144 FERC ¶ 61,044
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.

Enbridge Pipelines (Southern Lights) LLC — Docket Nos. IS10-399-003
IS11-146-000

ORDER ON INITIAL DECISION

(Issued July 19, 2013)

1. This order addresses briefs on and opposing exceptions to an Initial Decision (ID or Initial Decision) issued on June 5, 2012, by the Presiding Administrative Law Judge (Presiding Judge or ALJ) related to two rate filings made by Enbridge Pipelines (Southern Lights) LLC (ESL) in the above-captioned proceedings.[1] As discussed herein, this order affirms the ID's holdings regarding the determination of the just and reasonable maximum rates for uncommitted service (the Uncommitted Rates) for 2010 and 2011 on the Southern Lights Pipeline.

I. Background

2. This proceeding commenced on July 20, 2007 when ESL filed a Petition for Declaratory Order, requesting approval of the rate structure it was proposing for the United States portion of a new pipeline, the Southern Lights Pipeline. The Southern Lights Pipeline consists of two interconnected pipelines: (1) the U.S. portion, which was built and operated by Enbridge Southern Lights and extends from Chicago to the international border near Neche, North Dakota, and (2) the connecting pipeline in Canada, which was built and operated by Southern Lights Canada and extends from the

[1] *Enbridge Pipelines (Southern Lights) LLC*, 139 FERC ¶ 63,015 (2012) (ID or Initial Decision).

international border to Edmonton, Alberta.[2] The Southern Lights Pipeline was built to transport light liquid hydrocarbon diluent. The diluent transported by Southern Lights is used to dilute heavy oil produced in Western Canada in order to facilitate transportation of that oil by pipeline.[3] The Commission approved the rate structure for Southern Lights by Declaratory Order in Docket No. OR07-15-000.[4] In the Declaratory Order, the Commission approved ESL's proposed rate design under which the rate for committed shipments is calculated in accordance with the agreed-upon Transportation Services Agreement (TSA) entered into between Southern Lights and its committed shippers and further approved the setting of the initial Uncommitted Rate at two times the Committed Rate, subject to review of the Uncommitted Rate when filed. Southern Lights commenced service on July 1, 2010.

3. On May 28, 2010, ESL filed to establish initial Committed and Uncommitted Rates in Docket No. IS10-399-000. Following protests from Imperial Oil and ExxonMobil Oil Corporation (jointly, the Indicated Shippers), on June 29, 2010, the Commission accepted and suspended the tariffs to be effective July 1, 2010, and set the matter for hearing.[5] The hearing was held in abeyance pending the outcome of settlement judge procedures. On January 18, 2011, the ALJ issued a report determining that further attempts at settlement would be futile, and on January 19, 2011, the Chief ALJ terminated the settlement procedures and established hearing procedures in Docket No. IS10-399-003.[6]

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[2] *Enbridge Pipelines (Southern Lights) LLC*, 121 FERC ¶ 61,310, at P 6 (2007) (Declaratory Order).

[3] Southern Lights Brief Opposing Exceptions, n.1.

[4] *Declaratory Order*, 121 FERC ¶ 61,310, *order granting clarification*, 122 FERC ¶ 61,170 (2008) (Clarification Order).

[5] *Enbridge Pipelines (Southern Lights) LLC*, 131 FERC ¶ 61,288 (2010) (2010 Suspension Order).

[6] *Enbridge Pipelines (Southern Lights) LLC*, "Order of Chief Judge Terminating Settlement Judge Procedures, Designating Presiding Administrative Law Judge, and Establishing Track III Procedural Time Standards" (Jan. 19, 2011).

4. On December 28, 2010, pursuant to the terms of the TSA which require ESL to recalculate and refile the tariff rates each year, the pipeline proposed to increase the uncommitted shippers' rates in Docket No. IS11-146-000. Following protests from the Indicated Shippers, on January 31, 2011, the Commission accepted and suspended the new rates to be effective February 1, 2011, subject to refund.[7] While the Docket No. IS10-399-003 hearing was pending, the Commission consolidated the annual ESL rate recalculation in Docket No. IS11-146-000 with the ongoing hearing on the initial ESL rates in Docket No. IS10-399-003.[8]

5. Because of a disagreement over the scope of the issues to be addressed at the hearing, briefs were filed on the issue. On March 15, 2011, the Presiding Judge heard oral arguments on the scope of the consolidated proceedings. ESL and other parties maintained that the only issue set for hearing was whether the Uncommitted Rate is just and reasonable. Indicated Shippers asserted that Southern Lights Pipeline's rate structure was discriminatory and anticompetitive and sought to examine various aspects of the TSA including the refund mechanism, right of first refusal provisions, the relationship of the U.S. and Canadian tariffs, and the annual rate filing requirement. On April 5, 2011, in an unpublished order, the Administrative Law Judge determined that only the justness and reasonableness of the Uncommitted Rate was at issue in the consolidated rate case proceedings.[9]

6. The hearing in this proceeding was held on January 10 and 11, 2012. Following the submission of post-hearing briefs, the Presiding Judge issued the ID on June 5, 2012. As will be discussed below, the Presiding Judge ruled that the Uncommitted Rates at issue for 2010 and 2011 were just and reasonable. A brief on exceptions to the ID was filed by the Indicated Shippers; ESL filed a provisional brief on exceptions. Briefs opposing exceptions were filed by ESL, Commission Trial Staff, committed shippers,[10]

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[7] *Enbridge Pipelines (Southern Lights) LLC*, 134 FERC ¶ 61,067 (2011) (2011 Suspension Order).

[8] *Id*.

[9] *Enbridge Pipelines (Southern Lights) LLC*, "Order on Scope of Issues Set for Hearing and Denying Motion for Certification to the Commission," April 5, 2011.

[10] Southern Light's committed shippers are BP Products North America Inc. (BP) and Statoil North America Inc. (Statoil). As will be discussed further below, committed shippers agreed to ship or pay for the transportation of a specified volume of diluent over

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and the Indicated Shippers. Because the Indicated Shippers' brief on exceptions to the ID expressly stated they do not challenge the cost of service calculated by the Trial Staff and approved by the Initial Decision – Issues 2 through Issues 14, this order will only address the remaining Issues 1, 15, 16 and 17.[11]

7. On February 29, 2012, the Indicated Shippers filed an Offer of Proof, included as part of their Initial Post-Hearing Brief, requesting that the Commission consider five additional issues beyond the justness and reasonableness of the Uncommitted Rate, including whether the two-to-one ratio between the Committed and Uncommitted Rate was lawful. On March 29, 2012, the Presiding Judge granted ESL's Motion to Strike the Offer of Proof as procedurally and substantively flawed.[12] Specifically, the Presiding Judge ruled that "[t]he Indicated Shippers do not identify any ruling of the presiding officer rejecting or excluding proffered oral testimony or excluding evidence in the form of an exhibit or a public document. Rather, the Offer of Proof is simply a continuation of their ongoing legal arguments regarding the scope of the issues that they assert should have been addressed in this proceeding."[13]

II. Ratio of the TSA Committed Rate to the Uncommitted Rate

Background

8. Before undertaking construction of the Southern Lights Pipeline, ESL conducted two widely publicized open seasons in which potential shippers were given the opportunity to commit volumes to the pipeline for 15 years under terms embodied in a TSA.[14] Shippers who committed to a 15-year contract were offered service at a 50 percent discount to the filed rates for uncommitted or spot shippers as an inducement to

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an initial fifteen-year contract term and pay the committed rate for their annual volume commitments. Exh. ESL-1 at 12 (Jervis).

[11] Indicated Shippers Brief on Exceptions at 12 & n.32.

[12] *See* Order Granting Motion to Strike, *Enbridge Pipelines (Southern Lights) LLC*, Docket Nos. IS10-399-003 and IS11-146-000 (March 29, 2012) (Order Granting Motion to Strike).

[13] *See* Order Granting Motion to Strike at P 14.

[14] Declaratory Order at PP 9-10.

undertake the long-term financial obligation necessary to support the project.[15] After two open seasons, Southern Lights had commitments for 77,000 barrels per day from two shippers, BP Products North America Inc. (BP) and Statoil North America Inc. (Statoil).[16] While the Indicated Shippers received notices and attended meetings related to the open seasons, neither became a committed shipper on the then-proposed pipeline.[17]

9. In 2007, ESL filed a petition for Declaratory Order seeking Commission approval of certain aspects of the proposed rate structure for the U.S. portion of the Southern Lights Pipeline. As is relevant here, ESL sought approval that (1) the committed shippers would be required to pay the Committed Rates to which they agreed in the TSA;[18] (2) the rate design by which the Uncommitted Rate is derived would be two times the Committed Rate and this relationship would not be considered unduly discriminatory; and (3) ESL would be permitted to true-up the tariff rates at the end of the year to reflect various credits under the TSA, including the refund of uncommitted revenues to both committed and uncommitted shippers.[19] ESL maintained that the significant rate design issue in the TSA cost-of-service formula was the provision setting the uncommitted rate at twice the level of the committed rate. According to ESL, the purpose of the provision was to distribute the agreed cost-of-service between the committed and uncommitted shippers according to their respective contributions to the initial development and construction of the pipeline. ESL stated that it was not seeking Commission approval for any specific rate to be charged to the committed or uncommitted shippers in advance of the actual annual tariff filings to be made once the pipeline is in operation, but instead

[15] *Id*.

[16] *Id*. P 10.

[17] Order on Complaint at P 9.

[18] The rate the committed shippers must pay for a minimum monthly volume is a negotiated rate that is set each year under the formula contained in Schedule B to the TSA. *See* Southern Lights' Request for Clarification or in the Alternative Rehearing at 3, filed January 23, 2008 in Docket No. OR07-15-001.

[19] Declaratory Order at P 11.

was seeking approval of the proposed rate design. There was no opposition to any part of the proposal ESL outlined in its petition for Declaratory Order.[20]

10. In its Declaratory Order, the Commission approved the proposed rate structure and found that the discount received by the committed shippers was not unduly discriminatory or preferential because the rate discount was offered to all interested shippers and because the rate reflected the difference between firm and non-firm shippers.[21] The Commission also stated when the actual rates were filed, it would review those rates to ensure they were just and reasonable.

11. In 2008, ESL filed a request for clarification of the Declaratory Order for the purpose of confirming that the terms of the TSA will govern the rates for the committed shippers for the length of the contracts. In other words, ESL requested assurance that the Declaratory Order did not anticipate that ESL would make a Part 346[22] cost-of-service filing to support its rates before the pipeline went into service.[23] Rather, ESL intended to file the Committed and Uncommitted Rates as negotiated rates agreed to by the committed shippers as permitted in Section 342.2(b) of the Commission's regulations.[24] ESL also recognized that if the Uncommitted Rates were to be challenged, the appropriate framework for evaluating that challenge would be the Commission's Opinion No. 154-B methodology codified at 18 C.F.R. Part 346.[25] The Commission granted the

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[20] *Id*. P 30.

[21] *Id*. PP 29-31.

[22] 18 C.F.R. Part 346 (2012).

[23] Declaratory Order at P 25, n.30.

[24] Section 342.2 of the regulations provides that a carrier must justify an initial rate for new service by one of the two methods: (a) by filing cost, revenue, and throughput data supporting that initial rate as required by Part 346 of the regulations, or (b) by filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question. However, the regulation also provides that, if a protest to the initial rate is filed, the pipeline must file the cost, revenue, and throughput data that supports the rate.

[25] Declaratory Order at P 28.

requested clarification, stating again that the agreed-upon terms of the TSAs would govern the determination of the committed shippers' rates, and that it was upholding the rate design embodied in the TSAs, with one condition.[26] In the event that the Uncommitted Rate was protested, the Commission held that it would require ESL to support the Uncommitted Rate by filing cost, revenue, and throughput data, as required by Part 346 of the oil pipeline regulations.[27] The Commission added that when a just and reasonable Uncommitted Rate was determined in this manner, the pipeline could derive the committed rate by applying the agreed-upon terms of the TSAs.[28]

12. As previously explained, this proceeding addresses two rate filings made by ESL in Docket Nos. IS10-399-000 and IS11-146-000. In Docket No. IS10-399-000, ESL sought to establish initial rates for the United States portion of the 1,582-mile pipeline from Manhattan, Illinois to Edmonton, Alberta. ESL's rates are based on its TSAs, under which the pipeline provides two categories of service. Committed shippers -- BP and Statoil - agree to ship or pay for the transportation of a specified volume of diluent over an initial fifteen-year contract term and pay the committed rate for their annual volume commitments.[29] Uncommitted shippers, and committed shippers who ship volumes in excess of their annual committed volumes, pay the uncommitted rate. The TSAs establish as "an over-arching principle" that the ratio of the uncommitted rate to the committed rate be two-to-one.[30] In its 2010 tariff filing, ESL proposed an uncommitted rate of $10.0526 per barrel and a committed rate of $5.0263 per barrel.[31]

13. Pursuant to the TSAs, ESL made its first annual recalculation of the tariff rates on December 28, 2010. When ESL filed its initial tariff rates based on the TSAs in 2010 in

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[26] *Enbridge Pipelines (Southern Lights) LLC*, 122 FERC ¶ 61,170, at P 13 (2008) (Clarification Order).

[27] Clarification Order at P 13.

[28] *Id*. P 13.

[29] Exh. ESL-1 at 12 (Jervis).

[30] Exh. ESL-9 at 42 n.1 (Webb) (Southern Lights Diluent Pipeline Transportation Services Agreement, *pro forma* U.S. version).

[31] Exh. ESL-4 at 2 (Jervis) (Enbridge Pipelines (Southern Lights) LLC, FERC ICA Oil Tariff, FERC No. 2).

Docket No. IS10-399-000, the Indicated Shippers protested the proposed uncommitted rate.[32] In accordance with the Clarification Order, the Commission required the pipeline to provide cost justification for the Uncommitted Rate under Part 346 of its oil pipeline regulations.[33] The Commission made clear that setting the initial rates for hearing did not undermine its approval of the rate structure in the Declaratory Order or the approved framework that Committed Rates would be 50 percent of the Uncommitted Rates.[34] The Commission again confirmed that as all potential shippers had been afforded the opportunity to sign up for the Committed Rates, there was no issue of undue discrimination as between committed and uncommitted shippers.[35]

14. In Docket No. IS11-146-000, ESL proposed to increase the Uncommitted Rate to $10.9744 per barrel and the Committed Rate to $5.4872 per barrel, subject to the TSA true-up mechanism.[36] The Commission suspended the new rates to be effective February 1, 2011, subject to refund, resulting in a locked-in period of July 2010 through January 2011 in which the rates at issue in Docket No. IS10-399-003 were in effect, and consolidating Docket No. IS11-146-000 with the ongoing proceeding.[37] On November 30, 2011, in Docket No. IS12-63-000, ESL filed its second annual recalculation of tariff rates under the TSAs.[38] It proposed to increase the Uncommitted Rate to $11.8434 per barrel and the Committed Rate to $5.9127 per barrel, again subject to true-up.[39] The Commission suspended the tariff filing to be effective January 1, 2012, subject to refund, resulting in a locked-in the period of February through December 2011 for the rates at

[32] 2010 Suspension Order at PP 5, 15.

