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

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

West Texas Gulf Pipe Line Company LLC Docket No. OR19-22-000

ORDER ON MARKET-BASED RATE APPLICATION AND ESTABLISHING HEARING PROCEDURES

(Issued February 21, 2020)

1. On April 30, 2019, pursuant to Part 348 of the Commission's regulations,[1] West Texas Gulf Pipe Line Company LLC (West Texas Gulf) filed an application for authorization to charge market-based rates for the transportation of crude oil from the Permian Basin production region to the Gulf Coast and the East Texas region surrounding Tyler, Texas (Application).[2] The Application also seeks market-based ratemaking authority for the intra-market transportation of crude oil within the destination markets. Protests were filed by Delek/Lion[3] and Husky/BP.[4] As discussed below, we find that West Texas Gulf lacks market power in the Permian Basin origin market. We set for hearing the issue of whether West Texas Gulf has the ability to exercise market power in the Gulf Coast and Tyler destination markets.

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[1] 18 C.F.R. pt. 348 (2019).

[2] On May 13, 2019, West Texas Gulf filed an errata with a corrected version of Statement F of the Application that includes headers, page numbers, arrows, and other metadata that had been inadvertently excluded from Exhibit Nos. F.1, F.3, F.4, and F.5 in Docket No. OR19-24-000. We incorporate the errata filing into the record in the instant Docket No. OR19-22-000.

[3] Delek Refining, LTD and Lion Oil Trading & Transportation, Inc. are shippers on the West Texas Gulf system to supply their refineries in Tyler, Texas and El Dorado, Arkansas, respectively. Delek/Lion Protest at 3.

[4] Husky Marketing & Supply Company and BP Products North America Inc. are shippers of light and medium crude oil on the West Texas system. Husky/BP Protest at 5.

I. Description of Filing

2. West Texas Gulf transports crude oil from origins in the Permian Basin to destinations in the Gulf Coast and East Texas regions. West Texas Gulf states that it currently transports the most common grades of crude oil produced in the Permian Basin (West Texas Intermediate, West Texas Sour, and West Texas Intermediate Premium). West Texas Gulf adds that it holds itself out to transport, and has the ability to transport, other grades of crude oil. The Application seeks authorization to charge market-based rates in the proposed Permian Basin origin market, Gulf Coast destination market, and Tyler destination market. Pursuant to section 348.1 of the Commission's regulations, the Application presents information regarding product and geographic market definitions, market power measures, and descriptions of the carrier's services. West Texas Gulf claims that these markets are competitive and that it lacks market power in them. West Texas Gulf further argues that market-based rate authority will provide ratemaking flexibility to respond to changes in market conditions and allow West Texas Gulf to compete more effectively against transportation alternatives in the proposed markets. West Texas Gulf provides market concentration calculations using the Herfindahl-Hirschman Index (HHI),[5] market share percentages, and excess-capacity ratios to support its position that it lacks market power.[6]

A. Product Market

3. West Texas Gulf contends that the relevant product market in the origin market is the absorption of all grades of crude oil and that the relevant product market in the destination markets is the supply of all grades of crude oil.[7] West Texas Gulf expert Dr. Robert Van Hoeke supports this position on the basis that: (1) the grades of crude oil that West Texas Gulf currently transports are the most common grades of crude oil produced in the Permian Basin origin market and are the same grades of crude oil that are transported by West Texas Gulf's competitors, (2) most, if not all, refineries in the destination markets have the ability to process many grades of crude oil, including those transported by West Texas Gulf and its competitors, and (3) different grades of crude oil

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[5] HHI measures the likelihood of a pipeline exerting market power in concert with other sources of supply. HHI equals the sum of the squared market shares of all competitors in the market. The HHI can range from just above zero, where there are a very large number of competitors in the market, to 10,000, where the market is served by a monopolist.

[6] Application at 3-5.

