170 FERC ¶ 61,288
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Permian Express Partners LLC — Docket No. OR19-32-000

ORDER ON MARKET-BASED RATE APPLICATION AND ESTABLISHING HEARING PROCEDURES

(Issued March 30, 2020)

1. On August 16, 2019, pursuant to Part 348 of the Commission's regulations,[1] Permian Express Partners LLC (Permian Express) filed an application for authorization to charge market-based rates for the transportation of crude oil from the Permian Basin, Fort Worth Basin, and Haynesville production regions to the Gulf Coast and the East Texas region surrounding Tyler, Texas (Application). The Application also seeks market-based ratemaking authority for the intra-market transportation of crude oil within the origin and destination markets. As discussed below, we find that Permian Express lacks significant market power in the proposed origin markets. We set for hearing the issue of whether Permian Express has the ability to exercise market power in the Gulf Coast and Tyler destination markets.

I. <u>Description of Filing</u>

2. Permian Express transports crude oil from origins in the Permian Basin, Fort Worth Basin, and Haynesville production areas to destinations in the Gulf Coast and East Texas regions. Permian Express states that it currently transports five types of crude oil and that it holds itself out to transport, and has the ability to transport, other grades of crude oil, if shippers elect to nominate other grades. The Application seeks authorization to charge market-based rates in the proposed Permian Basin origin market, Fort Worth Basin origin market, Haynesville 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. Permian Express claims that these markets are competitive and that it lacks market power in them. Permian Express argues

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

that market-based rate authority will provide ratemaking flexibility to respond to changes in market conditions and allow Permian Express to compete more effectively against transportation alternatives in the proposed markets. Permian Express provides market concentration calculations using the Herfindahl-Hirschman Index (HHI),[2] market share percentages, and excess capacity ratios to support its contention that it lacks market power.[3]

A. Product Market

3. Permian Express argues that the relevant product market in the origin markets 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.[4] Permian Express supports this position on the basis that (1) Permian Express holds itself out to transport a wide range of crude oil grades and it is Permian Express's shippers, not Permian Express, that determine which grades of crude oil will be transported on the Permian Express System; (2) Permian Express currently transports West Texas Intermediate (WTI), West Texas Intermediate Premium, and West Texas Sour, which are the three grades of crude oil most commonly produced in the Permian Basin, as well as North Texas Blend, produced in the Fort Worth Basin origin market, and a WTI-like crude oil from East Texas; (3) the grades of crude oil that Permian Express transports are consistent with the grades of crude oil that Permian Express's competitors transport; (4) most, if not all, refineries in Permian Express's destination markets have the ability to process many grades of crude oil, including those transported by Permian Express and its competitors; and (5) different grades of crude oil tend to track closely in price, on a relative basis, demonstrating cross-elasticity of demand or ease of product substitution.[5]

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[2] HHI measures market concentration in a statistic that combines the number and size of competitors in a market. 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.

[3] Application at 7-8.

[4] *Id.* at 5, 11.

[5] *Id.* at Statement B (Product Market), B-1.

B. Geographic Markets

4. Permian Express states that it has defined its three proposed origin markets based on the production areas from which the crude oil shipped on the Permian Express System is sourced and the areas in which Permian Express's receipt facilities are located.[6] First, Permian Express asserts that the proposed Permian Basin origin market is the Permian Basin production region, as defined by the Energy Information Administration (EIA), plus the adjacent Taylor County in which some of Permian Express's affiliates have receipt facilities that originate Permian Basin crude oil.[7] Second, Permian Express states that the Fort Worth Basin origin market includes the Fort Worth Basin production region, as defined by the EIA, plus the adjacent Navarro County in which one of Permian Express's receipt points that originates Fort Worth Basin crude oil is located.[8] Third, Permian Express further states that the Haynesville origin market consists of the counties and parishes included in the Haynesville production area, as defined by the EIA.[9]

5. According to Permian Express, the proposed Gulf Coast destination market is the U.S. Gulf Coast refining area, which comprises two refining districts as defined by the EIA: (1) the Texas Gulf Coast refining district, plus Live Oak County, Texas and (2) the Louisiana Gulf Coast refining district.[10] Permian Express claims that the Gulf Coast destination market has 35 refineries that are capable of consuming 8,297,847 barrels per day (bpd) of crude oil.[11] Permian Express asserts that the use of the combined Texas and Louisiana Gulf Coast refining districts 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 Permian Express. Permian Express 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 Permian

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[6] *Id.* at 13.

[7] *Id.* at 4, 13-14.

[8] *Id.* at 4, 14.