[33] *Id*. P 15.

[34] *Id*. P 16.

[35] *Id*.

[36] Exh. ESL-4 at 2 (Jervis) (Enbridge Pipelines (Southern Lights) LLC, FERC ICA Oil Tariff, FERC No. 2).

[37] 2011 Suspension Order at P 13 (2011).

[38] *Enbridge Pipelines (Southern Lights) LLC*, 137 FERC ¶ 61,256, at P 1 (2011).

[39] Enbridge Southern Lights, FERC ICA Oil Tariff, FERC No. 4.5.0, at 2.

issue in Docket No. IS11-146-000.[40] It did not however consolidate the new docket with the ongoing hearing, but instead held proceedings in the second annual recalculation docket in abeyance pending the outcome of the hearing.[41] On May 31, 2013, in Docket No. IS13-439-000, ESL filed reduced Committed and Uncommitted Rates to reflect the outcome of a recent open season conducted by ESL which resulted in the addition of 50,000 barrels per day of committed volumes as of July 1, 2013. On June 28, 2013, the Commission accepted and suspended the tariff filing to be effective July 1, 2013, subject to refund.[42] The Commission also held in abeyance further proceedings in Docket No. IS13-439-000 pending the outcome of the initial decision in Docket Nos. IS10-399-003 and IS11-146-000.

15. As is also relevant here, on May 11, 2011, the Indicated Shippers filed a complaint against ESL's implementation of its TSAs and tariff, including the annual refund adjustment mechanism in Docket No. OR11-9-000, as well as a motion requesting that the complaint be consolidated with the ongoing rate proceeding in Docket No. IS10-399-000, *et al*. Indicated Shippers again challenged certain rates, terms and conditions of service, and practices of ESL -- including Southern Light's rate structure and methodology -- as unjust and unreasonable, unduly discriminatory and preferential, and anticompetitive. The Commission dismissed the complaint and denied the motion to consolidate, in part because they were unripe and because they amounted to a collateral attack on the Declaratory Order approving the ESL rate framework.[43]

Initial Decision

16. The Initial Decision concurred with and adopted the position advocated by Trial Staff that all aspects of the TSAs apply to the calculation of the Uncommitted Rate except for the automatic application of the individual cost components specified in Schedule B of the TSAs which would be determined by the Commission's traditional

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[40] *Enbridge Pipelines*, 137 FERC ¶ 61,256, at P 1.

[41] *Id*.

[42] *Enbridge Pipelines (Southern Lights) LLC*, 143 FERC ¶ 61,293, at P 1 (2013).

[43] *Imperial Oil and ExxonMobil Oil Corp. v. Enbridge Pipelines (Southern Lights) LLC*, 136 FERC ¶ 61,115 (2011) (Order on Complaint).

cost-of-service methodology for oil pipelines.[44] The Presiding Judge concluded that the TSAs must be taken into account in assessing rate structure and rate design and should also be taken into account in the determination of individual cost elements in situations where Part 346 and Opinion No. 154-B do not prohibit it.[45]

17. The Presiding Judge found that the appropriate framework for evaluating a protest to the Uncommitted Rates was the Commission's Part 346 oil pipeline regulations as applied in the Commission's Opinion No. 154-B methodology.[46] The Presiding Judge also stated, however, that in setting the justness and reasonableness of the Uncommitted Rates for hearing, the Commission did not rule that the participants were free to ignore the prior rulings approving other aspects of the TSAs. Rather, the Initial Decision found the Commission had expressly ruled that setting the Uncommitted Rates for hearing did not undermine its approval of the rate structure or the two-to-one ratio between the uncommitted and committed rates in the TSA.[47] The Presiding Judge found that in determining the justness and reasonableness of the Uncommitted Rates, the approach advanced by the Indicated Shippers must be rejected because it derived an Uncommitted Rate solely in reference to Opinion No. 154-B and Part 346 of the Commission's regulations without regard to the Commission's prior rulings and was predicated on the premise that no aspect of Southern Lights' TSAs with its committed shippers would be applicable to rates for uncommitted shipper service.[48] The Presiding Judge stated that such an approach ignores the Commission's Declaratory Order approval of the two-to-one ratio of uncommitted to committed rates. The Presiding Judge also noted that the Indicated Shippers' approach failed to address the fact that with the exception of rate base, use of an Opinion No. 154-B methodology and the data filed under Part 346 of the regulations did not dictate a particular method for calculating the costs and throughput underlying the rates at issue.

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[44] ID, 139 FERC ¶ 63,015, at P 72. *See also* ID, 139 FERC ¶ 63,015, at P 561.

[45] *Id*. P 72.

[46] *Id*. P 70.

[47] *Id*.

[48] *Id*. P 71 (citing Exh. IS-1 at 7, 16).

<u>The Appropriate Rate Design (Issue #16)</u>

18. In determining that the Commission-approved two-to-one rate design methodology must be used in determining the just and reasonable Uncommitted Rate, the Presiding Judge rejected the Indicated Shippers' proposed rate design. The Presiding Judge concluded that the Indicated Shippers' rate design improperly disregarded the existence of committed and uncommitted shippers entirely and simply set an across-the-board rate using the design capacity of the pipeline as the throughput in the rate calculation.[49] In addition, the Initial Decision concluded that Indicated Shippers' method would design a rate that would not permit ESL to collect its cost-of-service, an unjust and unreasonable result inconsistent with the Commission's Declaratory Order.[50] The Presiding Judge stated that nothing in the Commission's prior orders supported Indicated Shippers' approach, which would ignore the Commission-approved two-to-one ratio of uncommitted to committed rates.[51]

19. The Initial Decision recognized that the rate design should appropriately allocate the cost-of-service between the committed and uncommitted shippers in a way that ensures the appropriate group of shippers pay for the services they receive.[52] Further, the Presiding Judge found that setting differential rates for the committed and uncommitted Shippers was consistent with Commission precedent and the Commission's prior rulings for ESL,[53] and the Presiding Judge noted the Commission acknowledged this point when it determined that the two-to-one ratio does not result in undue discrimination,[54] and is just and reasonable.[55]

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[49] *Id*. P 535.

[50] *Id*.

[51] *Id*.

[52] ESL-7 at 9:11-14; 23:19-24:14, 25-27, 54-67; ESL-44 at 13-30.

[53] *Id*. P 534. *See* ESL-7 at 26, 55-56; ESL-44 at 14-15; Tr. at 260:9-16.

[54] Declaratory Order at PP 25-31.

[55] ID P 534 (citing Order on Complaint at P 16; ESL-44 at 51; *see also* National Energy Board Decision at 24 ("Taking into account all the factors above . . . the Board is

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20. In affirming Trial Staff's proposed rate design, the Presiding Judge explained that the Opinion No. 154-B annual cost-of-service for ESL, as calculated using the various components determined in the Initial Decision, should be divided by the annualized minimum throughput volumes of the committed shippers.[56] This determines the Committed Rate, which is multiplied by two, for the reasons explained *infra*, to determine the Uncommitted Rate.[57] The Presiding Judge stated the same methodology should be used to calculate the 2011 rate design.[58]

21. The ID also concluded that the question of whether one calculates the Committed Rate first and then the Uncommitted Rate, or vice versa, was inconsequential.[59] The Presiding Judge stated the Commission has ruled that "Indicated Shippers' argument that the Committed Rates cannot be decoupled from the Uncommitted Rate is effectively an attempt to overturn the rate structure approved by the Commission in the Declaratory Order proceeding, and is an impermissible collateral attack on the Commission's prior orders."[60]

Exceptions

A. Briefs on Exceptions

Enbridge Pipeline (Southern Lights) LLC

22. ESL filed provisional exceptions noting that if the Initial Decision were not upheld on the rate design issues it would provisionally take exception to some of the Initial Decision's findings. As discussed below, the Commission affirms the Initial Decision's adoption of the rate design proposed by Trial Staff (i.e., utilization of the two-to-one rate design methodology) based on the Commission's prior orders related to Southern Lights.

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of the view that a 2 to 1 Toll Ratio is just and reasonable.")).

[56] ID at P 537 (citing Exh. S-15 at 9; Exh. S-17).

[57] ESL transported only committed volumes during the 2010 rate period.

[58] ID at P 537.

[59] *Id*. P 538.

[60] *Id*. (citing Order on Complaint at P 17).

Accordingly, ESL's provisional exceptions are moot, as are Staff's and Indicated Shippers' Briefs Opposing Exceptions as they relate to ESL's provisional exceptions.

Indicated Shippers

23. On exceptions, Indicated Shippers contend that the ID erroneously held that the provisions of the TSA, including the two-to-one ratio, must be taken into account in determining the rate structure and rate design of Southern Lights' Uncommitted Rate.[61] Indicated Shippers argue the ID's holding ignored the provisions of the Clarification Order, the Complaint, and the 2010 and 2011 Suspension Orders that the Uncommitted Rate must be calculated first, on a stand-alone basis apart from the terms of the TSA, using actual costs.[62] Indicated Shippers state that after the Uncommitted Rate has been calculated in this manner, the Committed Rate may then be derived from the Uncommitted Rate by applying the rate structure of the TSA.[63] Indicated Shippers state that "[n]o aspect of ESL's TSA with its committed shippers will be applicable to the rates for uncommitted service."[64]

24. On exceptions, the Indicated Shippers advance three main arguments to support their view that the Commission must set the maximum allowable Uncommitted Rate without regard to the Commission-approved two-to-one rate design methodology. First, Indicated Shippers contend that the two-to-one rate design is contained in a "private contract" to which the Indicated Shippers were not a party, and therefore cannot be binding on them.[65] Second, Indicated Shippers argue that the Uncommitted Rate constitutes a "recourse rate" within the meaning of the 1996 Natural Gas Policy Statement, and therefore that it is required to be unaffected by any discounts provided to

[61] Indicated Shippers Brief on Exceptions at 28.

[62] *Id*. at 29, 54, & n.129.

[63] *Id*. at 29.

[64] Exhibit No. IS-1 at 7. *See also* Exhibit No. IS-1 at 22 ("The initial rates for uncommitted service proposed here do not relate to, and are not governed by, the Committed Rates negotiated in the TSAs between [ESL] and its committed shippers.").

[65] ESL Brief on Exceptions at 34; Indicated Shippers Brief on Exceptions at 41-45.

the committed shippers.[66] Third, Indicated Shippers assert that a rate set using the two-to-one rate design cannot – by definition – be a just and reasonable rate.[67]

25. Indicated Shippers contend that Staff's rate design methodology approved in the Initial Decision generates Uncommitted Rates that are not "cost-based" and therefore not just and reasonable, which violates *F.P.C. v. Hope Natural Gas*,[68] and contradicts controlling Commission orders that the Uncommitted Rate must be "cost-based".[69] Specifically, Indicated Shippers state that Staff's rate design, as adopted by the ID, generate Uncommitted Rates that are not cost-based because multiplying by two is not reflective of the relative cost for Southern Lights to provide service to committed and uncommitted shippers or supported by any other recognized rate design function or policy.[70] The Indicated Shippers contend that the two-to-one factor employed by Staff's model as adopted in the ID to derive the Uncommitted Rate is "improperly based on a contractual provision which the Commission rightly recognized has no place in the formulation of a cost-based rate for uncommitted service in the face of a protest under the ICA."[71] Indicated Shippers argue the justification for the two-to-one ratio is not rooted in the different costs incurred in providing uncommitted and committed service by the pipeline.[72] Indicated Shippers further argue Southern Lights did not establish on the record that the costs the pipeline will incur to transport uncommitted volumes are any different on a per unit barrel basis from those incurred in transporting committed volumes – let alone that the costs Southern Lights incur for transporting uncommitted volumes will be twice as high.[73] Rather, the Indicated Shippers, state the basis for the multiplier approved by the ID was the ratio established in the TSA.

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[66] ESL Brief on Exceptions at 35; Indicated Shippers Brief on Exceptions at 45-48.

[67] ESL Brief on Exceptions at 35; Indicated Shippers Brief on Exceptions at 48-50.

[68] 320 U.S. 591 (1944) (*Hope*).

[69] Indicated Shippers Brief on Exceptions at 15, 33.

[70] *Id*. at 31.

[71] *Id*.

[72] *Id*. at 32.

[73] *Id*.

26. However, Indicated Shippers argue that if a cost-based Uncommitted Rate is derived first, as Indicated Shippers propose, and this rate is divided by two to derive the Committed Rate, the Committed Rate will not be cost-based, but neither is it required to be.[74] Indicated Shippers state that the choice of which methodology is employed is the single most important issue in dispute in this case and is determinative of outcome.[75] Indicated Shippers argue the Commission's prior orders implicitly recognized that the Committed Rate, as a negotiated rate between the pipeline and its two committed shippers, need not be cost-based.

27. Indicated Shippers argue the ID erred by ignoring the Clarification Order's analogy of the Uncommitted Rate to a natural gas pipeline recourse rate, and by improperly allowing cost-shifting from committed shippers to uncommitted shippers in violation of the 1996 Negotiated Rate Policy Statement.[76] Indicated Shippers argue that the Commission expressly stated in the Clarification Order that the Committed Rate agreed to by ESL and its committed shippers was a "negotiated rate," and that the Uncommitted Rate would function as a recourse rate akin to a natural gas pipeline's cost-based recourse rate, which must be available to shippers who choose not to negotiate a rate.[77] Indicated Shippers argue that this key holding – that the TSA rate is a negotiated rate and that the uncommitted rate is analogous to a cost-based, recourse rate – differentiates the instant case from the Commission's decisions in *TransCanada Keystone Pipeline*,[78] and *Express Pipeline Partners*,[79] which did not discuss the concept of a

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[74] *Id*.

[75] *Id*.

[76] Indicated Shippers Brief on Exceptions at 37 (citing *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *clarification granted*, 74 FERC ¶ 61,194, *reh'g and clarification denied*, 75 FERC 61,024 (1996), *reh'g denied*, 75 FERC ¶ 61,066 (1996), *pet. for review denied sub nom., Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998)) (*Alternative Rate Policy Statement* or 1996 Negotiated Rate Policy Statement).

[77] *Id*. at 39 (citing Clarification Order at P 14).

[78] 125 FERC ¶ 61,025 (2008).

[79] 76 FERC ¶ 61,245 (1996).

recourse rate.[80] Indicated Shippers argue the central tenet of the interplay between a cost-based recourse rate and a negotiated rate, such as ESL's committed rate, was enunciated by the Commission in the 1996 Negotiated Rate Policy Statement, stating that "customers electing the recourse rate should be no worse off as a result of the use of negotiated rates than they would be absent the use of negotiated rates."[81]

28. Indicated Shippers contend that Trial Staff's rate design models for ESL's Uncommitted Rates for 2010 and 2011, which the Initial Decision adopted, are flawed because the incorporation of the two-to-one ratio in these models produces improper cost-shifting from committed shippers to uncommitted shippers and cross-subsidization of ESL's committed shippers.[82] Given this alleged cost-shifting and cross-subsidization, Indicated Shippers state Staff's rate design models adopted by the ID violate the 1996 Negotiated Rate Policy Statement, incorporated by reference in Paragraph 14 of the Clarification Order. In addition, Indicated Shippers argue the cost-shifting and cross-subsidization embedded in the models adopted by the ID cause the Uncommitted Rates for 2010 and 2011 generated by those models to be unjust and unreasonable. Moreover, Indicated Shippers argue the ID's adoption of Staff's rate design model (i.e., incorporating the TSA's two-to-one ratio in the calculation of the ESL's Uncommitted Rate) improperly allows ESL and its committed shippers to exert market power over its recourse rate customers.[83] Indicated Shippers argue that for a shipper to have recourse to an alternative cost-based rate, that rate must not be increased as a result of the special deal negotiated by the pipeline with the committed shippers. Indicated Shippers argue the Clarification Order makes clear that the Commission had these principles in mind for purposes of calculating ESL's Uncommitted Rate in the event of a protest, and that the Uncommitted Rate must be calculated first without regard to the special deal negotiated with the committed shippers.[84]

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[80] Indicated Shippers Brief on Exceptions at 40.

