152 FERC ¶ 61,204
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Seaway Crude Pipeline Company LLC Docket No. OR15-6-000

ORDER ON MARKET-BASED RATE APPLICATION AND
ESTABLISHING HEARING PROCEDURES

(Issued September 15, 2015)

1. On December 9, 2014, Seaway Crude Pipeline Company LLC (Seaway), pursuant to Part 348[1] of the Commission's regulations, filed an application for authority to charge market-based rates for the interstate transportation of crude oil on its pipeline between Seaway's Cushing, Oklahoma origin market and its U.S. Gulf Coast destination market. The application was protested by multiple parties. As detailed below, the Commission sets all issues properly raised by the protests for hearing.

I. Background

2. The Seaway Pipeline is a common carrier crude oil pipeline subject to the Commission's jurisdiction under the Interstate Commerce Act (ICA). Seaway is owned 50 percent by Enterprise Product Partners L.P. (Enterprise) and 50 percent by Enbridge Inc. (Enbridge). The Seaway system consists primarily of an approximately 665 mile, 30-inch and 36-inch diameter pipeline that provides north-to-south transportation of crude oil from its origin at Cushing, Oklahoma to destinations in Texas. Seaway is connected to the Enterprise crude oil facilities as well as other terminals in Cushing, which gives Seaway access to all crude oil delivered to Cushing. Seaway has 5 destination points in Texas: (1) Seaway's Freeport, Texas terminal; (2) Enterprise's terminal near Katy, Texas; (3) the Phillips 66 Refinery at Sweeny, Texas; (4) Enterprise's ECHO crude oil storage facility in Houston, Texas; and (5) Nederland, Texas in the Beaumont/Port Arthur, Texas area. Seaway also includes two lateral pipelines: (1) a 65-mile, 36-inch lateral from Freeport, Texas to Enterprise's ECHO crude oil storage

[1] *See* 18 C.F.R. Part 348 (2015).

facility in Houston, and a 100-mile, 30-inch pipeline from ECHO to Nederland, Texas, in the Beaumont/Port Arthur, Texas area. Seaway also recently completed and placed into service an approximately 500-mile, 30-inch "loop" line from Cushing to the Freeport Area.[2] Seaway currently transports a variety of heavy crude oils that originate in Oklahoma and the Rocky Mountain and Western Canada crude oil production areas.

II. Description of Filing

3. Seaway is requesting authority to charge market-based rates at its Cushing origin market and its U.S. Gulf Coast destination market. Seaway argues that market-based rate authority will permit greater flexibility in setting rates than would otherwise be available under the Commission's indexing and cost-of-service ratemaking regulations.[3] Seaway claims that it does not have market power in its origin and destination markets and would not be able to profitably maintain its transportation rates above competitive levels for a significant period of time.[4]

4. In its Application, Seaway states that in order to determine whether an oil pipeline has the ability to profitably maintain prices above competitive levels for a significant period of time, the Commission requires oil pipelines to: (1) define the relevant product market, (2) define the relevant geographic market, (3) identify the competitive alternatives within the geographic market, and (4) compute the market concentration and other market power measures for the relevant markets.[5]

A. Product Market

5. Seaway states that the relevant product market is the transportation of all crude oil. Seaway argues that this definition is appropriate because Seaway is capable of transporting multiple types of crude oil and currently transports light, sweet crude oil (e.g., West Texas Intermediate or "WTI"), heavy, sour Canadian crude oil (e.g., Western Canadian Select or "WCS") and light, sour crude oil (e.g., West Texas Sour or "WTS") . Additionally, as explained by Seaway, the pipeline's competitors can transport/supply all

---

[2] Application of Seaway Crude Oil Pipeline Company LLC For Authorization to Charge Market-Based Rates, Docket No. OR15-6-000 (Dec. 9, 2014) (Application).

[3] Application at 3.

[4] Application at 4-5.

[5] Application at 8, citing *Enterprise TE Products Pipeline Co. LLC*, 146 FERC ¶ 61,157, at PP 7, 17 (2014).

types of crude oil (supply-side substitution) and different types of crude oil are substitutes for each other within refineries (demand-side substitution).[6] The relevant product market therefore, according to Seaway, should be defined as all crude oil, rather than any particular type of crude oil.

B. Origin Market

6. As stated by Seaway, the Commission requires an oil pipeline seeking to charge market-based rates to describe the geographic markets, both origin and destination, in which it seeks to make a showing that it lacks significant market power.[7] Seaway states that it has three origin markets based on where the oil shipped on the pipeline is produced. The pipeline argues that its origin market is appropriately defined geographically to include the Cushing production area as well as the Western Canada and Rocky Mountain production areas from which crude oil is delivered to Cushing and subsequently moved on Seaway.

C. Destination Market

7. Seaway argues that its geographic destination market is appropriately defined as the entire Gulf Coast refining area. Seaway argues that the Gulf Coast refining area is the area from Corpus Christi, Texas to Mobile, Alabama. Seaway states that the entire refining area is connected by pipelines and waterborne movements and it is therefore appropriate to use the entire Gulf Coast refining area as the destination market. Seaway further argues that even if the Commission decides to define the destination market more narrowly the market should still cover Houston to Lake Charles as that area covers all of Seaway's physical delivery points.

