need for the pipeline to affirmatively demonstrate a lack of market power. To justify contract modification on the existence of market power alone completely ignores the existence of separate requirements for negotiated and market-based rates set forth in Order No. 561. To hold otherwise would place an onerous burden on both pipelines and the Commission. A case by case inquiry into the presence and extent of market power in negotiated contracts would inject a new and potentially burdensome element into the analysis, while serving the questionable

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[26] Order on PDO, 142 FERC ¶ 61,201 at P 13, *see also Enbridge Pipelines (Southern Lights) LLC*, 122 FERC ¶ 61,170 (2008).

[27] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996).

[28] *Id*. at 61,240 (1996).

interest of protecting a buyer who voluntarily entered into an agreement with a dominant seller.[29] Further, requiring any pipeline seeking to utilize negotiated rates to affirmatively demonstrate it lacked market power, while requiring pipelines to meet the same burden that would allow them to file market-based rates without a need for a cost-of-service alternative, effectively eliminates negotiated rates as a viable ratemaking methodology. Shippers' and Trial Staff's improper conflation of two entirely separate ratemaking methodologies cannot stand as justification for modifying Seaway's contract rates.

33. One area where contract modification may be appropriate is in certain circumstances where it is necessary to protect third parties, primarily where the negotiated rate places an excess burden on other customers.[30] Such a party would still need to demonstrate that the negotiated rate was unjust and unreasonable.[31] While third parties may in certain instances challenge contract rates, there is no precedent for such challenges when, as in this proceeding, the third party is not affected in any way by the contract rate.

34. Seaway's rate structure does not establish a link between committed and uncommitted rates, and the level of committed rates does not impact in any way uncommitted rates. There is simply no burden on uncommitted shippers regardless of the level of the committed rates. Seaway did set forth a revenue mechanism for offsetting its cost of service with committed revenues, which under certain parties' calculations exceed Seaway's entire cost of service. This mechanism, however, is not sufficient ground for arguing that the TSAs place a burden, or impacts whatsoever, uncommitted shippers. There is no evidence the mechanism would cause uncommitted rates to exceed Seaway's cost of service, or impact uncommitted rates in any way.

35. Several parties argue that due to the revenue generated by Seaway's committed rates, a just and reasonable uncommitted rate cannot be calculated. Yet these same parties provided testimony in this proceeding alleging to do just that.[32] As stated above, the shippers' arguments concerning modification of the committed rates came after they filed their answering testimony. In that answering testimony, the shippers' various

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[29] *Northeast Utils. Svc. Co. v. FERC*, 993 F.2d 937 (1st Cir. 1993).

[30] *Morgan Stanley*, 554 U.S. at 533, *Northeast Utils. Svc. Co.*, 66 FERC ¶ 61,332, 62,082 (1994).

[31] *Northeast Utils. Svc. Co.*, 66 FERC ¶ 61,332 (1994).

[32] Trial Staff's argument concerning committed rates, though erroneous, has been consistent throughout the proceeding.

witnesses calculated what in their minds were just and reasonable uncommitted rates, and they were able to do so without requiring any change to Seaway's committed rates. These parties have not withdrawn this testimony or altered it in any way. As such, the parties own testimony undermines the argument that a just and reasonable uncommitted rate simply cannot be calculated absent committed rate modification.

36. In this proceeding, not only is there no clear showing of harm to third parties from the negotiated rates, there is also a complete absence of any argument from the committed shippers (or from potential shippers that said they were unfairly denied an opportunity to become a committed shipper) that would support modifying the committed rates. Indeed, committed shippers have uniformly opposed any such modification even when faced with the potential for rate modification in their favor. The arguments for rate modification in this proceeding are ultimately predicated on the belief that the revenue generated by the TSA rates voluntarily agreed to by committed shippers are high relative to cost-based rates. In fact, no party even alleged a true harm incurred to them outside of a general distaste over Seaway earning revenues above its cost of service. Not only is this alleged harm insufficient to support contract modification, it runs counter to the general principle that when sophisticated economic actors voluntarily agree to face higher costs, one should be reluctant to modify their contract, unless there is some important policy purpose to be served, or a clearly unreasonable or unduly discriminatory impact on others.