[81] Indicated Shippers Brief on Exceptions at 40 (citing 1996 Negotiated Rate Policy Statement, 74 FERC ¶ 61,076, at 61,242).

[82] Indicated Shippers Brief on Exceptions at 37, 53.

[83] *Id*. at 41-43.

[84] *Id*. at 45.

29. Indicated Shippers contend that in approving Staff's rate design model based on the TSA's two-to-one rate design, the ID erred by confusing the Commission's discounted rate policy, which Indicated Shippers aver does not apply to this case, and the Commission's negotiated rate policy which Indicated Shippers aver does apply to this case.[85] Indicated Shippers argue the rate design models adopted by the ID improperly embed a discount adjustment in the model's calculation of an Uncommitted Rate. To calculate ESL's 2010 Uncommitted Rate, the rate design method adopted by the ID multiplies the calculated cost-based committed rate by an adjustment factor of two to derive the Uncommitted Rate. Similarly, the rate design model adopted by the ID "weights" uncommitted volumes by a factor of two relative to the committed volumes, or put another way, the model "adjusts" the committed volumes by a factor of one half relative to the uncommitted volumes – which Indicated Shippers state is in effect a discount rate adjustment. Indicated Shippers claim the embedding of the TSA's two-to-one ratio and a discount-type adjustment in these models violates the principle that recourse rate shippers should not be adversely affected by a pipeline's use of a negotiated rate. Indicated Shippers claim the rate design models adopted by the ID fail to recognize that, like a natural gas recourse rate, ESL's cost-based Uncommitted Rate must not be increased as a result of the negotiated commitment contract offered by ESL and accepted by the committed shippers through the open season. Indicated Shippers claim this essentially forces uncommitted shippers to cross-subsidize the reduced negotiated rate for committed shippers in violation of the Commission's precedent regarding recourse and negotiated rates.[86]

Rate Design

30. Indicated Shippers argue the ID should have adopted the Indicated Shippers' rate design model for the derivation of ESL's 2010 Uncommitted Rate by dividing the total cost-of-service by design capacity.[87] Indicated Shippers state they developed their rate design model in accordance with Paragraphs 13 and 14 of the Clarification Order and the 1996 Negotiated Rate Policy Statement, without regard to the "special deal ESL negotiated with the committed shippers."[88] Indicated Shippers state a fundamental

[85] *Id*. at 46.

[86] *Id*. at 49-50.

[87] *Id*. at 50.

[88] *Id*.

premise of their rate design model is that the Uncommitted Rate is not derived from the Committed Rate or the TSA between ESL and its committed shippers. Neither the true-up nor refund mechanism, nor any other provision of ESL's TSA with its Committed Shippers affect Indicated Shippers' rate design model.[89]

31. Indicated Shippers state the ID erred by failing to adopt their alternative for the derivation of the 2011 rate, i.e., dividing the cost-of-service for the 2011 test-period by ESL's design capacity, without regard to any provision of the TSA.[90] Indicated Shippers counter the ID's finding that that this approach ignores the Commission's prior holding that in setting the Uncommitted Rate for hearing the Commission was not undermining the TSA's rate structure or the two-to-one ratio. Indicated Shippers claim their evidentiary presentations in this proceeding have not sought to undermine or to relitigate the two-to-one ratio, but that they disagree with the ID on how and when the two-to-one ratio should be applied, not on the principle of the ratio itself. Indicated Shippers argue the two-to-one ratio should be applied to reduce the Committed Rate rather than to increase the Uncommitted Rate. This result, Indicated Shippers claim, is fundamentally fair and comports with the Commission's negotiated rate policy and the Commission's prior orders.

32. Indicated Shippers contend the choice is between two fundamentally different, competing ratemaking methods. The first, proposed by ESL and Staff, and adopted by the ID, would establish the Uncommitted Rate essentially by multiplying a cost-based committed rate by a factor of two. The alternative, proposed by Indicated Shippers, would establish a cost-based rate for uncommitted shippers, and then derive the Committed Shipper rate by dividing the Uncommitted Rate by two. Indicated Shippers claim that both of these methods preserve the two-to-one ratio. However, Indicated Shippers claim that only their ratemaking alternative harmonizes the two-to-one ratio with paragraphs 13 and 14 of the Clarification Order, the 1996 Negotiated Rate Policy Statement, and *Hope Natural Gas*, which they believe requires that the Uncommitted Rate not be adversely affected (i.e. increased) by the revenue deficit flowing from the negotiated TSA committed rate.

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[89] *Id*.

[90] *Id*. at 51.

33. Indicated Shippers argue the ID erroneously found that the question of which rate should be calculated first is "inconsequential."[91] According to the Indicated Shippers the question of whether one calculates the Committed Rate first and then the Uncommitted Rate, or vice versa, determines the outcome, and the failure of the ID to recognize this illustrates the fundamental error of the ID.[92] Indicated Shippers argue that applying the two-to-one ratio to the calculation of the Uncommitted Rate in the first instance would nullify the Clarification Order's requirement that, in the event of a protest, ESL would be required to establish a cost-based recourse rate applicable to uncommitted service. Indicated Shippers argue that contrary to the findings of the ID, the Commission has already determined that the Uncommitted Rate is to be calculated first.[93] The essential point, Indicated Shippers claim, is that the committed rate is a negotiated rate that must not adversely impact the cost-based Uncommitted Rate. Thus, Indicated Shippers aver, the TSA rate should not be allowed to be reflected in the derivation of the Uncommitted Rate as a 50 percent discount, with the alleged "under-recovery" of such discount to be recovered from uncommitted shippers.[94] Indicated Shippers maintain that only after a cost-based, just and reasonable Uncommitted Rate has been developed can the Committed Rate subsequently be determined under the terms of the TSA, and at this point the two-to-one ratio of the TSA can be applied to decrease the Committed Rate rather than to increase the Uncommitted Rate.[95]

34. Indicated Shippers contend the ID erroneously found the Indicated Shippers' rate design "disregards the existence of committed and uncommitted shippers entirely and

[91] *Id*. at 52.

[92] *Id*. at 53.

[93] *Id*. at 54 (citing Clarification Order at P 13 ("When a just and reasonable Uncommitted Rate is determined in this manner, [ESL] may derive its Committed Rate by applying the agreed-upon terms of the TSA."); Order on Complaint at P 5 ("Committed Shippers would receive the discounted rates agreed to in the TSA after the Uncommitted Rate was derived."); 2011 Suspension Order at P 12 ("the Committed Rate, which is 50 percent of the Uncommitted Rate, can be derived when a just and reasonable Uncommitted Rate is determined.").

[94] Indicated Shippers Brief on Exceptions at 54.

[95] *Id*.

simply sets an across-the-board rate using the design capacity of the pipeline."[96] Indicated Shippers argue their rate design is consistent with the Commission's prior orders and with the Commission's NGA section 4 rate design treatment of negotiated rates.

35. Indicated Shippers dismiss the Presiding Judge's concern that ESL would not receive enough revenue under the Indicated Shippers' rate design method as misplaced, as a pipeline can always charge less than its cost-of-service. Thus, Indicated Shippers argue that ESL's potential inability to recover its full cost of service does not render the Indicated Shippers' rate model unjust or unreasonable. Whether the pipeline actually receives its full cost-of- service is not a requirement of cost-of-service rates Indicated Shippers state, especially not initial rates.[97] Under longstanding precedent, Indicated Shippers explain, the regulated entity is never "guaranteed" a return on its investment (i.e., its revenue requirement), only the opportunity to earn a fair return.[98] Further, Indicated Shippers note, it is the Commission's general policy to set initial rates based on an oil pipeline's design capacity and to hold a pipeline at risk for unsubscribed volumes.[99] Indicated Shippers state that because an oil pipeline may not initially ship 100 percent of its design capacity, this policy assumes that an initial rate may not satisfy the pipeline's revenue requirement.

36. Moreover, Indicated Shippers argue that when the pipeline voluntarily agrees to lower, negotiated rates, the notion that the rates may be unjust and unreasonable because the pipeline may under-earn its revenue requirement is effectively thrown by the wayside.[100] It is in the nature of such negotiated rates, Indicated Shippers state, that the pipeline – not the recourse rate shippers who are not party to the negotiated rates – is "at

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[96] *Id*. (citing ID at P 501).

[97] Indicated Shippers Brief on Exceptions at 56.

[98] *Id*. (citing *Hope*, 320 U.S. at 602).

[99] Indicated Shippers Brief on Exceptions at 56 (citing Declaratory Order at P 29; *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,122, at P 44 (2005); Clarification Order at P 10).

[100] Indicated Shippers Brief on Exceptions at 56.

risk" for such under-recovery.[101] In addition, Indicated Shippers note that under the TSA, ESL receives substantial guaranteed revenues from the committed shippers for 15 years, including an annual true up between revenue and actual costs.[102] Indicated Shippers state that given these guaranteed revenues, it is unlikely ESL will under-recover its cost-of-service.

B. Briefs Opposing Exceptions

Enbridge (Southern Lights)

37. In its brief opposing exceptions, ESL asserts that the Initial Decision correctly held that the Commission-approved two-to-one rate design methodology established in the TSA must be used in determining the just and reasonable Uncommitted Rate for both 2010 and 2011.[103] In rebutting Indicated Shippers' premise that no aspect of Southern Lights' TSAs with its committed shippers would be applicable to rates for uncommitted shipper service, ESL states the Indicated Shippers ignore the Commission's Declaratory Order, where the Commission approved the basic tariff structure and expressly held that the two-to-one rate design methodology was lawful.[104] ESL states that it is not the TSA itself, but rather the Commission's declaratory rulings with respect to the TSA, that constitute the framework within which this case must be decided. ESL states that though the Indicated Shippers had notice and an opportunity to participate in the Declaratory Order process, they chose not to do so and cannot now collaterally attack the result of that process.[105] In discussing the economic significance of Southern Lights'

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[101] *Id*. (citing 1996 Negotiated Rate Policy Statement, 74 FERC ¶ 61,076 at 61,242*; Rockies Express Pipeline LLC*, 138 FERC ¶ 61,241, at P 36-38 (2012); *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208, at P 203 (2011)).

[102] Indicated Shippers Brief on Exceptions at 58; Exh. ESL-9 at 1, 38-47.

[103] ESL Brief Opposing Exceptions at 28-53.

[104] *Id*. at 35 (citing Declaratory Order at P 31; Clarification Order at P 13; Order on Complaint at P 16).

[105] ESL Brief Opposing Exceptions at 36 (citing Order on Complaint at P 9 ("[T]he Indicated Shippers' complaint against Southern Lights Pipeline's rate structure and methodology is an impermissible collateral attack on the Declaratory Order proceeding.")).

Commission-approved tariff structure, ESL notes the economic essence of the TSA is the allocation of risk among ESL, the committed shippers, and the uncommitted shippers, and the corresponding allocation of costs and revenues to reflect that pattern of risk bearing.[106] Because the TSA obligates the committed shippers to pay Southern Lights' whether or not they ship their committed volumes, it is the committed shippers who primarily bear the risk related to diluent demand. Conversely, the uncommitted shippers bear no risk whatsoever under the TSA and yet benefit from the flexibility to ship when they choose. Thus, ESL argues the appropriate rate design must incorporate the concept that the uncommitted shippers should pay an Uncommitted Rate that compensates those who do bear the project risk for the cost of doing so, which is exactly what the TSA does through the two-to-one rate design and the year-end refund mechanism.[107]

38. ESL states the fact that the two-to-one rate design originated in a contract entered into during the open season for the Southern Lights Pipeline does not entitle the Indicated Shippers to relitigate the Commission's prior rulings affirming that rate design, nor are the Indicated Shippers exempt from those rulings simply because they did not sign up for a volume commitment during the open season.[108] ESL states that it is the Commission's prior rulings – not the contract – that dictate the method of evaluating the just and reasonable rates in this case.[109] ESL argues the two-to-one rate design, as recognized by the Commission in the Declaratory Order, is fully applicable to apportion the total cost of service between the Committed and Uncommitted volumes. ESL cites Paragraph 27 of the Declaratory Order which states "[a]ccording to [ESL], while the committed and uncommitted shippers will share in paying the agreed cost-of-service of the pipeline, after revenue sharing is implemented, the *uncommitted shippers will pay a higher proportion of the costs of on a unit basis*." ESL again references Paragraph 27 of the Declaratory Order which states the basis for this rate design, namely that "all potential shippers had an opportunity during the open season to commit volumes and establish a 50-percent tariff rate discount. Accordingly, the Commission finds that the proposed rate structure does not violate the antidiscrimination or undue preference provisions of the Interstate

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[106] ESL Brief Opposing Exceptions at 36.

[107] *Id*. at 38.

[108] *Id*.

[109] *Id*.

Commerce Act (ICA) because the rate discount was made available to all interested shippers and *reflects the differences in service between firm and non-firm shippers*."

39. ESL asserts that the Commission's natural gas pipeline "recourse rate" decisions do not require the Uncommitted Rate be set without regard to the Commission-approved two-to-one rate design structure. As an initial matter, ESL asserts that the Indicated Shippers are clearly not "worse off" than they would have been without the TSAs because in that scenario ESL would not have been able to construct the pipeline, and if they had been able to, the rates for the uncommitted shippers would undoubtedly been much higher than the Uncommitted Rates under ESL's existing tariff.[110] ESL further rebuts Indicated Shippers' reliance on various "recourse rate" rulings pursuant to the 1996 Negotiated Rate Policy Statement.[111] ESL states that while the Clarification Order did reference the "recourse rate" concept, the Commission did not suggest that the 1996 Negotiated Rate Policy Statement dictates how to apply the Opinion No. 154-B methodology for purposes of demonstrating the justness and reasonableness of the 2010 and 2011 Uncommitted Rates; rather, ESL asserts the Commission stated only that "if the uncommitted rate is protested it must be supported by filing cost, revenue, and throughput data, similar to the requirement that gas pipelines must offer a cost-of-service based recourse rate."[112] ESL maintains this is precisely what the ID did in determining the just and reasonable Uncommitted Rate based on a straightforward application of the oil pipeline rate methodology and regulations, and consistent with the Declaratory Order.