D. Competitive Alternatives

8. Seaway claims it faces numerous competitors at its Cushing origin market, which includes both the Oklahoma and Permian Basin/West Texas crude oil production areas. Seaway also states that shippers with crude oil at Cushing have numerous alternatives, including processing crude oil at refineries within the Cushing origin market and moving their crude oil out of the Cushing origin market via pipeline and rail. Seaway asserts that there are 9 refineries in the Cushing origin market. In addition, there are 13 pipelines of which there are two direct competitors to Seaway, that transport from Cushing to the Gulf

---

[6] Application at 8-9.

[7] Application at 9.

Coast and that both of those pipelines have greater capacity than Seaway. Also, there are 9 rail loading facilities that transport crude oil out of the Cushing origin market. Moreover, crude oil can move from the Cushing origin market by truck to a barge terminal facility 60 miles from Cushing, from which it can be transported by barge to the U.S. Gulf Coast. Seaway concludes that there are numerous alternatives to Seaway in the Cushing origin market, and so it clearly could not exercise market power in that market.

9. Seaway goes on to argue that there are also numerous competitive alternatives for Western Canada area producers and shippers. Seaway states that there are 8 refineries in Western Canada, 47 refineries in the United States (excluding the Gulf Coast) that use Canadian oil and Western Canadian producers/shippers have access to numerous pipeline, rail and waterborne transportation alternatives.

10. Seaway also argues that there are competitive alternatives in the Rocky Mountain production region. Seaway states there are 16 refineries in the Rocky Mountain area that source Rocky Mountain crude. Additionally, there are 13 refineries in the Upper Midwest that may use Rocky Mountain Crude. Finally, Seaway posits there are also numerous rail, pipeline and waterborne transportation alternatives (to Seaway) available to Rocky Mountain production area shippers and producers.

11. Finally, Seaway argues that there is extensive competition at its destination market. Seaway states that waterborne deliveries by tanker and barge account for about 40% of crude oil deliveries in both the entire Gulf Coast and Houston to Lake Charles markets. Seaway further argues that there are 14 rail unloading facilities in the entire Gulf Coast and 4 in the Houston to Lake Charles market. Seaway also mentions there are extensive pipeline facilities in both markets and significant local production.

E. Market Metrics

12. Seaway claims its origin and destination markets have low level of concentration, low market share and significant excess capacity. For its origin market of Cushing, Seaway calculates an average HHI of only 674 and an effective capacity-based market share of 8.7%. For the Western Canada production area the average HHI, according to Seaway, is 388 with an effective capacity-based market share of 4.0%. For the Rocky Mountain production area, Seaway claims an average HHI of 462 with an effective capacity-based market share of 6.5%. Additionally, Seaway states there is excess capacity in the market. For its destination market, Seaway also claims it lacks market power. The HHI in the market, as calculated by Seaway, is 155 if the entire Gulf Coast is used and 293 if the Houston to Lake Charles area is used as the destination market. Moreover, Seaway’s market share in the destination markets is 4.0% and 5.8% respectively.

13. Finally, Seaway argues that there are no serious barriers to entry into the relevant markets, and that there is significant excess capacity which demonstrates that Seaway does not possess market power in the relevant markets.

III. Protests

14. Pursuant to section 348.2(g) of the Commission's regulations,[8] interventions or protests to the application were required to be filed by February 9, 2015. Protests were filed by Suncor Energy Marketing Inc. (Suncor), Phillips 66 (Phillips), Airlines for America (Airlines), Valero Marketing and Supply Company (Valero), the Canadian Association of Petroleum Producers (CAPP) and the Liquids Shippers Group (Liquid Shippers).[9] The protestors all requested either summary disposition or an evidentiary hearing.

15. The Liquid Shippers argue that Seaway's petition for market based rates is a transparent attempt to avoid the consequences of its 2012 rate case which is currently pending before the Commission. The Liquid Shippers further argue that Seaway is substantially over-recovering its costs and if it were to be given market-based rates it would allow Seaway to exploit the market. Furthermore, the Liquid Shippers state that Seaway's assertions that it lacks market power are false. The Liquid Shippers argue it would be a flagrant violation of the just and reasonable rate requirement of the ICA to allow Seaway to qualify for market based rates to continue to over-recover its costs. Finally, the Liquid Shippers believe giving Seaway market based rates would set a harmful precedent, allowing pipelines to circumvent the ICA, simply by showing they do not have market power.

16. CAPP argues that Seaway's application is riddled with deficiencies. CAPP states that the proposed origin market used by Seaway is too large. CAPP further states that the market share and HHI metrics used by Seaway have not been endorsed by the Commission. CAPP argues that Seaway's origin HHI is actually above 2,500 and therefore does not qualify for market based rates. Also, CAPP mentions that Seaway does not properly account for alternatives that are joint ventures or alternatives that are owned or controlled by the partners in Seaway. Furthermore, CAPP argues that there are many factual issues with Seaway's claimed alternatives to include that Seaway does not take into account the directional movements of the alternative pipelines or provide proof

[8] 18 C.F.R. Part 348.2(g) (2015).

