

142 FERC ¶ 61,201  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Seaway Crude Pipeline Company LLC

Docket No. OR13-10-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued March 22, 2013)

1. On December 12, 2012, Seaway Crude Pipeline Company LLC (Seaway) filed a petition for a declaratory order requesting the Commission affirm its policy of honoring the tariff rates agreed to by shippers who sign contracts in a valid open season. As discussed below, the Commission denies the requested declaratory order, but reaffirms its policy with regard to committed and uncommitted rates.

**Background**

2. The Seaway Pipeline is a crude oil pipeline extending from Cushing, Oklahoma to Seaway's Jones Creek Terminal near Freeport, Texas. Prior to 2012, the Seaway Pipeline operated a northbound service, transporting crude oil from the Gulf Coast to Cushing. The reversed Seaway Pipeline went into service in May 2012. As relevant to the instant petition for declaratory order, on April 13, 2012, Seaway filed to establish initial rates for its reversed pipeline project in Docket No. IS12-226.<sup>1</sup> The filing was protested and the Commission set the matter for hearing.

3. The dispute in the instant docket arose on November 30, 2012, when Commission Trial Staff (Trial Staff) filed Answering Testimony in the Docket No. IS12-226

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<sup>1</sup> The background of Seaway's tariff proceeding in Docket No. IS12-226 is set forth in the order setting that proceeding for hearing, *Seaway Crude Pipeline Co. LLC*, 139 FERC ¶ 61,109 (2012) (Hearing Order). As relevant here, Seaway proposed uncommitted and committed rates for movements on the reversed Seaway Pipeline. Following two open seasons, committed shippers signed Transportation Service Agreements (TSAs) prior to April 13, 2012, setting forth the content of rates for service with Seaway based on a contract term of either five or ten years, committed volumes, and an additional power charge.

proceeding. In its Answering Testimony, Trial Staff addressed the issue of rate design and argued Seaway's proposed committed and uncommitted rates were not cost-based.<sup>2</sup> Consequently, Trial Staff proposed new cost-based rates for both the committed and uncommitted shippers that would reduce the committed rates by nearly eighty percent.<sup>3</sup>

4. In response to Trial Staff's proposal, on December 12, 2012, Seaway filed a petition for declaratory order in the present docket. Seaway requests the Commission to "promptly affirm that its established policy of honoring the tariff rates agreed to by shippers who sign contracts in a valid open season applies equally to Seaway's Committed Shippers."<sup>4</sup> Seaway contends an order granting the petition is necessary to provide certainty to Seaway's owners as they proceed with major investments to expand and improve the Seaway Pipeline in reliance on the TSA commitments made by the Committed Shippers. Seaway also contends an order affirming the Commission's policy will reassure the oil pipeline industry as a whole that the Commission supports contracts fairly offered to all potential shippers to finance and construct new and expanded oil pipelines.

#### **Notice, Interventions and Protests**

5. Public notice of the Petition issued on December 12, 2012, with interventions and protests due on or before January 7, 2013. Numerous interventions and protests to Seaway's petition were received.

6. Apache Corporation, Chevron Products Company and Noble Energy, Inc. (ACN) oppose Seaway's petition arguing that it is inconsistent with the Commission's regulations, policies, and precedent.<sup>5</sup> ACN criticizes Seaway for not providing a cost-based justification for its committed rates, and also objects to Seaway filing a petition for declaratory order during a hearing. Suncor Energy Marketing Inc. (Suncor) opposes Seaway's petition, similarly objecting to Seaway's committed and uncommitted rates in the hearing in Docket No. IS12-226. Suncor argues that there is credible evidence that Seaway's committed rates are unjust and unreasonable.

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<sup>2</sup> Prepared Answering Testimony of Meagan K. McComb, Ex. No. S-14 at 13.

<sup>3</sup> Ex. No. S-14 at 18-19.

<sup>4</sup> Petition at 1.

<sup>5</sup> ACN Protest at 4.

7. The Association of Oil Pipelines (AOPL), the Gas Processors Association (GPA), and Plains Marketing, L.P. argue that Trial Staff's position on committed rates would have a destabilizing impact on the future construction of needed pipeline infrastructure.<sup>6</sup> These parties therefore support the Commission acting on the instant petition.

8. Chesapeake Energy Marketing, Inc. (CEMI) also filed a motion to intervene and comments.<sup>7</sup> CEMI states it is a party to a TSA with Seaway. CEMI states it did not expect the Commission to take action to reduce Seaway's committed rates. Likewise, CEMI did not expect the Commission to take action allowing Seaway to increase its committed rates except as expressly provided in the TSA.

9. Trial Staff also filed comments opposing Seaway's petition. Trial Staff argues that Seaway inappropriately bypassed the administrative litigation process by failing to file either a motion to strike testimony or a motion for summary disposition for action by the presiding judge. Trial Staff reiterates its position that the Commission should adjust downward Seaway's committed rates, and further argues the committed rates are essentially market-based rates, and the Commission rejected such rates in a prior proceeding.

10. On January 17, 2013, Seaway filed reply comments.<sup>8</sup> In reply, Seaway reiterates its arguments against Trial Staff's position and for the petition for declaratory order. Seaway also argues that the Commission's policy concerning the honoring of contract rates does not depend on the filing of a petition for declaratory relief, and that the Commission has unquestioned statutory authority, in appropriate circumstances, to override the provisions of private contracts.