40. ESL argues that the Clarification Order did not state that the TSA structure approved in the Declaratory Order proceeding should be disregarded if a party protests ESL's Uncommitted Rate.[113] To the contrary, the Commission clarified that "the rate design embodied in the TSA used to determine both the committed and uncommitted

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[110] *Id*. at 40.

[111] ESL characterizes the *Alternative Rate Policy Statement* as the "1996 Natural Gas Pipelines policy statement." For consistency purposes, the Commission will characterize the policy statement as the "1996 Negotiated Rate Policy Statement," as that is the characterization Indicated Shippers uses to describe the *Alternative Rate Policy Statement*.

[112] *Id*. (citing Clarification Order at P 14).

[113] ESL Brief Opposing Exceptions at 41.

rates will be upheld and applied during the term of the TSA."[114] ESL explains that this unambiguous ruling was subject only to the condition that, if the Uncommitted Rate was protested, ESL must support the rate "by filing cost, revenue, and throughput data supporting such rate as required by Part 346 of the Commission's regulations."[115] Finally, ESL argues that in the Order on Complaint, the Commission removed any doubt as to the applicability of the TSA rate structure, when it stated it had "reviewed the TSA and the rate structure in the Declaratory Order proceeding and determined that the proposed rate design was just and reasonable and not unduly discriminatory because all potential shippers had the opportunity to become committed shippers."[116]

41. ESL contends that the TSAs resulted from valid open seasons and are therefore not the type of individually-negotiated contracts addressed in the 1996 Negotiated Rate Policy Statement.[117] ESL disagrees with Indicated Shippers' characterization that the process leading up to the TSAs was "private," "secret," or "individualized." ESL states its witness Jervis showed that the TSAs were the outcome of an entirely transparent process consisting of two open seasons. ESL cites the Commission's summary of the process: "[i]n 2006, in order to determine the financial viability of its proposed Southern Lights Pipeline, ESL held a widely publicized open season. Imperial and ExxonMobil were among the potential shippers who received notices and attended meetings. Neither of the Indicated Shippers became a committed shipper on the proposed pipeline."[118] Therefore, ESL argues that the TSA rate structure was developed through a fully transparent process in which the Indicated Shippers and any other prospective shippers were provided two opportunities to become committed shippers. Accordingly, the 1996 Negotiated Rate Policy Statement's concern about pipelines using negotiated rates to unilaterally impose cost demands is not applicable in this case.

42. ESL explains that another feature that distinguishes this case from the gas pipeline negotiated rate regime is that ESL sought and obtained pre-approval of the TSA rate

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[114] *Id*. (citing Clarification Order at P 13).

[115] ESL Brief Opposing Exceptions at 41 (citing Clarification Order at P 13).

[116] *Id*. (citing Order on Complaint at P 16).

[117] ESL Brief Opposing Exceptions at 41-43.

[118] Order on Complaint at P 9.

structure through the Commission's Declaratory Order process. ESL notes that this differs from the process envisioned under the 1996 Negotiated Rate Policy Statement, inasmuch as the Commission has encouraged oil pipelines to file petitions for declaratory orders concerning their proposed rate structures as a means of obtaining regulatory certainty in advance of constructing major new infrastructure projects. ESL notes the Commission has repeatedly held "a Declaratory Order [is] procedurally appropriate for a new oil pipeline entrant . . . because it needs to acquire and guarantee financing in order to begin construction."[119] ESL notes its Petition for Declaratory Order was supported by multiple affidavits detailing, among other things, how the TSA rate structure would be used to establish the Uncommitted Rate. ESL states that the Indicated Shippers could have raised concerns about the TSA rate structure by participating in the Declaratory Order proceeding, but they chose not to.

43. In opposing Indicated Shippers' allegation that using the TSA rate structure to set the Uncommitted Rate will result in the type of undue discrimination prohibited under the ICA, ESL argues that the Commission expressly held to the contrary. Specifically, ESL cites Paragraph 31 of the Declaratory Order, where the Commission expressly held that "the [ESL] proposed rate structure does not violate the antidiscrimination or undue preference provisions of the [ICA] because the rate discount was made available to all interested shippers and reflects the differences in service between firm and non-firm shippers." ESL notes the Commission then revisited that issue in the 2010 Suspension Order, holding that "[s]ince all potential shippers had the opportunity to sign up for the committed rates, *there is no issue of discrimination*."[120] ESL argues that even if the TSA

[119] ESL Brief Opposing Exceptions at 44 (citing *Express Pipeline Partnership*, 77 FERC ¶ 61,188, at 61,755 (1996); *see also Colonial Pipeline Co.*, 116 FERC ¶ 61,078, at P 45 (2006) ("[I]t is useful to remove uncertainty regarding rate methodology issues prior to construction of a project and prior to the filing of proposed rates because the assurances facilitate financing and other investment decisions."). ESL noted that the list of new or expanded pipelines that have obtained Declaratory Orders in this fashion also includes *Enbridge Pipelines (North Dakota) LLC*, 133 FERC ¶ 61,167 (2010) (*Enbridge (North Dakota*); *White Cliffs Pipeline, L.L.C.*, 126 FERC ¶ 61,070 (2009) (*White Cliffs*); *CCPS Transp., LLC*, 121 FERC ¶ 61,253 (2007) (*CCPS*); *Calnev Pipe Line LLC*, 120 FERC ¶ 61,073 (2007); *Caesar Oil Pipeline, LLC*, 102 FERC ¶ 61,339 (2003); *Proteus Oil Pipeline Co.*, 102 FERC ¶ 61,333 (2003); *Plantation Pipe Line Co.*, 98 FERC ¶ 61,219 (2002) (*Plantation*).

[120] ESL Brief Opposing Exceptions at 44 (citing 2010 Suspension Order at P 16).

rate structure were deemed to be the product of negotiations between ESL and the committed shippers, the resulting Uncommitted Rate would not violate the ICA. ESL explains that the ICA does not preclude rates set by contract – it requires only that the same contract rates be offered to similarly situated shippers.[121]

44. In opposing Indicated Shippers' argument that Staff's rate design model adopted by the ID violate the 1996 Negotiated Rate Policy Statement because these models produce improper cost-shifting from committed shippers to uncommitted shippers, ESL states that Indicated Shippers stress a policy adopted for gas pipelines, but wholly ignore the Commission's policy for oil pipelines that was adopted in orders issued after the 1996 Negotiated Rate Policy Statement. ESL cites *Express Pipeline Partners*,[122] where the Commission held that it was permissible in certain circumstances for oil pipelines to establish differential rates for different classes of shippers, such as committed shippers and uncommitted shippers. ESL states that the principle discussed in *Express* has been repeatedly reaffirmed, including in the *Keystone* case,[123] where the pipeline explained to the Commission that its proposed rate structure "results in uncommitted shippers bearing a higher proportionate share of the pipeline's costs on a unit basis, that is, 'walk-up' shippers pay more per barrel of transportation."[124]

45. ESL notes Indicated Shippers argument that Trial Staff's application of the two-to-one rate design, adopted by the Initial Decision, violates the ICA because it results in Uncommitted Rates that bear a greater share of per-unit costs than the Committed Rates

[121] ESL Brief Opposing Exceptions at 45 (citing *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1316 (D.C. Cir. 1984) (*Sea-Land*) ("the [ICC] has held that contract rates are not inherently discriminatory, provided that the carrier offering them makes them available to all similarly situated shippers of like commodities.").

[122] *See* 76 FERC ¶ 61,245 (1996) (*Express*).

[123] *See, e.g., White Cliffs*, 126 FERC ¶ 61,070 at P 28; *TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, at P 25 (2008) (*Keystone*); *Enbridge (U.S.) Inc. and ExxonMobil Pipeline Co.*, 124 FERC ¶ 61,199, at P 29 (2008); *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211, at P 38 (2005) (*Enbridge Energy*); *Plantation*, 98 FERC ¶ 61,219 at 61,866; *Mid-America Pipeline Co.*, 93 FERC ¶ 61,306, at 62,048-49 (2000) (*Mid-America Pipeline*).

[124] *Keystone* at P 23 (2008).

do, is contradicted by decades of Commission and ICA precedent indicating that differentials in rates are entirely appropriate – and quite consistent with the statutory requirement of just and reasonable rates – where they are based on relevant differences between the respective classes of shippers. ESL argues that where the Commission itself has declared that the applicable rate design reflects "differences in service between firm and non-firm shippers"[125] there can be no question that the two-to-one rate design does not violate the statutory requirement.

46. In addition to the *Express* and *Keystone* precedents, ESL notes scores of examples of rates that have been held just and reasonable even though they do not apply uniformly to all classes of shippers. The operative question, in all such cases ESL states, is whether the differential properly reflects relevant differences in service, cost, or the shipper's relationship to the pipeline.[126] Given the wide range of circumstances in which the Commission has upheld such differentials, ESL argues there is no basis for the Indicated Shippers' contention that any rate that does not reflect average costs over all volumes is by definition an unjust and unreasonable rate.

47. In *Sea-Land*, ESL states the D.C. Circuit explained that "Congress has delegated broad legislative discretion to the [Interstate Commerce Commission] to determine when differential treatment amounts to improper discrimination among shippers and when such treatment is justified by relevant dissimilarities in transportation conditions."[127] ESL states that in the oil pipeline context, the Commission has repeatedly used this discretion to uphold rate differentials in a variety of settings. For example, ESL explains the Commission has approved open season proposals that set aside expansion capacity for committed shippers paying premium rates, explaining that the rate differentials were justified by the different commitments made by firm and non-firm shippers.[128] Specifically, in *CCPS* the Commission recognized "[i]t can be appropriate to charge a premium rate to those shippers willing to meet the contract's terms and pay more for the guarantee of capacity without proration. In this case, premium rate firm shippers are not

[125] ESL Brief Opposing Exceptions at 49 (citing Declaratory Order at P 31).

[126] *Id*. at 50.

[127] ESL Brief Opposing Exceptions at 50 (citing 738 F.2d at 1319).

[128] ESL Brief Opposing Exceptions at 50 (citing *CCPS*, 121 FERC ¶ 61,253 at P 19).

similarly situated with the pipeline's non-firm shippers."[129] ESL again notes that in *Express*, the Commission also approved proposals in which oil pipelines offered volume discounts to shippers willing to make certain term commitments.[130]

48. In sum, ESL argues Trial Staff's approach, adopted by the Initial Decision, is entirely consistent with the Declaratory Order and related Commission orders. In particular, ESL notes that in upholding the two-to-one rate design method, the Commission expressly stated that, "[a]ccording to [ESL], while the committed and uncommitted shippers will share in paying the agreed cost-of-service of the pipeline, after revenue sharing is implemented, the uncommitted shippers will pay a higher proportion of the costs on a unit basis."[131] ESL further notes that the Commission went on to observe that "the proposed rate structure does not violate the antidiscrimination or undue preference provisions of the [ICA] because the rate discount was made available to all interested shippers and reflects the differences in service between firm and non-firm

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[129] *Id*. ESL also cites to *Enbridge (North Dakota)*, 133 FERC ¶ 61,167 at P 40 where the Commission recognized ("[t]he proposal appropriately distinguishes committed and uncommitted shippers and provides for rates consistent with the obligations of each class of shipper."); *Mid-America Pipeline*, 136 FERC ¶ 61,087 at P 19 ("Mid-America appropriately distinguishes committed and uncommitted shippers and provides for rates consistent with the obligation of each class of shipper . . . ."); *Skelly-Belvieu Pipeline*, 138 FERC ¶ 61,153, at P 17 (2012).

[130] ESL Brief Opposing Exceptions at 51 (citing *Express*, 76 FERC ¶ 61,245 at 62,258; *Plantation*, 98 FERC ¶ 61,219 at 61,866; *Enbridge Energy*, 110 FERC ¶ 61,211 at P 38). ESL also notes that in the natural gas context, the Commission has explained that because it permits "rate differentials among customers based on a number of grounds – including differing elasticities of demand, volumes to be transported, and length of service commitments – a project sponsor might wish to offer preferential rates to shippers who contract for larger volumes of service." *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, Order No. 686, 117 FERC ¶ 61,074, at P 67 (2006). ESL further notes the Commission has recognized analogous distinctions in the electric transmission industry. *See, e.g., Allocation of Capacity of New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects*, 140 FERC ¶ 61,061, at P 18 (2012) ("For instance, developers might offer 'first mover' customers more favorable terms and conditions than later customers.").

[131] ESL Brief Opposing Exceptions at 52 (citing Declaratory Order at P 27).

shippers."[132] Thus, ESL argues that the Trial Staff's approach to implementation of the two-to-one rate design appropriately calculated the 2011 Uncommitted Rate by weighting the uncommitted and committed volumes in the proportion of two-to-one, so that each uncommitted barrel received twice the allocation of costs as each committed barrel. Accordingly, ESL maintains the ID correctly found that this approach when applied to the Trial Staff's cost of service – results in maximum allowable Uncommitted Rates at every volume level that are higher than the effective Uncommitted Rates (after revenue sharing) that would be paid at that same volume level.[133]

49. Finally, ESL states that the Indicated Shippers' emphasis on the order of calculation, i.e., their argument that the Committed Rate must be derived after the Uncommitted Rate is calculated, is misplaced, and is derived solely from the Indicated Shippers' insistence that the Uncommitted Rate must be calculated without regard to the Commission's prior rulings.[134] ESL asserts that if the calculation is performed correctly in accordance with the two-to-one rate design as approved in the Declaratory Order, the sequence in which the calculation is performed is of no significance to the outcome, as Trial Staff witness McComb testified, and the Presiding Judge agreed.[135]

Trial Staff

50. Opposing exceptions to the ID, Trial Staff states that the Initial Decision correctly held that the Commission-approved two-to-one rate design methodology established in the TSA must be applied to the design of the just and reasonable Uncommitted Rate in this proceeding.[136] Trial Staff also states that because the Indicated Shippers protested the uncommitted rates, the Presiding Judge properly adopted the Opinion No. 154-B cost-of-service methodology for evaluating the uncommitted rates.[137]

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[132] *Id*. (citing Declaratory Order at P 31).

[133] *Id*. at 53 (citing ID at P 553).

[134] *Id*. at 53, n.42.

[135] *Id*.

[136] Trial Staff Brief Opposing Exceptions at 21.

[137] *Id*.

51. Trial Staff argues that contrary to Indicated Shippers' claim, Trial Staff's methodology for calculating the Uncommitted Rate from the Committed Rate produces just and reasonable, cost-based rates.[138] Trial Staff states that the Indicated Shippers' contention that the calculation of the Uncommitted Rate by multiplying a "cost-based" committed rate by two does not reflect the relative cost of the pipeline to provide service to the committed and uncommitted shippers is not only incorrect but also does not go to an issue properly raised in this proceeding. Trial Staff argues the Presiding Judge correctly found that setting differential rates for committed and uncommitted shippers is consistent with Commission precedent and prior rulings involving ESL Southern Lights. Specifically, Trial Staff observes the Declaratory Order expressly found that the two-to-one ratio did not create discrimination or undue preference in violation of the ICA.[139] Moreover, Trial Staff points out that in the 2010 and 2011 Suspension Orders, the Commission explicitly emphasized that the fact it was setting ESL's tariff rate filings for hearing did not undermine its prior approval of the TSA rate structure or the fact that it had previously approved committed rates that would be 50 percent of the uncommitted rates.[140] Trial Staff further states these straight-forward directives, as enunciated in the Declaratory Order and the 2010 and 2011 Suspension Orders, belie Indicated Shippers' characterization of the Commission's prior approval of the two-to-one ratio as "limited and conditional."[141] Trial Staff also rebuts Indicated Shippers' assertions: (1) that if a cost-based uncommitted rate is derived first, and then divided by two, the resulting committed rate will not be cost-based; and (2) if the committed rate is derived first, and then multiplied by two to derive the uncommitted rate, the Uncommitted Rate will not be cost-based.[142] Trial Staff points out that the Presiding Judge correctly found that both the Committed and Uncommitted Rates approved by the Initial Decision are indeed cost-based because they are both derived from an Opinion No. 154-B cost-of-service, as directed by the Commission.[143] Citing the Declaratory Order at Paragraph 31, the Trial

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[138] *Id*. at 22.