37. In upholding the terms of the TSA, the Commission is not "blindly" honoring these contracts. In setting the matter for hearing, the Commission sought an investigation into the open season and the contract formation process. The question was whether the process was open, transparent, and free of the traditional contract nullifiers such as fraud. The record shows no appearance of impropriety in the negotiation process. There is no question the Commission has the authority to review the TSAs, and that the Commission exercised this power in the present proceeding. There is also no question that the Commission allows for negotiated rates for committed shippers, and these rates will not be determined unjust and unreasonable solely due to a divergence from cost-of-service rates.

38. At bottom, the Initial Decision strains to find a cost-of-service requirement for Seaway's committed rates by grasping at any means necessary to support the argument that it was the Commission's mandate all along. The Commission's well-established policies and precedent, however, made explicitly clear in the Order on PDO, call for a reversal of this ruling. The Initial Decision ignores this precedent, as well as the importance of contracts and contract stability in the oil pipeline industry, without reasonable justification, and therefore cannot be upheld.

III. Scope of Remand

39. It is unclear from the record whether the Presiding Judge's error concerning Seaway's committed rates is a distinct and independent matter from the other issues decided in the Initial Decision such that a reversal in part would be appropriate.

40. Accordingly, the Initial Decision is reversed in whole and remanded to the Presiding Judge to ensure the entire Initial Decision is consistent with the directions set forth in this order.

41. In the Initial Decision, the Presiding Judge requested that the Commission remand the issue of whether Enbridge as a co-owner of a partnership qualifies to record the acquisition premium on its books and, if so, how that translates into carrier property in service for Seaway.[33] The Presiding Judge also requested the Commission derive the proper Average Remaining Life (ARL) or order a compliance filing.[34] The Presiding Judge also recommends the Commission order a compliance filing concerning the appropriate level of *ad valorem* taxes for 2012.[35]

42. These matters were set for hearing by the Commission so that a factual record could be developed and a decision made. Pursuant to Rule 703, a decision will contain a ruling on issues of material law or fact raised in the proceeding. The Initial Decision found that Seaway did not demonstrate that an acquisition premium is appropriate, but the Presiding Judge argued that further proceedings were appropriate on the issue. Two other issues were left completely unresolved. While this remand derives primarily from the Initial Decision's rulings on the issue of committed rates, the Presiding Judge is directed to rule on all material issues of law or fact raised in the proceeding, including those the Presiding Administrative Law Judge asked to be remanded.

43. The Commission at this time sees no good cause to re-open the evidentiary record in this proceeding for the purpose of taking additional evidence. While reopening of the record may be appropriate upon a material change in law or fact, or in the public interest, in the present proceeding no such change has occurred. An error in interpreting long-established Commission policy is not a change in law sufficient to reopen the record under Rule 716. Further, the public interest calls for finality in this proceeding, and no justification has been presented that the proceedings to this point did not provide a

[33] Initial Decision, 144 FERC ¶ 63,026 at P 62.

[34] *Id*. P 211.

[35] *Id*. P 184.

sufficient opportunity for the participants to fully present and support their respective arguments.

44. The revised Initial Decision will be issued in accordance to Subpart G of the Commission's Rules. Upon issuance of the revised Initial Decision, participants may file briefs on and opposing exceptions pursuant to Rule 711 concerning revised findings, and may incorporate by reference briefs on or opposing exceptions previously filed in this proceeding concerning findings unaltered by the Presiding Judge.

The Commission orders:

The Initial Decision issued in this proceeding is reversed and the proceeding is remanded to the Presiding Judge for further action consistent with the directions in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.