[7] *Id.* at 11.

tend to track closely in price, on a relative basis, demonstrating cross-elasticity of demand, or ease of product substitution.[8]

B. Geographic Markets

4. West Texas Gulf asserts that the proposed origin market is the Permian Basin production region, plus the adjacent Taylor County in which some of West Texas Gulf's facilities are located.[9]

5. According to West Texas Gulf, the proposed Gulf Coast destination market comprises the U.S. Gulf Coast refining area, which encompasses two refining districts as defined by the Energy Information Administration (EIA): (1) the Texas Gulf Coast refining district, plus Live Oak County, Texas, and (2) the Louisiana Gulf Coast refining district. West Texas Gulf claims that the Gulf Coast destination market has 35 refineries that are capable of consuming 8.3 million barrels per day (bpd) of crude oil. West Texas Gulf asserts that the use of the combined Texas and Louisiana Gulf Coast refinery areas as a destination market is appropriate because it includes all competing alternatives to which end-users could reasonably turn in order to avoid a supracompetitive price increase by West Texas Gulf. West Texas Gulf contends that: (1) the Gulf Coast destination market is a recognized area of crude oil consumption and refining that encompasses the market in which competition for its transportation service occurs, (2) the market captures both direct and indirect alternatives to West Texas Gulf, allowing for an appropriately dynamic analysis, and (3) the U.S. Gulf Coast refinery area is a well-established market definition that has previously been accepted by the Commission when analyzing market power measures.[10]

6. West Texas Gulf states that the proposed Tyler destination market includes the counties located within a 50-mile radius of the Delek Refinery in Tyler, Texas, plus the adjacent Freestone and Navarro Counties. West Texas Gulf claims that a 50-mile radius is a conservative estimate of the distance that trucks can travel to supply the Delek Refinery with crude oil that is produced in the local market. West Texas Gulf asserts that Freestone and Navarro Counties are appropriately included because crude oil shipments on the West Texas Gulf System to Wortham, Texas (in Freestone County) and crude oil shipments on the intra-market Wortham-to-Tyler Pipeline owned by West Texas Gulf's affiliate Sunoco Pipeline, L.P. (Sunoco)[11] from Corsicana, Texas (in Navarro County),

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[8] *Id.* at Statement B.

[9] *Id.* at 13.

[10] *Id.* at 13-14.

[11] *Id.* at 2 n.7, 15.

are subsequently transported to the Delek Refinery. West Texas Gulf claims that the Delek Refinery could turn to these sources for crude oil if a market participant, such as West Texas Gulf, attempted to raise its rates above the competitive level. West Texas Gulf contends that the proposed Tyler destination market appropriately captures both direct and indirect alternatives to the West Texas Gulf System, allowing for an appropriately dynamic analysis.[12]

C. Competitive Alternatives

7. West Texas Gulf asserts that it faces significant competition in the proposed markets. West Texas Gulf claims that the competitive alternatives include:

- In the Permian Basin origin market – consumption by local refineries, other outbound pipelines, and outbound railroads.
- In the Gulf Coast destination market – local production, waterborne deliveries, rail deliveries, and other inbound pipelines.
- In the Tyler destination market – local production and other inbound pipelines.[13]

8. Regarding the proposed origin market, West Texas Gulf states that local oil wells produce 3.4 million bpd of crude oil and that 20 pipelines owned by 11 separate companies with a combined capacity of 6.8 million bpd transport crude oil out of the defined origin market. West Texas Gulf asserts that rail facilities are capable of loading approximately 0.4 million bpd of crude oil for transportation out of the market.[14]

9. Regarding the proposed Gulf Coast destination market, West Texas Gulf asserts that 35 refineries in the market consume approximately 8.3 million bpd of crude oil. West Texas Gulf states that the West Texas Gulf System is one of 23 pipelines owned by 18 different companies that deliver crude oil into the market, with a combined capacity of 9.0 million bpd. West Texas Gulf further contends that oil wells produce 2.0 million bpd of crude oil and that refineries may also source their crude oil from inbound rail deliveries or from international origins via waterborne vessels. According to West Texas Gulf, in 2018 waterborne deliveries into the market were 2.8 million bpd and inbound rail deliveries were approximately 80,000 bpd.[15]

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[12] *Id.* at 14.