[139] *Id*. at 23.

[140] *Id*.

[141] *Id*. at 24 (citing Indicated Shippers Brief on Exceptions at 31).

[142] *Id*.

[143] *Id*.

Staff explains the differential between the two rates reflects the difference in the quality of service and the financial obligations of the two classes of shippers.[144]

52. As such, Trial Staff argues the difference in the rates may be viewed as result of a Commission-authorized allocation of total pipeline costs between two customer classes, rather than, as the Indicated Shippers would have it, the allocation of costs to only one customer class, leaving the rates derived for the other class without a cost basis. Trial Staff explains how an examination of Hearing Exhibit No. S-21 illustrates the fact that the Uncommitted Rate is indeed cost-based. Trial Staff rate design witness McComb began with the total Opinion No. 154-B cost-of-service, as determined by the Trial Staff witnesses, and then derived Committed and Uncommitted Rates by maintaining a two-to-one ratio between the rate design volumes of the two customer classes. The two resulting rates when multiplied by their respective volumes yield the Opinion No. 154-B cost-of-service. Trial Staff argues that their rates, which the Presiding Judge endorsed in the ID, are in fact cost-based, as they are based on an appropriate cost-of-service and produce revenues exactly equal to that cost-of-service at rate design volumes.[145]

53. Trial Staff disagrees with Indicated Shippers' argument on exceptions that the ID's holding ignored the provisions of the Clarification Order, the Order on Complaint, and the 2010 and 2011 Suspension Orders that the Uncommitted Rate must be calculated first, without regard to the terms of the TSA.[146] Trial Staff argues it demonstrated and the Presiding Judge agreed that it is inconsequential whether one first calculates the Uncommitted Rate or the Committed Rate. Because the Commission required that the two-to-one ratio be maintained in the design of ESL's rates, it makes no difference whether one first derives the Committed Rate and then the Uncommitted Rate from that rate, or derives the Uncommitted Rate directly.[147]

54. Trial Staff argues Hearing Exhibit No. S-21 conclusively demonstrates that for both the 2010 and 2011 rate periods, because of the underlying two-to-one principle, one can derive an identical Uncommitted Rate regardless of whether one first calculates the

[144] *Id*. at 25.

[145] *Id*. at 26.

[146] *Id*. at 26-27.

[147] *Id*. at 27.

Committed Rate or the Uncommitted Rate.[148] The top eleven lines of the exhibit show the derivation of a committed rate at various levels of pipeline throughput, and then the corresponding uncommitted rates that result by doubling the committed rates.[149] The eleven lines at the bottom of the exhibit show the derivation of the Uncommitted Rates first, and then the Committed Rates derived from them by multiplying by 0.50.[150] Both approaches produce the same rates because if one is to calculate the Uncommitted Rates first, based on committed throughput only, one must weigh the committed volumes by 50 percent to achieve the proper two-to-one ratio.[151] Trial Staff explains that though the order of the calculation is inconsequential, because Southern Lights transported only committed volumes during the 2010 and 2011 rate periods,[152] Trial Staff's witness McComb chose to derive a Committed Rate first, and then the Uncommitted Rate from the Committed Rate.[153] Thus, Trial Staff maintains the Presiding Judge appropriately relied on Trial Staff's evidence for an appropriate rate design for determining uncommitted rates for the 201 and 2011 rate periods based on an Opinion No. 154-B cost-of-service. Trial Staff argues the Commission should therefore affirm the Initial Decision on this issue.

55. Trial Staff also contests Indicated Shippers' assertion that the ID violated the 1996 Negotiated Rate Policy Statement.[154] Rather, Trial Staff argues the rate methodology adopted in the ID accords with the Commission's negotiated rate policy. First, Trial Staff notes that it does not dispute that in the Clarification Order the Commission likened the

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[148] *Id*.

[149] Exh. No. S-21, lines 9 and 10 (McComb).

[150] *Id*.

[151] *See* Exh. No. S-21, line 6 (bottom half) (McComb) (showing the application of appropriate 0.50 weighting).

[152] Exh. No. S-15 at 9 (McComb); hearing transcript at 279 (McComb); Exh. No. IS-46 at 3 (Jervis) (showing that ESL did not transport any uncommitted volumes from July 2010 through December 2011).

[153] Trial Staff Brief Opposing Exceptions at 28.

[154] *Id*. at 35.

Uncommitted Rate to a gas pipeline recourse rate, and the Committed Rate to a negotiated rate, but states that the rate methodology adopted by the ID does not contravene Commission policy in this respect.[155] Trial Staff suggests that in Paragraph 14 of the Clarification Order, the Commission said that a pipeline recourse rate is a cost-of-service based rate, and that if someone protested ESL's uncommitted rate, it would need to support the Uncommitted Rate by filing cost, revenue, and throughput data which is exactly what occurred in this proceeding. Trial Staff argues the Presiding Judge evaluated the Uncommitted Rate, not on the cost-of-service agreed to by the pipeline and committed shippers in the TSAs, but on the different Opinion No. 154-B cost-of-service developed at the hearing. Indeed, Trial Staff notes the differences between the Opinion No. 154-B and TSA-derived rates include, for example, use of (1) conventional straight-line depreciation rates, rather the TSAs' "sculpted" depreciation rates; (2) a DCF-based return on equity, rather than the TSAs' specified return; and (3) a trended original cost rate base, rather than the original cost rate base of the TSAs.[156] Therefore, Trial Staff argues the Uncommitted Rate is in fact consistent with a traditional oil pipeline cost-of-service rate.[157]

56. Second, Trial Staff notes that the rate methodology adopted in the Initial Decision accords with the requirements of the 1996 Negotiated Rate Policy Statement that pipelines negotiate rates with customers in a manner that is not unduly discriminatory, and does not place the responsibility of unsubscribed capacity on recourse rate shippers alone.[158] Trial Staff states the Commission has previously determined that ESL's rate structure, including the two-to-one ratio, does not violate the antidiscrimination or undue preference provisions of the ICA, and that the ratio reflects the differences in service between firm and non-firm shippers.[159] Furthermore, Trial Staff argues that under the TSAs, it is the committed shippers, not the uncommitted shippers, who bear responsibility for the costs of unsubscribed capacity.[160] Finally, Trial Staff argues the

[155] *Id*.

[156] *Id*. at 36, n.100.

[157] *Id*. at 36.

[158] *Id*. (citing *Alternative Rate Policy Statement*, 74 FERC at 61, 242).

[159] *Id*. (citing Clarification Order at P 11).

[160] Trial Staff Brief Opposing Exceptions at 37.

Indicated Shippers have failed to show that they are worse off as a result of the use of negotiated rates (assuming the TSA-derived committed rates can properly be treated as negotiated rates).[161]

Committed Shippers

57. Committed shippers also filed a brief opposing exceptions arguing the Initial Decision correctly held that the Commission-approved two-to-one rate design methodology established in the TSA must be applied to the design of the just and reasonable Uncommitted Rate in this proceeding.[162] Committed shippers also state that because the Indicated Shippers protested the Uncommitted Rates, the Presiding Judge properly adopted the Opinion No. 154-B cost-of-service methodology for evaluating the uncommitted rates.[163]

58. Committed shippers argue the ID properly applied a methodology that produces a just and reasonable result as the pipeline's costs were reviewed and determined pursuant to the Commission's Part 346 regulations applicable to oil pipelines and from that, the Committed and Uncommitted Rates were calculated by applying the Commission-approved rate design to those costs. Thus, the committed shippers claim the Indicated Shippers' reliance on *Hope* to argue that the result reached by the Presiding ALJ is unjust and unreasonable is at best misplaced. Quoting *Hope*, committed shippers state that by looking at the entire result, that is both the Uncommitted Rate and Committed Rate, the Commission-approved rate design produces a just and reasonable rates because it allows ESL to recover its costs while adhering to the Commission's prior orders that repeatedly upheld the two-to-one rate design ratio as non-discriminatory and, therefore, as just and reasonable.[164] The committed shippers argue that contrary to the Indicated Shippers' argument, the absence of specific language in the Declaratory and Clarification Orders does not mean that the Commission did not find the two-to-one rate design ratio just and reasonable. Committed shippers aver the Commission clarified that a finding that the proposed two-to-one rate design ratio does not violate the anti-discrimination and undue preference provisions of the ICA also meant that the application of such rate design to the

[161] *Id*.

[162] Committed Shippers Brief Opposing Exceptions at 11.

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

[164] *Id*. at 12.

pipeline's costs, as determined in accordance with Part 346, would produce just and reasonable rates. Thus, committed shippers maintain that inherent in the Commission's finding that two-to-one rate design ratio is nondiscriminatory is a finding that it is also just and reasonable.[165] Moreover, committed shippers argue that the ID's correct application of the Commission-approved two-to-one rate design ratio allows for the proper recovery of the pipeline's cost in accordance with the Commission's Part 346 regulations while also preserving the approved two-to-one rate design ratio, and thus results in just and reasonable rates.[166]

59. Committed shippers also argue the Presiding ALJ and Trial Staff correctly concluded that the Indicated Shippers' proposal -- calculating the Uncommitted Rate by dividing the pipeline's annual revenue requirement by its design capacity and, then, calculating the Committed Rate by dividing that Uncommitted Rate by two -- would result in the substantial under-recovery of ESL's cost of service and would result in unjust and unreasonable rates.[167] The committed shippers state that because of the Indicated Shippers' rate design and misapplication of *Hope*, the issue at hand is not whether ESL will achieve its return on investment but whether it will even recover its pre-return costs.[168] Unlike the Indicated Shippers' proposal, the Commission-approved two-to-one rate design ratio employed by the Presiding ALJ allows ESL to recover its costs in accordance with the Commission's regulations without foreclosing the possibility of achieving a fair return. Moreover, the committed shippers assert the Commission-approved Refund Mechanism embodied in the TSA prevents the pipeline from over-recovering costs, further supporting the Presiding ALJ's conclusion that the end result is just and reasonable.[169]

60. Committed shippers contest the Indicated Shippers' analysis of *Hope*, arguing that though the Federal Power Commission (FPC) substantially reduced the interstate rates of the gas pipeline in that case, finding that the pipeline's cost of service was lower than the

[165] *Id*.

[166] *Id*.

[167] *Id*. at 13 (citing the ID at P 535).

[168] *Id*. at 14.

[169] *Id*.

pipeline alleged, the FPC did allow the pipeline a 6.5 percent return.[170] The *Hope* Court upheld the FPC's order because, in determining the return, the FPC had *"stressed the importance of maintaining the financial integrity of the company."*[171] Further, committed shippers assert the FPC also "considered the financial history of Hope and a vast array of data bearing on the natural gas industry, related businesses, and general economic conditions."[172] Committed shippers further explain that in light of these considerations and because "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called 'fair value' rate base," the Court found that the FPC's order did not result in rates that were unjust and unreasonable.[173] Committed shippers assert the Indicated Shippers' rate design proposal is contrary to the finding in *Hope* because the Indicated Shippers would have the financial integrity of the pipeline, let alone a fair rate of return, subordinated to their interest in receiving lower rates. Committed shippers assert that such a proposal would impede the successful operation of the pipeline, reduce its ability to attract capital, and inadequately compensate the investors (e.g., the committed shippers).

61. Committed shippers argue the Indicated Shippers' assertion that the Uncommitted Rate must be derived first is a red herring.[174] Committed shippers state that as demonstrated by Commission Trial Staff when calculating cost of service rates, the question of whether one calculates the Committed Rate first and then the Uncommitted Rate, or vice versa, is immaterial. If a cost-based rate design is properly undertaken, the order of computation does not matter – both rates can be derived simultaneously.

62. With respect to Indicated Shippers argument that the ID contradicts the Commission's requirement that the Uncommitted Rate be cost-based, Committed

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[170] *Id*. at 15.

[171] *Id*. (citing *Hope* at 604).

[172] *Id*.

[173] *Id*.

[174] *Id*. at 17.

Shippers disagree.[175] ESL's Uncommitted Rate is to be cost-based so that ESL does not over-recover its cost of service. Nevertheless, committed shippers state that any rate design and cost of service rate calculation must also take into account the fundamental precept of rate design: rates are to be designed with the objective of meeting the pipeline's revenue requirement.[176] Committed shippers state that the method used to determine whether cost-based rates have been properly designed is the revenue check, where, for each class of shipper, one multiplies the rate to be tested by the associated volume in the model to calculate annual revenue for that class. The aggregate of revenues from all classes of shippers should equal the total cost of service. Committed Shippers argue that the approach approved by the Initial Decision passes such a revenue check.[177] In contrast, Committed shippers state the approach advocated by the Indicated Shippers—calculating an Uncommitted Rate using the design capacity of the pipeline as the throughput determinant and then dividing by two for the Committed Rate—could not possibly pass a revenue check when utilizing the volumes that actually flowed during the locked in 2010 rate period and the test period for the 2011, as the Indicated Shippers' use of design capacity instead of historical locked-in or test-period data (for the 2010 and 2011 rate periods, respectively) grossly overstates the appropriate billing determinants.[178] The result is artificially low rates that cannot possibly recover cost of service. Committed shippers argue that such a result must be rejected as unjust and unreasonable under the principles found in *Hope* because the Indicated Shippers' methodology yields a result that forecloses the possibility of ESL's cost recovery.[179]

63. Committed shippers argue that the Indicated Shippers' arguments related to the natural gas pipeline 1996 Negotiated Rate Policy Statement and to cost-shifting between classes of shippers must be rejected. Committed shippers state that the very question of whether costs would be shared between committed and uncommitted shippers on a per-unit basis in the manner set forth in the ID was expressly one of the primary questions that ESL raised in its petition for Declaratory Order and the Commission approved this

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

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

[177] *Id*. at 18.

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

[179] *Id*. at 20.

rate design.[180] Committed shippers cite Paragraph 27 of the Declaratory Order which states "[a]ccording to [ESL], while the committed and uncommitted shippers will share in paying the agreed cost-of-service of the pipeline, after revenue sharing is implemented, the *uncommitted shippers will pay a higher proportion of the costs of on a unit basis*."