[9] The Liquid Shippers group consists of Anadarko Petroleum Corp., Apache Corp., ConocoPhillips Co., Marathon Oil Co., and Noble Energy, Inc.

that the refineries mentioned actually utilize crude from the production areas as Seaway claims.

17. The Airlines and Valero state that they are protesting due to the fact that the Commission has not yet acted on the Requests for Rehearing in Docket OR12-4-001. They argue that in Docket OR12-4-000, the Commission created new standards for reviewing market-based rate cases that are inappropriate and that Seaway's application should be rejected, or a bifurcated hearing should be given to determine the correct standard to review market-based rate applications – before reviewing Seaway's instant application.

18. Suncor and Phillips argue that Seaway's analysis is erroneous in that Seaway uses overly broad product markets and origin and destination markets. Suncor and Phillips also state that Seaway makes false assumptions about the competitive alternatives to Seaway. They argue that Seaway does not consider whether the alternatives it contemplates are constrained or even actually available to prospective shippers. Suncor and Phillips continue by arguing that Seaway uses erroneous statements of competitive rates by using rail. Finally, they state that Seaway is using misleading facts in its arguments for excess capacity and the potential for entry.

IV. Answer to Requests for Summary Disposition

19. On February 24, 2015, Seaway filed a response to the protestor's requests for summary disposition. Seaway states that its request clearly complies with Commission policies regarding applications for market based rates. Seaway argues the protestors are actually protesting Commission policy rather than challenging the merits of Seaway's applications and therefore those protests cannot be used to deny Seaway's application. Finally, Seaway posits that the Commission has a complete record before it and the Commission does not need to set Seaway's application for hearing.

V. Discussion

20. The Commission grants the unopposed motions to intervene of Suncor, Phillips, CAPP and the Liquids Shippers Group. In its Response to Requests for Summary Disposition, Seaway argued that the protests of the Airlines and Valero were procedurally improper and should be dismissed.[10] The Commission denies the motions to intervene from the Airlines and Valero as a result of the Commission issuing a contemporaneous order on rehearing in Docket No. OR12-4-001. The arguments set forth by the Airlines

---

[10] This argument serves as an opposition to the Airlines and Valero's motion to intervene under 18 C.F.R. § 285.214(c)(2) (2015).

and Valero have been properly raised in rehearing requests in Docket No. OR12-4-001. As the Commission is issuing its Order on Rehearing in that docket concurrently with this order, the interests of neither the Airlines nor Valero as set forth in their motion to intervene will be directly affected by the outcome in the present docket.[11]

21. While the Commission has historically denied standing to entities that are not current or prospective shippers on a pipeline, especially when the interventions are seen as vehicles to raise arguments more appropriately addressed in other proceedings,[12] standing in oil pipeline proceedings is based on all the facts and circumstances of the particular proceeding.[13] The Airlines and Valero specifically state that the reason they are seeking intervention is because the Commission has not acted on the pending requests for rehearing concerning the Rehearing Order.[14] As the Order on Rehearing will issue concurrently with the present order, the motion to intervene of the Airlines and Valero would appear moot.[15]

22. The Commission's preliminary analysis indicates that the remaining protests raise numerous issues concerning Seaway's request for market-based rates which cannot be resolved on the basis of the record at this point. Therefore, the Commission will deny the requests for summary disposition and set the application for hearing.

---

[11] *See* 18 C.F.R. § 385.214(b)(ii) (2015).

[12] *See Enbridge Energy Ltd. P'Ship*, 152 FERC ¶ 61,047, at PP 27-30 (2015). The Commission notes that while the applicable Commission Regulations, *see* 18 C.F.R. § 343.2 (2015), address standing in relation to a tariff filing which an application for market-based rate authority is not, intervenors must still demonstrate a substantial economic interest in the market power determination in order to be granted party status.

[13] *Enbridge Pipelines (Southern Lights) LLC*, 134 FERC ¶ 61,067, at P 11 (2011).

[14] Joint Motion to Intervene, Comment and Protest of Airlines for America and Valero Marketing and Supply Co., filed Feb. 9, 2015 at P 2.

[15] The Commission therefore need not examine whether the Airlines and Valero have established a substantial economic interest in Seaway's market-based rate application to warrant party status. *See* 18 C.F.R. § 343.2 (2015); *see also Shell Pipeline Co. LP*, 148 FERC ¶ 61,208 (2014) (addressing the requirements for standing of a non-current shipper in a tariff proceeding).

The Commission orders:

(A) Pursuant to the authority conferred on the Commission by the ICA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the ICA, a public hearing shall be held concerning the protests against Seaway's market-based rate application.

(B) A Presiding ALJ, to be designated by the Chief ALJ within 15 days of this order, shall within 15 days of the date of the Presiding ALJ's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The Presiding ALJ is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.