[9] *Id.* at 5, 14.

[10] *Id.* at 14.

[11] *Id.*

Express, allowing for an appropriately dynamic analysis; and (3) the U.S. Gulf Coast refinery area is a well-established market definition that the Commission has previously accepted when analyzing market power in the context of oil pipeline market-based rate applications.[12]

6. Permian Express states that the proposed Tyler destination market includes the counties located within a 50-mile radius of the refinery in Tyler, Texas owned by Delek US Holdings, Inc. (Delek Refinery) plus the adjacent Freestone and Navarro Counties.[13] Permian Express 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. Permian Express states that Freestone and Navarro Counties are appropriately included because crude oil shipments from Wortham, Texas (in Freestone County) and Corsicana, Texas (in Navarro County) currently serve the Delek Refinery. Permian Express claims that the Delek Refinery could turn to these sources for crude oil if a market participant, such as Permian Express, attempted to raise its rates above the competitive level. Permian Express argues that the Tyler destination market captures both direct and indirect alternatives to the Permian Express System, allowing for an appropriately dynamic analysis.[14]

C. Competitive Alternatives

7. Permian Express asserts that it faces significant competition in the proposed markets. Permian Express states that the competitive alternatives include:

- In the Permian Basin origin market – consumption by two local refineries, other outbound crude oil pipelines, and outbound railroads.
- In the Fort Worth Basin origin market – other outbound crude oil pipelines.
- In the Haynesville origin market – consumption by four local refineries and other outbound crude oil pipelines.
- In the Gulf Coast destination market – local production, other inbound crude oil pipelines, waterborne deliveries, and rail deliveries.

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[12] *Id.* at 14-15.

[13] *Id.* at 5, 15.

[14] *Id.* at 15.

- In the Tyler destination market – local production and other inbound crude oil pipelines.[15]

8. Regarding the proposed Permian Basin origin market, Permian Express states that local oil wells produce approximately 3,438,437 bpd of crude oil and that 20 pipelines owned by 11 separate companies with a combined capacity of 6,846,000 bpd transport crude oil out of the origin market.[16] Permian Express asserts that rail facilities are capable of loading approximately 408,000 bpd of crude oil for transportation out of the market. In addition, Permian Express claims that two refineries in that market owned by two separate companies have a combined capacity to absorb 183,000 bpd of crude oil.[17]

9. Regarding the proposed Fort Worth Basin origin market, Permian Express claims that local oil wells produce approximately 44,082 bpd of crude oil and that 14 pipelines owned by seven separate companies with a combined capacity of 2,219,000 bpd transport crude oil out of the market. Permian Express maintains that the aggregate capacity of these pipelines far exceeds the local crude oil production of 44,082 bpd.[18] Permian Express adds that the majority of barrels that originate on the Permian Express System in the Fort Worth Basin origin market are imported into this market from the Permian Basin. Permian Express contends that the fact that these barrels are routed through this market while in transit to their final destination in another market demonstrates that Permian Express could not exercise market power over these barrels, as producers could avoid any supracompetitive rate increase by Permian Express by electing to use another route out of the Permian Basin.[19]

10. Regarding the proposed Haynesville origin market, Permian Express asserts that local oil wells produce approximately 42,098 bpd of crude oil and that seven pipelines owned by three separate companies with a combined capacity of 1,197,000 bpd transport crude oil out of the market.[20] Permian Express argues that the aggregate capacity of these pipelines exceeds the local crude oil production of 42,098 bpd.[21] In addition,

[15] *Id.* at 18-22.

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

[17] *Id.* at Statement D (Competing Facilities and Services), D-11.

[18] *Id.* at 19.

[19] *Id.* at 20.

[20] *Id.*

[21] *Id.*

Permian Express claims that four refineries in the Haynesville origin market owned by two separate companies have a combined capacity of 160,849 bpd of crude oil.[22] Permian Express contends that the fact that local consumption exceeds local production limits Permian Express's ability to exercise market power because all local production could be sold directly to local refineries, rather than transported out of the market.[23] Moreover, Permian Express states that as with the Fort Worth Basin origin market, many of the crude oil barrels that originate on the Permian Express System in the Haynesville origin market are imported into the market from the Permian Basin. Permian Express argues that the fact that these barrels are not locally produced demonstrates that Permian Express could not exercise market power over them because producers could avoid any supracompetitive price increase by Permian Express by electing to use another route out of the Permian Basin.[24]