64. Committed shippers also reference Paragraph 27 of the Declaratory Order which states "[m]oreover, all potential shippers had an opportunity during the open season to commit volumes and establish a 50-percent tariff rate discount. Accordingly, the Commission finds that the proposed rate structure does not violate the antidiscrimination or undue preference provisions of the [ICA] because the rate discount was made available to all interested shippers and *reflects the differences in service between firm and non-firm shippers*."[181] Further, committed shippers reference Paragraph 25 of the Declaratory Order which states "According to [ESL], the purpose of this provision is to distribute the agreed cost-of service between the committed and uncommitted shippers according to their respective contributions to the initial development and construction of the pipeline. . . . Accordingly, [ESL] asks the Commission to consider whether it is reasonable, as a matter of regulatory policy, for the uncommitted shippers to bear such a higher proportionate share of the costs *on a unit basis*.[182] Committed shippers argue the Commission approved the rate design in the Declaratory Order at Paragraph 31 where "the Commission finds that the proposed rate structure does not violate the antidiscrimination or undue preference provisions of the [ICA] because the rate discount was made available to all interested shippers and reflects the differences in service between firm and non-firm shippers."[183] Committed shippers note this conclusion was repeated in the Clarification Order, and the Order on Complaint.[184] Thus, committed shippers argue the question of whether the rate design, which places twice as much cost on uncommitted volumes on a per unit basis, is just and reasonable under the ICA has been answered.

[180] *Id*. at 24-26.

[181] *Id*. at 25.

[182] *Id*. at 24.

[183] *Id*.

[184] *Id*. (citing Clarification Order at P 5 and the Complaint Order at PP 16-17).

C. <u>Commission Decision</u>

65. The Commission affirms and adopts the Presiding Judge's determination that the Commission-approved two-to-one rate design methodology established in the TSA must be used in determining the just and reasonable Uncommitted Rate for both 2010 and 2011. Indeed, the Commission's prior orders require this result. The Commission has repeatedly upheld the two-to-one rate design as just and reasonable and not unduly discriminatory. Specifically, in its Petition for Declaratory Order, ESL stated that the significant rate design issue in the TSA cost-of-service formula was the provision setting the uncommitted rate at twice the level of the committed rate and explicitly requested approval of this rate design.[185] In the Declaratory Order, we approved the proposed rate structure and found that the discount received by the committed shippers was not unduly discriminatory or preferential because the rate discount was offered to all interested shippers and because the rate reflects the differences between firm and non-firm shippers.[186] In the Clarification Order, we stated again that the agreed-upon terms of the TSAs would govern the determination of the committed shippers' rates, and that we were upholding the rate design embodied in the TSAs.[187] In the Clarification Order, we restated our conclusion from the Declaratory Order that ESL's "proposed rate structure does not violate the antidiscrimination or undue preference provisions of the ICA [b]ecause the committed rate discount was offered to all interested shippers through an open season, reflects the differences in service between firm and non-firm shippers, and is unchallenged…".[188] In addition, in both the 2010 and 2011 Suspension Orders the Commission again expressly ruled that setting the Uncommitted Rates for hearing did not undermine its approval of the rate structure or the two-to-one ratio between the Uncommitted and Committed Rates in the TSA.[189] Finally, in our Order on Complaint we stated:

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[185] Declaratory Order at P 25.

[186] *Id*. PP 29-31.

[187] Clarification Order at P 13.

[188] *Id*. P 11.

[189] ID at P 70; 2010 Suspension Order at P 16; 2011 Suspension Order at P 12.

> The Commission rejects Indicated Shippers' argument that the Commission has failed to appropriately review the Committed Rates pursuant to the [ICA]. The Commission reviewed the TSA and the rate structure in the Declaratory Order proceeding and determined that the proposed rate design was just and reasonable and not unduly discriminatory because all potential shippers had the opportunity to become Committed Shippers. The Commission also stated in the clarification order that Uncommitted Shippers would be adequately protected because to the extent the Uncommitted Rate was protested, [ESL] would have to support it with cost-of-service information in a hearing. This protection is sufficient and adequate under the [ICA], and **the Uncommitted Shippers are not entitled to be shielded from the consequences of their decision not to choose Committed Shipper status when the opportunity was presented to them**. (Emphasis added).

66. Thus, the Commission has repeatedly upheld the TSAs two-to-one rate design as just and reasonable and not unduly discriminatory. In light of the aforementioned orders, Indicated Shippers' assertion that "[n]o aspect of [ESL]'s TSA with its committed shippers will be applicable to the rates for uncommitted service" is clearly in error.[190] As we noted in the Order on Complaint, "[t]he Indicated Shippers did not protest or comment on [ESL]'s petition nor did they seek rehearing or reconsideration of the Commission's Declaratory Order." To argue now that the Commission must set the maximum allowable Uncommitted Rate without regard to the Commission-approved two-to-one rate design methodology is effectively an untimely request for rehearing and reconsideration of prior Commission orders that are now final. Accordingly, we affirm the Presiding Judge's determination that the approach advanced by the Indicated Shippers must be rejected because it derived an Uncommitted Rate solely in reference to Opinion No. 154-B and Part 346 of the Commission's regulations without regard to the Commission's prior rulings. The refusal of the Indicated Shippers to recognize that the Commission has already made important determinations such as the justness and reasonableness of the two-to-one ratio is in clear error.

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[190] Exhibit No. IS-1 at 7. *See also* Exhibit No. IS-1 at 22 ("The initial rates for uncommitted service proposed here do not relate to, and are not governed by, the Committed Rates negotiated in the TSAs between [ESL] and its committed shippers.").

67. On exceptions, the Indicated Shippers argue that the two-to-one factor adopted in the ID to derive the Uncommitted Rate is "improperly based on a contractual provision which the Commission rightly recognized has no place in the formulation of a cost-based rate for uncommitted service in the face of a protest under the ICA."[191] We disagree. The Commission's prior orders do not state that the TSA structure approved in the Declaratory Order proceeding should be disregarded if a party protests ESL's Uncommitted Rate. Rather, we explicitly stated 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."[192] We further stated that if the Uncommitted Rate was protested, ESL must support the Uncommitted Rate "by filing cost, revenue, and throughput data supporting such rate as required by part 346 of the Commission's regulations."[193] This is precisely what the ID did in determining the just and reasonable Uncommitted Rate based on a straightforward application of the oil pipeline rate methodology and regulations. Stated differently, the TSAs specify a cost-of-service methodology that in some ways differs from the Commission's conventional methodology, and sets out either a specific value or a formula for the cost components. It was precisely these untested and unsupported values and methodology that concerned the Commission in light of the protest of the Indicated Shippers. The Commission therefore required ESL to justify the uncommitted rate using the traditional cost-of-service methodology. Thus, as the Presiding Judge correctly held, all aspects of the TSAs apply to the calculation of the uncommitted rate except for the automatic application of the individual cost components specified in Schedule B of the TSAs which were determined by our traditional cost-of-service methodology for oil pipelines.[194] Again, the Presiding Judge correctly concluded that the TSAs must be taken into account for assessing rate structure and rate design and should be taken into account in the determination of individual cost elements in situations where Part 346 and Opinion No. 154-B do not prohibit it.[195]

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[191] Indicated Shippers Brief on Exceptions at 31.

[192] Clarification Order at P 13.

[193] *Id*.

[194] *See* ID at PP 72, 561.

[195] ID at P 72.

68. The Commission is not persuaded by the exceptions taken by Indicated Shippers to reverse the ID. Indicated Shippers argue that if the TSA rate methodology is used to derive either the committed or uncommitted rate, at least one of them cannot be considered cost-based in any meaningful sense. They contend that if a cost-based uncommitted rate is derived first, and then divided by two, the resulting committed rate will not be cost-based. Conversely, they argue that if the committed rate is derived first, and then multiplied by two to derive the uncommitted rate, the uncommitted rate will not be cost-based. Again, we disagree. We affirm the Presiding Judge's conclusion that both the committed and uncommitted rates approved by the Initial Decision are cost-based because they are both derived from an Opinion No. 154-B cost-of-service, as directed by the Commission, as opposed to having accepted the specified cost components and formula contained within the TSA.[196] Southern Light's construction is now complete and a body of actual cost and throughput data is available in the record before us. We stated in our Order on Complaint, the "Indicated Shippers are adequately protected in the ongoing hearing on the Uncommitted Rate, in that they can *challenge the reasonableness of any cost* proposed to be included in the Uncommitted Rate."[197] Notably, while the Indicated Shippers have every right to contest the cost elements derived from the Opinion No. 154-B cost-of-service, they have expressly stated they do not challenge the cost of service calculated by the Trial Staff and approved by the Initial Decision.[198] Indeed, the approach adopted in the Initial Decision produces cost-based rates, as when multiplied by design throughput, the rates generate revenues equal to the Opinion No. 154-B cost-of-service approved in the Initial Decision.[199]

69. We affirm the Presiding Judge's determination that setting differential rates for committed and uncommitted shippers is consistent with Commission precedent and prior rulings involving ESL.[200] The Commission has long recognized that it is appropriate for Uncommitted Shippers to pay higher rates to reflect their lack of a contractual obligation

[196] Trial Staff Brief Opposing Exceptions at 24; ID at n.48.

[197] Order on Complaint at P 17 (emphasis added).

[198] Indicated Shippers Brief on Exceptions at 12 & n.32.

[199] *See* Hearing Exhibit No. S-21.

[200] ID at P 534.

to use the pipeline's services.[201] In the Declaratory Order and the Order on Complaint, the Commission expressly found that the two-to-one ratio did not result in undue discrimination in violation of the ICA, and is just and reasonable.[202] We recognized that while the committed and uncommitted shippers will share in paying the agreed cost-of-service of the pipeline, after revenue sharing is implemented, the uncommitted shippers "will pay a higher proportion of the costs of on a unit basis."[203] In the 2010 and 2011 Suspension Orders, the Commission explicitly emphasized that the fact it was setting ESL's tariff rate filings for hearing did not undermine its prior approval of the TSA rate structure or the fact that it had previously approved committed rates that would be 50 percent of the uncommitted rates.[204] In addition, we further recognized in the Declaratory Order that the differential between the two rates merely reflects the difference in the quality of service and the financial obligations of the two classes of shippers.[205] The Commission here confirms these determinations.

70. Moreover, the Presiding Judge's determination that setting differential rates for committed and uncommitted shippers is consistent with Commission precedent and prior rulings involving ESL does not violate the 1996 Negotiated Rate Policy Statement because the rate design models used by the Presiding Judge produce no improper cost-shifting from committed shippers to uncommitted shippers, Indicated Shippers'

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[201] *See, e.g., Express Pipeline P'ship*, 77 FERC ¶ 61,188, at 61,756 (1996) ("Without the rate incentives essential to attract those willing to make term commitments the project might not be built at all. The proposed term rate structure of Express does not violate the antidiscrimination or undue preference provisions of the [ICA] because such term rates were made available to all interested shippers and reflect relevant differences among term shippers, and between term shippers and uncommitted shippers."); *Colonial Pipeline Co.*, 116 FERC ¶ 61,078, at P 45 (2006) ("it is useful to remove uncertainty regarding rate methodology issues prior to construction of a project and prior to the filing of proposed rates because the assurances facilitate financing and other investment decisions.").

[202] Declaratory Order at PP 25-31; Order on Complaint at P 16.

[203] Declaratory Order at P 27.

[204] 2010 Suspension Order at P 16; 2011 Suspension Order at P 12.

[205] Declaratory Order at P 31.

arguments to the contrary notwithstanding. Indicated Shippers' argument that Trial Staff's application of the two-to-one rate design, adopted by the Initial Decision, violates the ICA because it results in Uncommitted Rates that bear a greater share of per-unit costs than the Committed Rates is without merit. Indicated Shippers argument is contradicted by decades of Commission and ICA precedent indicating that differentials in rates are entirely appropriate – and quite consistent with the statutory requirement of just and reasonable rates – where they are based on relevant differences between the respective classes of shippers.[206] In any event, the rate methodology adopted by the Presiding Judge accords with the requirements of the 1996 Negotiated Rate Policy Statement that pipelines negotiate rates with customers in a manner that is not unduly discriminatory, and does not place the responsibility of unsubscribed capacity on recourse rate shippers alone.[207] As described *supra*, the Commission has previously determined that ESL's rate structure, including the two-to-one ratio, does not violate the antidiscrimination or undue preference provisions of the ICA, and that the ratio reflects the differences in service between firm and non-firm shippers.[208]

71. Furthermore, as explained in ESL's testimony, the committed shippers bear most of the business and financial risks of the Southern Lights Pipeline.[209] The committed shippers took on most of the commercial risk of the pipeline when they signed the TSAs.[210] Therefore, it is the committed shippers, not the uncommitted shippers, who bear responsibility for the costs of unsubscribed capacity.[211]

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[206] *See, e.g.*, *Keystone*, 125 FERC ¶ 61,025 at P 25; *Express*, 77 FERC at 61,756.

[207] *Alternative Rate Policy Statement*, 74 FERC ¶ 61,076 at 61,242.

[208] *See, e.g.*, Clarification Order at P 11.

[209] *See* Exh. ESL-29 at 3 (Fairchild) (Further, there is no disagreement that most of the business and financial risks of the Southern Lights Pipeline have been transferred to the Committed Shippers through the TSAs during their term.").

[210] *See* Exh. ESL-44 at 10 (Webb) ("Consequently, one must recognize, as the Trial Staff does, that by signing the TSAs, the Committed Shippers took on most of the commercial risk of this pipeline.").

[211] Exh. ESL-44 at 13 (Webb) ("Initially, when only Committed Shippers are shipping, they will bear 100% of the TSA cost of service. Uncommitted Shippers will

(continued…)

72. In addition to the fact that they had the opportunity to be among the committed shipper class if they had chosen to, the Indicated Shippers have difficulty showing that they are worse off as a result of the use of the TSA-derived committed rates, given that the uncommitted rates approved by the ID prove to be exactly twice the level of the committed rates, as required by the Commission, and had the pipeline not had commitments it may not have been built, and had it been built without support, it may have been more costly to do so. Thus, there is no undue discrimination in the treatment accorded shippers based on their commitment or lack thereof, and no unjustness or unreasonableness in the rates that reflect that difference. The arguments advanced by the Indicated Shippers on exceptions do not justify a different result.

73. The Commission affirms the ID's finding that the rate design set forth by the Indicated Shippers is inherently flawed as it ignores the distinction between committed and uncommitted shippers by creating a single cost of service and dividing it by the design capacity of the pipeline.[212] Had the Presiding Judge adopted the Indicated Shippers' rate design based on full capacity which at the same time ignores the existence of the TSAs, then ESL would face the risk of under-recovery,[213] a result of which is inconsistent with the Commission's Declaratory Order and established cost recovery principles which recognize that a pipeline have a reasonable opportunity to recover its costs.[214]

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begin to share the total cost of service on an increasing percentage as their volumes increase."); *Id.* at 10 ("In this case, Committed Shippers' obligation to pay the TSA cost-of-service and the true-up mechanism governs the pipeline's revenue and assures the pipeline does not over- or under-recover the TSA cost of service."). *See also* Trial Staff Brief Opposing Exceptions at 37.

[212] ID at P 535.