[13] *Id.* at 16-17.

[14] *Id.* at 17-18.

[15] *Id.* at 18-19.

10. Regarding the proposed Tyler destination market, West Texas Gulf states that the primary consumer of crude oil is the Delek Refinery, which consumed approximately 80,000 bpd in 2018. West Texas Gulf asserts that it faces competition from local production (approximately 30,000 bpd) and inbound crude oil pipelines. West Texas Gulf claims that it is one of eight pipelines, owned by five different firms capable of delivering crude oil to the market. West Texas Gulf contends that the combined local production plus effective inbound pipeline capacity is 260,007 bpd.[16]

D. Market Power Measures

11. West Texas Gulf asserts that it lacks market power in each of its markets and that each market is workably competitive. West Texas Gulf provides the following HHI calculations, market share statistics, and excess capacity ratios for its proposed markets.[17]

	Permian Basin Origin Market	**Gulf Coast Destination Market**	**Tyler Destination Market**
HHI, DoJ Method[18]	822	84	843
HHI, FERC Method[19]	1,341	306	1,644
Market Share, Capacity Based	14.0%	6.9%	19.3%
Market Share, Receipt Based	21.8%	8.1%	42.5%
Excess Capacity Ratio	2.2	1.8	3.4

[16] *Id.* at 19.

[17] *Id.* at 7-8.

[18] The adjusted capacity method for calculating HHI advocated by the United States Department of Justice in *Report on Oil Pipeline Deregulation, Report of the U.S. Department of Justice* (May 1986), https://www.ferc.gov/industries/oil/gen-info/handbooks/volume-I/doj-report.pdf.

[19] *See Williams Pipe Line Co.*, Opinion No. 391, 68 FERC ¶ 61,136, at 61,665 (1994), *order on reh'g*, 71 FERC ¶ 61,291 (1995).

E. Potential Competition and Other Factors

12. West Texas Gulf claims that potential competition may include: (1) an expansion of rail, waterborne, and truck transportation, (2) expansion or extension of existing crude oil pipelines, (3) conversion of existing pipelines to crude oil service, (4) the reversal of existing pipelines to serve new markets, and (5) new pipelines.[20] West Texas Gulf discusses other factors it claims are relevant to the competitiveness of the origin market and the destination markets, including the availability of pipelines with cost-based rates that are owned by West Texas Gulf affiliates and the use of committed rates by numerous new and expansion pipelines.[21]

II. Protests

13. Pursuant to section 348.2(g) of the Commission's regulations,[22] interventions or protests to the Application were required to be filed by June 28, 2019. Delek/Lion and Husky/BP filed timely interventions and protests. PBF Holding Company LLC and Marathon Petroleum Company LP filed timely motions to intervene.

14. Delek/Lion request that the Commission summarily deny the Application as to the Tyler destination market and the intra-market transportation within that market or alternatively set those portions of the Application for hearing. Delek/Lion argue that West Texas Gulf has substantial market power in the Tyler destination market and the intra-market transportation in Tyler.[23]

15. Husky/BP request that the Commission summarily deny the Application as to all destination markets or alternatively set those portions of the Application for hearing. Husky/BP argue that West Texas Gulf uses overly broad product and geographic destination market definitions.[24]

16. Protesters argue that West Texas Gulf's market power analyses of the destination markets are flawed because the proposed product market of all crude oil is overly broad. They contend that West Texas Gulf has not demonstrated that shippers would substitute

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[20] Application at 24.

[21] *Id.*

[22] 18 C.F.R. § 348.2(g).

[23] Delek/Lion Protest at 1.