11. Regarding the proposed Gulf Coast destination market, Permian Express states that 35 refineries in the market consume approximately 8,297,847 bpd of crude oil. Permian Express further states that the Permian Express System is one of 23 pipelines owned by 18 different companies that deliver crude oil into the market, with a combined capacity of 9,013,000 bpd. Permian Express argues that oil wells produce approximately 2,033,040 bpd of crude oil and that refineries may also source their crude oil from international origins via waterborne vessels or from inbound rail deliveries. According to Permian Express, waterborne deliveries into the market in 2018 were 2,786,934 bpd and inbound rail deliveries were approximately 200,901 bpd.[25]

12. Regarding the proposed Tyler destination market, Permian Express claims that the primary consumer of crude oil is the Delek Refinery, which consumed approximately 77,349 bpd of crude oil in 2018. Permian Express asserts that it faces competition from local production (approximately 26,132 bpd) and inbound crude oil pipelines. Permian Express states that it is one of eight pipelines, owned by five different firms capable of delivering crude oil to the market. Permian Express contends that the combined local production plus effective inbound capacity is 263,000 bpd, which is approximately 3.4 times total market demand.[26]

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[22] *Id.* at Statement D (Competing Facilities and Services), D-16.

[23] *Id.* at 20-21.

[24] *Id.* at 21.

[25] *Id.* at 21-22.

[26] *Id.* at 22.

D. Market Metrics

13. Permian Express asserts that it lacks market power in each of its markets and that each market is workably competitive. Permian Express provides the following HHI calculations, market share statistics, and excess capacity ratios for its proposed markets.[27]

Table 1: Permian Express's Proposed Origin Markets

	Permian Basin Origin Market	**Fort Worth Basin Origin Market**	**Haynesville Origin Market**
HHI, DoJ Method[28]	822	1,429	2,500
HHI, FERC Method[29]	1,341	1,429	2,500
Market Share, Capacity Based	14.0%	14.3%	25%
Excess Capacity Ratio	2.2	7.0	4.0

Table 2: Permian Express's Proposed Destination Markets

	Gulf Coast Destination Market	**Tyler Destination Market**
HHI, DoJ Method	85	877
HHI, FERC Method	306	1,665
Market Share, Capacity Based	6.9%	19.5%

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

[28] 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.

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

Market Share, Delivery Based	5.2%	43.5%
Excess Capacity Ratio	1.8	3.4

E. Potential Competition and Other Factors

14. Permian Express claims that potential competition may include (1) the expansion of existing pipelines; (2) the conversion of existing pipelines to crude oil service; (3) the reversal of existing pipelines to serve new markets; (4) the construction of new pipelines; and (5) the expansion of rail, waterborne, and truck movements.[30] Permian Express also discusses other factors it claims are relevant to the competitiveness of the origin markets and the destination markets, including the availability of pipelines with cost-based rates that are owned by Permian Express affiliates and the use of committed rates by numerous new and expansion pipelines.[31]

II. Discussion

15. Pursuant to section 348.2(g) of the Commission's regulations,[32] interventions or protests to the Application were required to be filed by October 15, 2019. No motions to intervene or protests were filed. The Application is therefore unopposed.

16. In Order No. 572,[33] as codified in Part 348 of the Commission's regulations,[34] 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

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[30] Application at 28-30.

[31] *Id.* at 30-32.

[32] 18 C.F.R. § 348.2(g) (2019).

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

[34] 18 C.F.R. pt. 348.

identify potential competition and other factors that bear on the issue of whether the pipeline lacks market power in the relevant markets.[35]

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

18. An applicant for market-based rates is required to demonstrate that it lacks market power in both the relevant origin and destination markets.[36] Therefore, the Commission's determination that Permian Express lacks market power in the origin markets does not authorize Permian Express to charge market-based rates unless and until a destination market is also shown to be sufficiently competitive.

A. Origin Markets

19. We find that Permian Express has met its burden under Order No. 572 to show that Permian Express lacks significant market power in the Permian Basin, Fort Worth Basin, and Haynesville origin markets.

20. Based on the record presented by the Application, we find that Permian Express appropriately defined the geographic market for the Permian Basin origin market based on counties that encompass the Permian Basin production area (as defined by the EIA), plus the adjacent Taylor County in which a Permian Express affiliate has origin points that originate Permian Basin crude oil.[37] Likewise, we find that Permian Express appropriately defined the Fort Worth Basin origin market based on counties that encompass the Fort Worth Basin production area (as defined by the EIA), plus the adjacent Navarro County in which Permian Express has a receipt point that is capable of originating crude oil produced in the Fort Worth Basin production area.[38] We also find

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[35] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,187-93.

[36] *Id.* at 31,188-89; *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).

[37] Application at Statement A (Geographic Markets), A-10.