[213] Staff Witness McComb testified at hearing Indicated Shippers' approach - to calculate an Uncommitted Rate using the design capacity of the pipeline as the throughput determinant and then divide by two for the Committed Rate - will not pass a revenue check (*i.e.*, if the proposed rates were applied to the actual volumes transported, they would not cover the cost of service). *See* Tr. at 295-296.

[214] *See, e.g.*, *Hope*, 320 U.S. 591, 603; *Bluefield Water Works and Improvement Co. v. PSC*, 262 U.S. 679, 690 (1923).

74. We affirm the ID's conclusion that the question of whether one calculates the Committed Rate first and then the Uncommitted Rate, or vice versa, is inconsequential.[215] Rather, the dispositive point is that the Commission approved a rate design under which the uncommitted shippers bear twice as much of the cost of service (on a per-barrel basis) as the committed shippers.[216] As such, under the Commission-approved TSAs, the Committed Rate must be 50 percent of the uncommitted rate. The Presiding Judge correctly quoted from the Order on Complaint that "Indicated Shippers' argument that the Committed Rates cannot be decoupled from the Uncommitted Rate is effectively an attempt to overturn the rate structure approved by the Commission in the Declaratory Order proceeding, and is an impermissible collateral attack on the Commission's prior orders."[217] In any event, Trial Staff's Hearing Exhibit No. S-21 conclusively demonstrates that for both the 2010 and 2011 rate periods, because of the underlying two-to-one principle, one can derive an identical Uncommitted Rate regardless of whether one first calculates the Committed Rate or the Uncommitted Rate.[218]

III. Use of Committed Volumes Rather Than Design Capacity (Issue #15)

Initial Decision

75. The Initial Decision found that 77,000 bpd was the appropriate level of throughput/billing determinants for both 2010 and 2011, adopting the approach advocated by Trial Staff.[219] The ID noted that while the actual throughput on Southern Lights in the seven-month period between July 1, 2010 and January 31, 2011, was well below 77,000 bpd, pursuant to the TSA requirements, the committed shippers were obligated to make payments based on the minimum throughput level of 77,000 bpd (or

[215] ID at P 538. *See also* Tr. at 96:19-25 (Jaffe); 229:23-230:6 (Webb); 279:15-17 (McComb); 285:1-5 (McComb); 286:2-5 (McComb); 292:5-9 (McComb).

[216] Declaratory Order at P 31; Clarification Order at P 13; *see also* 2010 Suspension Order at P 16; 2011 Suspension Order at P 12.

[217] ID at P 538 (citing Order on Complaint at P 17).

[218] *See* Hearing Exhibit No. S-21; *see also* Trial Staff Brief Opposing Exceptions at 27.

[219] ID at PP 485-488.

28,105,000 barrels per year), whether they shipped that amount or not.[220] The Presiding Judge concluded that because ESL received revenues from the committed shippers based on a throughput level of 77,000 bpd this was the correct level of throughput to use to determine the Uncommitted Rate for the 2010 and 2011 rate periods.[221]

76. The Presiding Judge also concluded that Indicated Shippers incorrectly claimed that the Clarification Order indicated that ESL must use its actual design capacity to calculate the initial Uncommitted Rate.[222] In that order, the Presiding Judge stated the Commission actually held that ESL's reliance on committed volumes and projected spot volumes was not inconsistent with Commission precedent that generally dictates use of actual design capacity for initial rates on a new pipeline.[223]

Exceptions

A. Briefs on Exceptions

Enbridge Pipeline (Southern Lights)

77. In its provisional Brief on Exceptions, ESL stated "ESL does not oppose the level of throughput when used in the context of the Commission-approved two-to-one rate design method."[224] Because the Commission here affirms the two-to-one rate design methodology, ESL's provisional proffer of a different approach to calculating throughput is moot, and only Trial Staff's and Indicated Shippers' approaches need be discussed.

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[220] ID at P 485; *see also* Exh. ESL-9 at 7 (TSA Article 3.01, requiring committed shippers to ship or pay for their committed volumes). During the two periods, neither the Indicated Shippers nor any other uncommitted shippers have transported any diluent on the pipeline. *See* Exh. ESL-1 at 8; ID at PP 485-488 & n.961.

[221] ID at PP 485-488.

[222] ID at P 485.

[223] ID at P 487 (citing Clarification Order at P 10).

[224] ESL's Brief on Exceptions n.18.

Indicated Shippers

78. On exceptions, Indicated Shippers ask the Commission to reverse the Initial Decision, and require that initial rates for uncommitted service on ESL be calculated using the full design capacity of the system, or 180,000 bpd (65,700,000 barrels per year).[225] Indicated Shippers argue it is the Commission's general policy to place a new pipeline at risk for unsubscribed capacity by designing rates based on system capacity.[226] Indicated Shippers point out the Commission in the Clarification Order stated that "Commission precedent generally dictates the use of actual design capacity for initial rates on a new pipeline, and a pipeline is placed at risk for the costs of unsubscribed capacity based on actual design capacity."[227] Thus, Indicated Shippers argue the ID erred in failing to require that ESL's actual design capacity be used to derive ESL's Uncommitted Rates.[228]

79. In a footnote to their brief, Indicated Shippers acknowledge the exception to this policy noted by the Commission in the Declaratory Order, but assert any exception to the general rule is inapplicable in this case because the Clarification Order stated that in the event of a protest, design capacity should be utilized for determining ESL's cost-based Uncommitted Rate.[229]

80. Indicated Shippers contend that in the Declaratory Order, the Commission noted that no one had challenged ESL's proposed method to derive the Committed Rates using less than full design capacity, and the Commission therefore accepted the proposed method.

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[225] Indicated Shippers Brief on Exceptions at 33-36.

[226] *Id*. at 34 (citing Clarification Order at P 10 (citing *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211 (2005); *Great Lakes Gas Transmission Ltd P'ship*, 66 FERC ¶ 61,118 (1994); *Equitrans, Inc*., 63 FERC ¶ 61,070 (1993); *Arkansas Western Pipeline Co*., 63 FERC ¶ 61,006 (1993))).

[227] Indicated Shippers Brief on Exceptions at 34 (citing Clarification Order at P 10).

[228] *Id*.

[229] *Id*. at 34, n.72.

81. According to the Indicated Shippers, the Clarification Order expressed "concern" that, because the Committed Rate was not cost-justified, neither was the Uncommitted Rate, and therefore no exception to the requirement for cost-justification applied to the Uncommitted Rate.[230] Accordingly, the Indicated Shippers believe that in the Clarification Order the Commission intended to apply its general throughput design policy (rather than the Declaratory Order framework) to require that ESL's actual design capacity be utilized to calculate ESL's initial Uncommitted Rate.[231] To support this conclusion, Indicated Shippers cite to the Clarification Order's Paragraph 13 which states that "if the uncommitted rate is protested, [ESL] must comply with section 342.2(b) 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."[232]

82. The Indicated Shippers also highlight a misstatement in the ID of a portion of the Clarification Order because the ID says that "ESL's reliance on committed volumes and projected spot volumes was not inconsistent with Commission precedent that generally dictates use of actual design capacity for initial rates on a new pipeline."[233] Indicated Shippers argue the proper quote from the Clarification Order states that ESL's proposal not to use design capacity was "not consistent with that precedent and the Commission's regulations."[234]

B. Briefs Opposing Exceptions

Enbridge Pipeline (Southern Lights)

[230] *Id*. at 35 (citing Clarification Order at P 12.)

[231] *Id*.

[232] *Id*. at 35-36.

[233] *Id*. at 36 (citing ID at P 487).

[234] *Id*. (citing Clarification Order at P 10).

83. In its brief opposing exceptions, ESL asserts that the Initial Decision correctly rejected Indicated Shippers' position that the appropriate level of throughput to be used to calculate rates for uncommitted service on ESL is the full design capacity of the system.[235] ESL argues that the Commission's design capacity policy arose in response to the concern that a new pipeline might project low initial volumes, resulting in high initial tariff rates that would permit over-recovery of its cost of service.[236] As a result of that concern, the Commission generally has pipelines base their initial rate on design capacity. ESL however, notes that the Commission has consistently recognized an exception for cases in which the pipeline's tariff includes a true-up or other automatic safeguard against over-recovery. ESL notes that in the Declaratory Order the Commission indicated that exception to the general rule.[237] ESL cites to *Crossroads Pipeline Co.,*[238] where the Commission recognized that an exception to the design capacity policy exists where pipelines have an automatic true-up or other automatic safeguard against over-recovery.[239]

84. ESL notes it has a true-up mechanism that prevents it from over-recovering.[240] ESL also cites *Keystone* as confirmation that design capacity is not required for new oil pipelines. According to ESL, the Commission in *Keystone* addressed Keystone's request

[235] ESL Brief Opposing Exceptions at 57.

[236] *Id*.

[237] *Id*. (citing Declaratory Order at P 29; ESL explained that principle is not reflected in the tariff filing regulations for oil pipelines, which state that the initial rates of a new pipeline should be established on projected throughput for the first 12 months of operation. 18 C.F.R. § 346.2(a)(ii)(3)).

[238] 73 FERC ¶ 61,138, at 61,396 (1995).

[239] ESL Brief Opposing Exceptions at 57 (citing *Crossroads*, 73 FERC at 61,396; *Keystone*, 125 FERC ¶ 61,025 at P 30; ESL-7 at 34).

[240] ID at P 73; 2011 Suspension Order at P 9; ESL-44 at 18-19. ESL noted that over-earning cannot be a relevant consideration for the period of 2010 because no uncommitted volumes moved during that period.

to justify its uncommitted rates using the approach set forth in *Laclede* where revenues from committed (i.e., contract) volumes are first subtracted from the total cost of service, and the remaining costs are recovered from the uncommitted volumes. The Commission specifically granted Keystone's request based on a true-up mechanism that assured no over-recovery.[241] Here, ESL argues the Commission's Declaratory Order has similarly already determined that ESL's true-up mechanism is non-discriminatory, just and reasonable, because of the assurance that no over-recovery will occur.[242]

85. ESL also notes the Commission has used actual design capacity to encourage a pipeline to correctly size its project.[243] According to ESL, the Commission recognized in *Crossroads* that another exception exists where the pipeline is redeploying an existing asset, as ESL has done here, because there is no risk of "oversizing" the asset, and therefore no need for the use of design capacity to set the initial rate.[244] As discussed in the Declaratory Order, the Southern Lights Pipeline involved the reversal and reuse of an existing pipeline for much of its length, at considerable savings to the shippers.[245] ESL argues this fact represents an additional ground for sustaining the ID.

86. Finally, ESL argues the Indicated Shippers are simply mistaken in asserting that the Declaratory Order and Clarification Order in this case *required* ESL to use design capacity to establish the just and reasonable initial Uncommitted Rate. Rather, ESL contends the Declaratory Order contained a general discussion of the design capacity policy, including the exception described above for pipelines with a true-up mechanism. ESL contends that just as with the cost of service, the actual throughput to be used in evaluating the initial Uncommitted Rate was left to be determined under the applicable regulations if and when a protest of the initial rate was filed.[246]

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[241] ESL Brief Opposing Exceptions at 57 (citing *Keystone*, 125 FERC ¶ 61,025 at P 30.)

[242] *See* Declaratory Order at P 45; Order on Complaint at PP 11-14.

[243] ESL Brief Opposing Exceptions at 57 (citing *Crossroads*, 73 FERC at 61,396).

[244] ESL Brief Opposing Exceptions at 60, n.48; *Crossroads*, 73 FERC at 61,396.

[245] ESL Brief Opposing Exceptions at 60, n.48; Declaratory Order at P 8.

[246] ESL Brief Opposing Exceptions at 57 (citing Clarification Order at P 13).

87. ESL states the Indicated Shippers attempt to confuse this issue by noting that the Initial Decision misquoted one word from the Clarification Order.[247] ESL asserts that apart from this mistake in transcription, the Initial Decision did not "mischaracterize" the Clarification Order, nor did its finding on this issue turn on whether "ESL's reliance on committed volumes and projected spot volumes" was consistent or inconsistent with Commission precedent. ESL argues that in substance, the Initial Decision clearly (and correctly) found that the Clarification Order did not mandate the use of actual design capacity.

88. ESL argues that having considered the full record and the evidence justifying the application of the *Crossroads* exception here, the ID rejected the Indicated Shippers' reliance on the design capacity approach. ESL points to the Presiding Judge's statement that ESL's "TSA true-up mechanism, which is also included in the pipeline's tariff, prevents ESL from collecting in rates anything above its cost-of service."[248]

89. Citing 18 C.F.R. § 346.2(a)(1)(i), ESL argues that the Commission's cost of service regulations for oil pipelines make clear that the starting point for calculating a changed rate is actual historical throughput, not design capacity. ESL argues that because the 2011 rate is neither an indexed rate nor an initial rate, it is plainly a changed rate under the applicable regulations.[249] Thus, because the 2011 rate is a changed rate, ESL contends there is no basis for the Indicated Shippers' argument that it should be set based on design capacity.

90. Finally, ESL argues that even if the Commission were to use design capacity as the throughput level for 2010 (or 2011), it would have to compare the resulting rate to the effective rate at that particular throughput level – not the posted rate. As shown by Trial Staff (and adopted by the Initial Decision), ESL's Uncommitted Rates were just and

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[247] ESL Brief Opposing Exceptions at 57 (citing IS Brief at 36).

[248] ESL Brief Opposing Exceptions at 59 (citing ID P 486, *see also* Declaratory Order at P 45).

[249] ESL notes that the Indicated Shippers have expressly withdrawn their claim that ESL's rates are subject to indexing after this approach was rejected by the ID. *See* Indicated Shippers Brief on Exceptions at 12 & n.32 and ID at P 101.

reasonable at all volume levels up to and including the design capacity 180,000 bpd when the year-end refunds applicable at each volume level are properly taken into account.[250]

Trial Staff

91. In its brief opposing exceptions, Trial Staff argues the Initial Decision correctly rejected Indicated Shippers' position that the appropriate level of throughput to be used to calculate rates for uncommitted service on ESL is the full design capacity of the system.[251] Trial Staff acknowledges that while the Commission has indicated that, in general, new pipelines should base their initial rate on design capacity, the rationale for that policy and precedent does not apply to ESL. Trial Staff notes that ESL has in place a Commission-approved cost recovery mechanism in the TSAs and tariff which includes a true-up mechanism whereby ESL cannot over-recover its cost-of-service.[252] Trial Staff also notes that in the Declaratory Order, the Commission found that the true-up mechanism in the TSAs guarantees that ESL will not over-recover its costs. Trial Staff also argue the use of design capacity volumes for rate design only makes sense for pipelines that collect rates established in traditional rate filings, not for those with full-cost-of-service rate recovery mechanisms, like ESL.

92. Trial Staff avers the Indicated Shippers' reliance on the Clarification Order's reference to section 342.2(b) and part 346 of the Commission's regulations is misplaced. Trial Staff explains that all the Commission said in that order was that if someone were to protest the uncommitted rate, as the Indicated Shippers have, ESL must comply with section 342.2(b) and would need to support the rate with cost, revenue, and throughput data, as required by part 346 of the regulations – exactly what ESL has done here. Trial Staff contends that neither section 342.2(b) nor part 346 of the regulations say anything about what volumes the pipeline must use to design its rates.[253]

93. Finally, Trial Staff argues the Commission should give no weight to the Indicated Shippers' reference to an incorrect reference in the Initial Decision to the Clarification

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[250] ESL Brief Opposing Exceptions at 62.