[24] Husky/BP Protest at 1, 6-8.

the transportation of heavy crude in response to a price increase in the transportation of light and medium crude.[25]

17. Delek/Lion argue that the Application is wrong to include Freestone and Navarro Counties in the Tyler destination market and that correcting this error results in a significantly greater measure of market concentration there. They challenge West Texas Gulf's justifications for including Freestone and Navarro Counties, arguing that West Texas Gulf includes Freestone County based on crude oil shipments on the West Texas Gulf System to Wortham. Delek/Lion claim that West Texas Gulf is improperly trying to distinguish between different segments of its pipeline that are part of the same continuous path of shipment and would be encompassed within the proposed grant of market-based rate authority. In addition, Delek/Lion argue that West Texas Gulf includes Navarro County based on shipments on Sunoco from Corsicana to the Delek Refinery, but that Sunoco should not be considered an alternate source of supply because it is an affiliate of West Texas Gulf. Delek/Lion claim that West Texas Gulf only included Freestone and Navarro in order to include Seaway Crude Pipeline Company LLC (Seaway) as a competitive alternative.[26]

18. Delek/Lion argue that West Texas Gulf's eight purported competitive alternatives in the Tyler destination market are not good alternatives. According to Delek/Lion, four of these alternatives do not count as good alternatives under Commission policy because they are affiliates of West Texas Gulf or are West Texas Gulf itself. They further assert that Marketlink, LLC (Marketlink), Delek's Talco pipeline, and Seaway are not viable alternatives that the Delek Refinery could turn to in the event West Texas Gulf were to increase rates above competitive levels. Delek/Lion state that neither Marketlink nor Seaway are being used for deliveries of crude oil to the Tyler destination market. They claim that Marketlink does not have any connections or tariff destination points in the market and that Seaway does not even pass through the market as properly defined. They argue that Seaway should not be considered a good alternative without a detailed netback analysis. They also contend that Delek's own Talco pipeline has been taken out of service.[27]

19. Delek/Lion claim the corrected HHI for the Tyler destination market is 3,842 and West Texas Gulf's market share is 42.5 percent. Delek/Lion claim West Texas Gulf and

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[25] Delek/Lion Protest at 11-13; Husky/BP Protest at 11.

[26] Delek/Lion Protest at 11-14.

[27] *Id.* at 16-25.

its affiliates hold 72.4 percent of all actual capacity of available alternatives into the market.[28]

20. Husky/BP argue that a proper geographic destination market is identified using the hypothetical monopolist test. They claim that applying this test, the appropriate destination markets are not the Tyler market and the Gulf Coast market. Rather, Husky/BP claim that the appropriate destination markets are (1) Husky's Refinery in Lima, Ohio (the Lima Refinery destination market), and (2) the Husky/BP Refinery and PBF Holding Company LLC Refinery in Toledo, Ohio (the Toledo Refineries destination market). Husky/BP assert that the proper competitive alternatives for both destination markets are West Texas Gulf, its affiliated Kilgore and Millennium pipelines, Red River pipeline, and Talco pipeline.[29]

21. Husky/BP calculate an HHI of 4,256 for their proposed Lima Refinery destination market, and 5,040 for their proposed Toledo Refineries destination market. They claim these figures indicate that West Texas Gulf has market power in those destination markets.[30]

22. Husky/BP argue that to the extent West Texas Gulf is seeking an advisory ruling that it may charge market-based rates to Nederland, the Commission should not grant such ruling because West Texas Gulf does not currently provide service to Nederland.[31] Husky/BP explain that although West Texas Gulf owns facilities that extend to Nederland, it has leased that capacity to another carrier; thus, West Texas Gulf does not currently have tariff service to Nederland.

III. Answers

23. On July 29, 2019, West Texas Gulf filed an answer to the Protests. West Texas Gulf states that the Application demonstrates the Permian Basin origin market is highly competitive. West Texas Gulf argues that the Protests make no challenge to West Texas Gulf's showing regarding the Permian Basin origin market and thus the issue is appropriate for summary disposition by the Commission.[32]

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[28] *Id.* at 24-27.

[29] Husky/BP Protest at 12-18.

[30] *Id.* at 17-18.

[31] *Id.* at 7-8, 12-13.

[32] West Texas Gulf Answer at 5-6.