[38] *Id.* at 14.

that Permian Express appropriately defined the Haynesville origin market based on counties and parishes that encompass the Haynesville production area (as defined by the EIA).[39] Although the Commission does not require any specific methodology for defining geographic markets, and analyzes each proceeding on a case-by-case basis, 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."[40] The uncontested record in this proceeding supports a finding that Permian Express's proposed Permian Basin, Fort Worth Basin, and Haynesville markets encompass the production areas where the crude oil being shipped on the Permian Express system originates.[41]

21. Based on the representations in the Application, we also find that Permian Express competes with numerous competitive alternatives in the Permian Basin, Fort Worth Basin, and Haynesville origin markets. Permian Express'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. Permian Express 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 Permian Basin 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 market.[42] 20 pipelines (including Permian Express) owned by 11 separate companies with a combined capacity of 6,846,000 bpd transport crude oil from the Permian Basin origin market. The aggregate capacity of these pipelines is nearly double the local crude oil production of 3,438,437 bpd.[43] Rail facilities located in the Permian Basin 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

[39] *Id.*; *id.* at Statement A (Geographic Markets), A-19.

[40] *Enterprise Prods. Partners L.P.*, 146 FERC ¶ 61,115, at P 39 (2014); *Seaway Crude Pipeline Co. LLC*, Opinion No. 563, 163 FERC ¶ 61,127, at P 25 (2018) ("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.").

[41] Application at Statement I (Van Hoecke Testimony), I-7 - I-9, I-13 - I-14.

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

[43] *Id.* at 19.

two separate companies in the Permian Basin origin market, which have a combined capacity of 183,000 bpd.[44]

22. Permian Express's Application also provides evidence that Permian Express faces significant competition in the Fort Worth Basin and Haynesville origin markets and that producers in those markets have multiple options to clear their production. In the Fort Worth Basin origin market, 14 pipelines (including Permian Express) owned by seven separate companies have a combined capacity to transport 2,219,000 bpd of crude oil from the market, which far exceeds the local crude oil production of 44,082 bpd.[45] Similarly, in the Haynesville origin market, seven pipelines (including Permian Express) owned by three separate companies have a combined capacity to transport 1,197,000 bpd of crude oil from the market, which far exceeds the local crude oil production of 42,098 bpd.[46] Alternatively, producers in the Haynesville origin market can route crude oil to one of the four refineries owned by two separate companies, which have a combined capacity of 160,849 bpd.[47] Moreover, with respect to the barrels originating on the Permian Express System in the Fort Worth Basin and Haynesville origin markets that are imported from the Permian Basin, Permian Express also competes with external transportation alternatives that producers may use to transport these barrels from the Permian Basin to their final destination.

23. Permian Express's market power statistics further support the conclusion that it lacks significant market power in the origin markets. Permian Express provides HHI calculations that are at or below the Commission's 2,500 threshold that typically indicates market competitiveness.[48] Accordingly, we find that Permian Express does not possess significant market power in the Permian Basin, Fort Worth Basin, and Haynesville origin markets.

B. Destination Markets

24. We have reviewed the information filed by Permian Express and find that the evidence presented is insufficient to permit a determination that Permian Express lacks market power in the proposed destination markets. Although Permian Express's

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[44] *Id.*; *id.* at Statement I (Van Hoecke Testimony), I-27; *id.* at Statement D (Competing Facilities and Services), D-11 - D-14, Ex. D.3.

[45] *Id.* at 19.

[46] *Id.* at 20.

[47] *Id.* at Statement D (Competing Facilities and Services), D-16, Ex. D.5.

[48] *See supra* P 13; Application at Statement G (Market Power Measures), G-27.

Application is unopposed, the Commission recently established hearing procedures in Docket No. OR19-22-000 to address whether West Texas Gulf Pipe Line Company LLC, an affiliate of Permian Express,[49] lacks market power in the same proposed Gulf Coast and Tyler destination markets.[50] Because issues regarding the competitive dynamics of those destination markets are currently being litigated and examined by the Commission, we shall set the issue of whether Permian Express lacks market power in the Gulf Coast and Tyler destination markets for hearing as well.

The Commission orders:

(A) As discussed in the body of this order, the Commission grants Permian Express's request for a determination that it lacks significant market power in the Permian Basin origin market, the Fort Worth Basin origin market, and the Haynesville 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 Permian Express has significant 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.

[49] Application at ix, 4 n.9.

[50] *W. Tex. Gulf Pipe Line Co. LLC*, 170 FERC ¶ 61,148, at PP 1, 38 (2020).