## **Discussion**

11. The Commission's regulations provide a process for a litigant to proffer its objection to testimony filed in a proceeding. A litigant may file a motion to strike or ask the presiding judge to certify a question to the Commission to clarify a law, policy or

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<sup>6</sup> See, e.g., GPA Comments at 3-4.

<sup>7</sup> CEMI is a party to the Docket No. IS12-226 proceeding, and there filed comments in support of Seaway's tariff. Hearing Order, 139 FERC ¶ 61,109 at P 8.

<sup>8</sup> The Commission grants leave and accepts Seaway's reply comments, as they provide the Commission a full understanding of the issues in this proceeding and will assist in our decision making.

procedure.<sup>9</sup> If Seaway was then dissatisfied with the presiding judge's ruling it might have been able to file an interlocutory appeal with the Commission as to the presiding judge's ruling.<sup>10</sup> Seaway failed to follow the Commission's administrative process in this regard when it filed its petition for declaratory order. Therefore, the Commission will deny Seaway's petition.

12. Nonetheless, to remove uncertainty, the Commission will reiterate its policy as to committed rates. Seaway's petition requests the "Commission [to] promptly affirm that its established policy of honoring tariff rates agreed to by shippers who sign contracts in a valid open season applies equally to Seaway's Committed Shipper."<sup>11</sup> The Commission hereby affirms that its regulations allow an oil pipeline to charge a negotiated rate if it is agreed to by at least one unaffiliated shipper. Although the Commission's regulations do not provide specifically for negotiated initial rates with agreed-to future rate changes, the Commission has ruled that such contracts "are consistent with the spirit of section 342.4(c)" of the Commission's regulations.<sup>12</sup> The Commission in this regard has allowed pipelines to request waiver of filing the verified statement, reasoning that all the committed shippers subject to the committed rate schedule have agreed to pay the associated rate over the period of their contracts.<sup>13</sup>

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<sup>9</sup> 18 C.F.R. §§ 385.212, 385.714 (2012).

<sup>10</sup> 18 C.F.R. § 385.715 (2012).

<sup>11</sup> Petition at 1 and 8.

<sup>12</sup> *Express Pipeline P'shp*, 76 FERC ¶ 61,245, at 62,258-59 (1996) (*Express*). See also *Kinder Morgan Pony Express Pipeline LLC and Belle Fourche Pipeline Co.*, 141 FERC ¶ 61,180, at P 21 (2012) (*Kinder Morgan*); *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167 (2010).

<sup>13</sup> Section 342.4(c) of the Commission's regulations provides that:

[a] filing pursuant to this section must contain a verified statement by the carrier that the proposed rate change has been agreed to by all current shippers.

The Commission stated in *Express*, 75 FERC at 62,258 that:

[t]he Commission will grant the request for waiver, so that prospective shippers may be substituted for current shippers in the verified statement required by section 342.4(c). The Commission will also grant the request for waiver, that Express not be required to re-apply for alternative rate

(continued...)

13. The Commission has also clarified that “the agreed-upon terms of [a TSA] will govern the determination of the committed shippers’ rates over the term of the TSA, and that the rate design embodied in the TSA used to determine both the committed and uncommitted rates will be upheld and applied during the term of the TSA,” with one condition.<sup>14</sup> If an uncommitted rate is protested, the pipeline must comply with section 342.2(b) of the Commission’s regulations to support its uncommitted rate by filing cost, revenue, and throughput data supporting such rate as required by Part 346 of the Commission’s regulations. The Commission also recognized that an “uncommitted rate is not unlike a gas pipeline’s recourse rate. It will be available to all shippers who choose not to select [the pipeline’s] negotiated committed rate.”<sup>15</sup> The Commission has also recently reiterated its “policy of honoring contracts signed by committed shippers, . . . , which include the commitment to pay for contract volumes and other agreed-to charges for the terms of the contracts.”<sup>16</sup> In doing so, as it does in the instant proceeding, the Commission affirmed that “agreements executed by . . . committed shippers (including the agreed-to tariff, rate, and priority service structure) would be upheld and applied during the established terms of the agreements between the pipeline and the shippers that made volume commitments during the open season.”<sup>17</sup>

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treatment under sections 342.1 and 343.4(c) each time the agreed-to rate adjustment exceeds the generic index under section 342.3. Express does not have current shippers because its pipeline has not been constructed. Its statement that all of its term shippers have agreed to the two percent adjustment, while not consistent with the letter of section of 342.4(c), is certainly consistent with the spirit of that section.

*See also TransCanada Keystone Pipeline, LP*, 135 FERC ¶ 61,259, at P 8 (2011) (The requirement for the verified statement makes sense when all current shippers have agreed to specific rates but there is no long-term contractual agreement, such as the TSAs, that bind shippers to future rate changes.).

<sup>14</sup> *Id.* P 13. *See also Magellan Pipeline Company, L.P.*, 138 FERC ¶ 61,177, at P 14 (2012) (Where the Commission reasoned “[a]s stated by the courts, ‘[t]he core concern in the nondiscrimination area has been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities in those key variables exist.’”).

<sup>15</sup> *Id.*

<sup>16</sup> *See Kinder Morgan*, 141 FERC ¶ 61,180 at P 21.

<sup>17</sup> *Id.* (citing *Express*, 76 FERC at 62,254).

The Commission orders:

Seaway's Petition for declaratory order is denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.