24. West Texas Gulf argues that the Protests' proposal to limit the product market to light and medium crude oil ignores the evidence presented in the Application demonstrating cross-elasticity of demand for all grades of crude oil.[33]

25. West Texas Gulf argues that Husky/BP improperly present alternative destination markets premised on the theory that the destination market is the ultimate destination of the crude oil that the applicant pipeline transports, even if that destination is hundreds of miles downstream from the markets served by the applicant pipeline. According to West Texas Gulf, Husky/BP argue that because shippers elect to transport some volumes delivered from the West Texas Gulf system at Longview and Goodrich, Texas further downstream to the Lima and Toledo refineries, those remote destinations are the proper destination markets.[34] West Texas Gulf challenges this theory, arguing that: (1) Commission regulations and Order No. 572[35] do not contemplate evaluation of remote markets, but instead provide that markets should be defined in relation to the transportation service the applicant offers,[36] (2) the Presiding Judge in the Seaway proceeding correctly found that competition in remote markets may only exert additional competitive pressure on the applicant,[37] (3) Husky/BP's approach is a variant of the corridor analysis that the Commission has repeatedly rejected,[38] (4) the flaws in Husky/BP's approach are apparent in the contrasting results of their expert's analysis of the Lima Refinery destination market in this proceeding as compared to Docket

[33] *Id.* at 15-19.

[34] *Id.* at 9-11, 20-21.

[35] *Id.* at 21; *Market-Based Ratemaking for Oil Pipelines*, Order No. 572, FERC Stats. & Regs. ¶ 31,007 (1994) (cross reference at 69 FERC ¶ 61,103).

[36] West Texas Answer at 21-25 (citing 18 C.F.R. § 348.1(c); Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,187-31,188).

[37] *Id.* at 21, 26-29 (citing *Seaway Crude Pipeline Co., LLC*, 157 FERC ¶ 63,024, at P 174 (2016), *aff'd*, Opinion No. 563, 163 FERC ¶ 61,127, at P 24 (2018)).

[38] *Id.* at 21, 29-30, 34-35 (citing Opinion No. 391, 68 FERC ¶ at 61,660-61,661; Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,188; *Explorer Pipeline Co.*, 87 FERC ¶ 61,374, at 62,388 (1999); *Kaneb Pipe Line Operating P'ship, L.P.*, 83 FERC ¶ 61,183, at 61,761 (1998); *Longhorn Partners Pipeline, L.P.*, 83 FERC ¶ 61,345, at 62,378 (1998)).

No. OR19-14-000,[39] and (5) Husky/BP's proposed markets are not, as they claim, defined using a properly conducted hypothetical monopolist analysis.[40] West Texas Gulf further claims that the competitive alternatives Husky/BP identify are not within their proposed destination markets.[41]

26. West Texas Gulf argues that Protesters' market power analyses: (1) incorrectly exclude pipelines that are allegedly in prorationing, rather than following the Commission's used alternative standard,[42] (2) either inappropriately exclude or misrepresent local production,[43] and (3) improperly exclude the Seaway and Marketlink pipelines.[44] Regarding the proposed Tyler destination market, West Texas Gulf contends that Delek/Lion inappropriately exclude Freestone and Navarro Counties in defining the market and incorrectly exclude the Talco pipeline from their HHI calculations, among other issues.[45]

27. West Texas Gulf asserts that the Application demonstrated the Gulf Coast destination market is highly competitive, and the Protests do not challenge West Texas Gulf's market power analysis. West Texas Gulf further argues that the Commission reviewed the same Gulf Coast destination market (including the delivery point of Goodrich) and found it to be workably competitive in 2018.[46] West Texas Gulf asserts that, contrary to Husky/BP's arguments, the Gulf Coast destination market is relevant, and volumes are delivered from West Texas Gulf at Goodrich into the Gulf Coast market to meet refinery demand.[47] West Texas Gulf also argues that the Commission should

[39] *Id.* at 31-33 (referencing the February 25, 2019 Motion to Intervene and Protest of Husky Marketing & Supply Company and Phillips 66 Company to MPLX Ozark Pipe Line LLC's market-based rate application in Docket No. OR19-14-000).

[40] *Id.* at 21, 35-38.

[41] *Id.* at 39-40.

[42] *Id.* at 41-45.

[43] *Id.* at 45-48.

[44] *Id.* at 48-51.

[45] *Id.* at 51-57.

[46] *Id.* at 7-8, 29 (citing *Seaway*, 157 FERC ¶ 63,024 at P 15; Opinion No. 563, 163 FERC ¶ 61,127 at P 3).

[47] *Id.* at 10.

reject Husky/BP's argument regarding the Nederland destination point. West Texas Gulf argues that its request for market-based rate authority appropriately applies to transportation from or to a market, not to specific origin or destination points within a market.[48]

28. On August 13, 2019, Delek/Lion and Husky/BP filed motions for leave to respond and responses to West Texas Gulf's answer. Protesters reiterate and elaborate on their contentions regarding the product market and the destination markets. On August 28, 2019, West Texas Gulf filed a motion for leave to respond and limited response to Protesters' August 13, 2019 answer.

IV. Discussion

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[49] the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213 of the Commission's Rules of Practice and Procedure[50] prohibits answers to answers and answers to protests unless otherwise ordered by the decisional authority. We accept West Texas Gulf's, Husky/BP's and Delek/Lion's answers because they have provided information that assisted us in our decision-making process.

30. In Order No. 572,[51] as codified in Part 348 of the Commission's regulations,[52] the Commission established filing requirements and procedures regarding an application by an oil pipeline for a determination that it lacks significant market power in the markets in which it proposes to charge market-based rates. Commission policy requires an oil pipeline seeking a market power determination to define the relevant product market, define the relevant geographic markets, identify the competitive transportation alternatives, compute the market concentration and other market power measures, and identify potential competition and other factors that bear on the issue of whether the pipeline lacks market power in the relevant markets.[53]

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[48] *Id.* at 12-14.

[49] 18 C.F.R. § 385.214.

[50] 18 C.F.R. § 385.213(a)(2).

[51] Order No. 572, FERC Stats. & Regs. ¶ 31,007.

[52] 18 C.F.R. pt. 348.

[53] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,187-31,193.

31. As discussed below, we have examined West Texas Gulf's Application and find adequate support for a finding that West Texas Gulf lacks significant market power in the proposed origin market. Accordingly, we grant West Texas Gulf's request for a determination that it lacks market power in the Permian Basin origin market, including with respect to intra-market movements in that market. However, we find that the evidence presented is insufficient to permit a determination that West Texas Gulf lacks market power in the proposed destination markets. Accordingly, we set the issue of whether West Texas Gulf lacks market power in those markets for hearing.

32. An applicant for market-based rates is required to demonstrate that it lacks market power in both the relevant origin and destination markets.[54] Therefore, the Commission's determination that West Texas Gulf lacks market power in its origin market does not authorize West Texas Gulf to charge market-based rates, unless and until a destination market is also shown to be sufficiently competitive.

A. Origin Market

33. We find that West Texas Gulf has met its burden under Order No. 572 to show that West Texas Gulf lacks significant market power in the Permian Basin origin market.

34. Based upon the record presented by the Application, we find that West Texas Gulf appropriately defined the geographic market based on counties that encompass the Permian Basin production area (as defined by the EIA) plus the adjacent Taylor County in which two of West Texas Gulf's three origin points are located.[55] Although the Commission does not require any specific methodology for defining geographic markets, and analyzes each proceeding on a case-by-case basis,[56] the Commission has stated that "the proper geographic origin market for crude oil pipelines is the production field from where the crude oil being shipped on the pipeline derives."[57] The uncontested record in

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[54] *Id.* at 31,188-31,189; *MPLX Ozark Pipe Line LLC*, 167 FERC ¶ 61,264, at P 24 (2019); *White Cliffs Pipeline, L.L.C.*, 163 FERC ¶ 61,120, at P 24 (2018).

[55] Application, Statement I (Van Hoecke Testimony), I-6.

[56] *Gutman Energy, Inc. v. Buckeye Pipe Line Co., L.P.*, Opinion No. 558, 161 FERC ¶ 61,180, at P 183 (2017), *reh'g denied*, Opinion No. 558-A, 164 FERC ¶ 61,025, at P 62 (2018); *Enterprise Prod. Partners L.P. & Enbridge Inc.*, 146 FERC ¶ 61,115, at P 39 (2014) (*Seaway I*); Opinion No. 563, 163 FERC ¶ 61,127 at P 24.

[57] *Seaway I*, 146 FERC ¶ 61,115 at P 39; Opinion No. 563, 163 FERC ¶ 61,127 at P 25 ("The proper geographic origin market for crude oil pipelines is normally the production field in which the pipeline is physically located. . . . The primary focus is on the origin of crude actually shipped on the applicant pipeline.").

this proceeding supports a finding that West Texas Gulf's proposed Permian Basin market encompasses the production area where the crude oil being shipped on the West Texas Gulf system originates.[58]

35. Based on the representations in the Application, we also find that West Texas Gulf competes with numerous competitive alternatives in the Permian Basin markets. West Texas Gulf's Application provides evidence that the Permian Basin is a major market of crude oil supply in which producers have multiple options to clear their production. West Texas Gulf faces competition from consumption by two local refineries, other outbound crude oil pipelines, and crude-by-rail facilities transporting crude oil out of the market. Local oil wells in the origin market produce approximately 3,438,437 bpd of crude oil. By comparison, producers have many different options available for clearing crude oil from the origin market.[59] Twenty pipelines (including West Texas Gulf) owned by eleven separate companies with a combined capacity of 6,846,000 bpd transport crude oil from the origin market. The aggregate capacity of these pipelines is more than double the local crude oil production of 3,438,437 bpd.[60] Rail facilities located in the origin market are capable of loading an additional 408,000 bpd of crude oil for transportation out of the market. Producers can alternatively route crude oil to one of the two refineries owned by two separate companies in the origin market, which have a combined capacity of 183,000 bpd.[61]

36. West Texas Gulf's market power statistics support the conclusion that it lacks market power in the origin market. West Texas Gulf provides HHI calculations that are well below the Commission's 2,500 threshold, which typically indicates market competitiveness.[62] Accordingly, we find West Texas Gulf does not possess market power in the Permian Basin origin market.

37. Protesters do not challenge the proposed origin market or the Application's market power statistics for the origin market. Nothing in the Protests alters our conclusion that the Application makes a sufficient showing that West Texas Gulf lacks market power in the origin market.

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[58] Application, Statement I (Van Hoecke Testimony), I-6.

[59] Application at 17.

[60] *Id.* at 17-18.

[61] *Id.*; *id.* at Statement I (Van Hoecke Testimony), I-16 – I-17; *id.* at Statement D (Competing Facilities and Services), D-11 – D-14, Ex. D.3.

[62] *See supra* P 11; Application at Statement G (Market Power Measures), G-24.

B. Destination Markets

38. We have reviewed the information filed by West Texas Gulf and find that the evidence presented is insufficient to permit a determination that West Texas Gulf lacks market power in the proposed destination markets. Protesters challenge the appropriateness of West Texas Gulf's product market and geographic market definitions, identification of competitive alternatives, and market concentration statistics. Our preliminary analysis indicates that the Protests raise numerous issues of material fact concerning whether West Texas Gulf lacks market power in the destination markets which cannot be resolved on the basis of the record at this point. Therefore, we set the issues regarding whether West Texas Gulf lacks market power in the contested destination markets, including intra-market transportation within those markets, for hearing.

The Commission orders:

(A) As discussed in the body of this order, the Commission grants West Texas Gulf's request for a determination that it lacks market power in the Permian Basin origin market.

(B) 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 whether West Texas Gulf has market power in the proposed destination markets.

(C) A Presiding Administrative Law Judge, to be designated by the Chief Judge, shall within 15 days of the date of the Presiding Judge'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 Judge 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.