[251] Trial Staff Brief Opposing Exceptions at 29-35.

[252] *Id*. at 30.

[253] *Id*. at 33.

Order.[254] Trial Staff states that the Clarification Order simply held that if someone filed a protest against the agreed-to rate, ESL would need to file cost-of-service and throughput data.[255] However, the Commission still did not by this require the use of design capacity volumes in rate design, but merely required ESL to file actual "throughput data."

Committed Shippers

94. Committed shippers argue ESL should not be required to base its cost of service calculations on the pipeline's design capacity. According to committed shippers, prior Commission oil pipeline orders adopting the use of design capacity for initial rates cite two policy goals: (i) to minimize the opportunity for a pipeline to over-recover its costs; and (ii) to incentivize a pipeline to correctly size its pipe.[256] Committed shippers stated that neither of those concerns is present here.

95. Committed shippers explain that there is no possibility of over-recovery in this case because ESL's tariff contains an annual true-up mechanism, which compares the actual revenues received by ESL from both committed and uncommitted shippers in a calendar year to the actual cost-of-service in that year. Committed shippers state that if the actual revenue exceeds the cost-of-service, ESL will issue refunds to its shippers based on their proportionate share of the revenues contributed to the pipeline during the year.[257]

96. Committed shippers assert that this approach is consistent with *Crossroads Pipeline Co.*, 73 FERC ¶ 61,138 (1995), and subsequent cases that do not require the use

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[254] *Id*. at 34.

[255] *Id*. (citing Clarification Order at P 11).

[256] Committed Shippers Brief Opposing Exceptions at 23 (citing *White Cliffs*, 126 FERC ¶ 61,070 at PP 31-32; *Keystone*, 125 FERC ¶ 61,025 at PP 30-32; *Crossroads*, 73 FERC ¶ 61,138 at 61,396-97).

[257] Committed Shippers Brief Opposing Exceptions at 20. Committed shippers note that when volume on the pipeline exceeds 162,000 bpd, ESL may retain 25 percent of revenues from the uncommitted volumes above 162,000 bpd.

of design capacity to calculate rates.[258] Committed shippers explain that in *Crossroads*, the pipeline converted an oil pipeline to natural gas service and proposed that it be able to base its initial rates on throughput rather than design capacity, which represented a larger volume. Crossroads argued that its initial rates should not be calculated using the pipeline's design capacity, pointing out that there was no question of building an oversized pipeline because the pipeline already existed. Committed shippers state that the Commission accepted this argument.[259]

97. Committed shippers assert that the Commission recently reaffirmed its reasoning in *Crossroads* in *White Cliffs,* and *Keystone*. Committed shippers explain that White Cliffs held a two-phase open season for a new oil pipeline, offering discounted prices for five-year term commitments; in addition to the lower Committed Rates. White Cliffs sought approval to use test period billing determinants, which were based only on the level of committed throughput at the time the system was placed into service plus a reasonable projection of uncommitted volume. According to committed shippers, White Cliffs' proposed throughput was less than the design capacity. However, unlike Southern Lights, White Cliffs failed to include a mechanism to protect against over-recovery, and while rejecting White Cliffs' proposal, the Commission explained that in calculating Uncommitted Rates, it will permit the use of throughput that is less than design capacity when the pipeline puts in place an effective safeguard against cost over-recovery.[260]

98. Committed shippers explain that in *Keystone*,[261] the pipeline provided a mechanism to safeguard against over-recoveries. Committed term shippers on Keystone had a rate that had two components: a fixed component, which represented the shipper's contribution to the capital costs of the pipeline, and a variable component, which recovered non-capital costs in the project. Committed shippers note that the Uncommitted Rate was a one-part rate that was higher than the total Committed Rate, and Keystone also had a mechanism whereby non-capital costs were allocated among committed and non-committed volumes and then trued-up by crediting committed shippers the difference between their estimated and actual non-capital costs. In this way,

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[258] *Id*. at 22.

[259] *Id*. (citing *Crossroads Pipeline Co.*, 73 FERC ¶ 61,138 at 61,396 (1995)).

[260] *Id*. at 21 (citing *White Cliffs* at PP 31-32).

[261] 125 FERC ¶ 61,025.

the pipeline could not over-recover its costs in any given year, and the Commission determined that the true-up protection was sufficient to allow Keystone to use projected throughput,[262] noting further that all potential shippers had the opportunity through an open season to become a committed shipper.[263]

99. Similarly, committed shippers state that there is no possibility that ESL will over-recover its costs, all potential shippers had the opportunity to choose the shipper class they desired, and the safeguards required by the Commission to prevent over-recovery are in place. Committed shippers maintain the Commission "approved [ESL]'s proposed true-up provision, finding that it will ensure that the pipeline will not over-recover its costs."[264]

100. According to committed shippers, the Commission thus recognized the significance of the true-up mechanism in preventing over-recovery on Southern Lights, and the Commission does not mandate the use of design capacity if there is an effective mechanism to prevent over-recovery, especially in the context of putting infrastructure to new use.

101. Committed shippers explain that this project was not a greenfield project, but was a reversal and redeployment of a pre-existing crude oil pipeline, Line 13 of the Enbridge/Lakehead mainline system, to avoid costly new construction from Clearbrook, Minnesota to Edmonton, Alberta.[265] Retooling an existing pipeline to meet current market needs is an efficient use of resources, minimizes or eliminates new environmental impacts, and is encouraged by the Commission, and in fact, redeploying the old pipeline is estimated to have saved shippers more than $1 billion in additional construction costs. Therefore, as in *Crossroads*, committed shippers explain that the Commission's historical concern that new pipelines be correctly sized does not arise here. Accordingly, committed shippers conclude that for all these reasons ESL should not be required to base its cost-of-service calculations on the pipeline's design capacity.

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[262] *Id*. at 22 (citing *Keystone* at P 30).

[263] *Id*. (citing *Keystone* at P 31).

[264] *Id*. at 22-23 (citing Clarification Order at P 5).

[265] *Id*. at 23 (citing Exh. ESL-1 at 5-7 (Jervis)).

C. Commission Decision

102. The Commission affirms the use of committed volumes for rate design purposes as adopted by the ID. The Commission is not persuaded by Indicated Shippers' arguments that use of the full design capacity of the system is required here. While it is the Commission's general policy to place a new pipeline at risk for unsubscribed capacity by designing rates based on system capacity, this rationale does not apply to ESL in this instance. For this reason, the Declaratory Order, while indicating that design capacity is frequently appropriate for initial rates on a new pipeline, explained that there are recognized exceptions to that general policy.[266] The Declaratory Order cited, for example, *Crossroads*,[267] where the Commission recognized that an exception to the design capacity policy exists where pipelines have an automatic true-up or other automatic safeguard against over-recovery.[268] As noted above, ESL has in place a Commission-approved cost recovery mechanism in the TSAs and tariff which includes a true-up mechanism whereby ESL cannot over-recover its cost-of-service.[269] The

[266] Declaratory Order at P 29.

[267] 73 FERC ¶ 61,138 at 61,396.

[268] *Id*. (citing *Crossroads,* 73 FERC at 61,396). *See also White Cliffs* 126 FERC ¶ 61,070 at PP 31-32; *Keystone*, 125 FERC ¶ 61,025 at PP 30-32.

[269] ID at P 73; 2011 Suspension Order at P 9.

Declaratory Order recognized that the true-up mechanism in the TSAs guaranteed that ESL cannot over-recover its costs.[270]

103. The Indicated Shippers are simply mistaken in asserting that the Declaratory Order and Clarification Order in this case required ESL to use design capacity to establish the Uncommitted Rate. The Declaratory Order's general discussion of the design capacity policy was background prelude to the actual declaration of approval of the ESL rate framework, including the exception described above for pipelines with a true-up mechanism. Indicated Shippers also misunderstand the Clarification Order's paragraph 13 where the Commission held that, "if the uncommitted rate is protested, ESL Southern Lights must comply with section 342.2(b) 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."[271] The quoted language simply explained that if someone protested the uncommitted rate, as the Indicated Shippers have done, ESL would need to comply with section 342.2(b) and would need to support the rate with cost, revenue, and throughput data, as required by Part 346 of the regulations, which is exactly what ESL did in the current proceeding. Neither section 342.2(b) nor Part 346 of the regulations mandates what volumes the pipeline must use to design its rates.[272] As discussed above, there is a basis here for the derivation of the Uncommitted Rate consistent with the TSAs' minimum throughput condition, specifically the Declaratory

[270] ESL and committed shippers correctly note the Commission has used actual design capacity to encourage a pipeline to correctly size its project. *See Crossroads,* 73 FERC ¶ 61,138, at 61,396. As recognized in *Crossroads,* an exception exists where the pipeline is redeploying an existing asset, as ESL has done here, because there is no risk of "oversizing" the asset, and therefore no need for the use of design capacity to set the initial rate. *Id.* As discussed above, the Southern Lights Pipeline involved the reversal and reuse of an existing pipeline for much of its length. Declaratory Order at P 8. This fact offers another basis for sustaining the ID, even though this fact was not explicitly discussed by the Presiding Judge. In any event, the rate design throughput approved in the ID can be upheld based solely on the fact that ESL is prevented from over-recovering its costs by virtue of the true-up mechanism, where this mechanism and overall rate framework was approved by the Declaratory Order, and all potential shippers had the opportunity to choose whether to be committed or uncommitted shippers.

[271] Indicated Shippers Brief on Exceptions at 35-36.

[272] Trial Staff Brief Opposing Exceptions at 33.

Order's approval of the general rate framework, including the true-up mechanism. Since Part 346 of the regulations and Opinion No. 154-B are silent on this issue, the Presiding Judge was correct in using the committed volume throughput instead of design throughput in the circumstances presented.

104. Finally, the ID's mistaken quotation of certain language did not amount to a "mischaracterization" of the Clarification Order; rather, it appears the Indicated Shippers may have misunderstood the Commission's substantive intent in the Clarification Order, not the Presiding Judge. The Presiding Judge in the Initial Decision correctly found that the Commission in the Clarification Order never intended to mandate the use of actual design capacity in this case.

IV. Indicated Shippers' Offer of Proof

Background

105. On February 29, 2012, the Indicated Shippers filed an Offer of Proof, included as part of their Initial Post-Hearing Brief, requesting the Commission to consider five additional issues beyond the justness and reasonableness of the Uncommitted Rate, including whether the two-to-one ratio between the Committed and Uncommitted Rate was lawful. Specifically, in the Offer of Proof, the Indicated Shippers listed five issues they requested the Commission to consider in this proceeding (1) the lawfulness of the rebate mechanism in the TSAs and pipeline tariff; (2) alleged discriminatory, preferential, and anticompetitive impacts of the TSAs and their rate structures on uncommitted shippers; (3) the lawfulness of the rights of first offer in the TSAs; (4) the lawfulness of the alleged subordination of the ESL's FERC tariff to the pipeline project's Canadian tariff; and (5) the lawfulness of the two-to-one ratio between the uncommitted and committed rates. The Indicated Shippers claimed these elements are discriminatory, anticompetitive, and unduly preferential, and therefore violate the ICA. On March 29, 2012, the Presiding Judge granted ESL's Motion to Strike on the ground that the Offer of Proof was procedurally and substantively flawed.[273] Specifically, the Presiding Judge ruled that "[t]he Indicated Shippers do not identify any ruling of the presiding officer rejecting or excluding proffered oral testimony or excluding evidence in the form of an exhibit or a public document." Rather, the Offer of Proof was simply a continuation of

[273] *See* Order Granting Motion to Strike, *Enbridge Pipelines (Southern Lights) LLC*, Docket Nos. IS10-399-003 and IS11-146-000 (March 29, 2012) (Order Granting Motion to Strike).

their ongoing legal arguments regarding the scope of the issues that they assert should have been addressed in this proceeding."[274]

Initial Decision

106. The Initial Decision simply noted that on March 29, 2012, the Presiding Judge granted ESL's Motion to Strike on grounds that the Offer of Proof was procedurally and substantively flawed.[275]

Exceptions

A. Briefs on Exceptions

Indicated Shippers

107. On exceptions, the Indicated Shippers claim that the Presiding Judge's rejection of their Offer of Proof violated the Commission's assurance in the Declaratory Order that the justness and reasonableness of the Uncommitted Rate would be determined in subsequent rate cases;[276] the guarantee in the Order on Complaint that "the Uncommitted Shippers' interests will be protected in the ongoing rate case proceeding";[277] and the requirements of the ICA that rates be just and reasonable, as well as their procedural rights under the Administrative Procedures Act assuring them due process.[278] Indicated Shippers argue their Offer of Proof sought to demonstrate that the method of application of the TSA's two-to-one rate structure, as distinguished from the justness and reasonableness of the rate structure itself, was anticompetitive and, therefore, unjust and unreasonable.[279]

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[274] *See id*. P 14.

[275] *See* ID at P 12 & n.27. *See also* Order Granting Motion to Strike.

[276] Declaratory Order at P 31.

[277] Order on Complaint Order at P 14.

[278] *See also* Indicated Shippers Brief on Exceptions at 60.

[279] *Id*.

108. Indicated Shippers argue the ID improperly assumed that the two-to-one ratio itself was beyond examination, that the ratio must be applied by multiplying the Committed Rate by a factor of two to yield the uncommitted rate, as distinguished from dividing a cost-based uncommitted rate by two to "derive" the Committed Rate,[280] and that a cost-based uncommitted rate was required to be determined *first*, after which the Committed Rate could be "derived" by application of the two-to-one ratio, by dividing the uncommitted rate by two to derive the Committed Rate.[281]

B. Briefs Opposing Exceptions

Enbridge Pipeline (Southern Lights) LLC

109. On exceptions, ESL argues the Presiding ALJ correctly determined the Indicated Shippers' efforts to expand the scope of the proceeding through the submission of the so-called "Offer of Proof" was procedurally and substantively defective.[282] ESL argues the Presiding ALJ correctly concluded that in submitting the "Offer of Proof," the Indicated Shippers failed to "identify any ruling of the presiding officer rejecting or excluding proffered oral testimony or excluding evidence in the form of an exhibit or a public document."[283] ESL argues the Presiding ALJ also appropriately determined that "the Offer of Proof was simply a continuation of their ongoing legal arguments regarding the scope of the issues that they assert should have been addressed in this proceeding."[284]

110. ESL explains that the Order on Complaint held that "[t]he Commission reviewed the TSA and the rate structure in the Declaratory Order proceeding and determined that the proposed rate design was just and reasonable and not unduly discriminatory."[285] ESL notes that while Indicated Shippers acknowledge the Commission's prior declaratory rulings in the Order on Complaint, they mistakenly contend the Order on Complaint

[280] *Id*. at 61.

[281] *Id*.

[282] ESL Brief Opposing Exceptions at 29-34.

[283] *Id*. at 29 (citing Order Granting Motion to Strike at P 14).

[284] *Id*. at 27 (citing Order Granting Motion to Strike at P 14).

[285] ESL Brief Opposing Exceptions at 29 (citing Order on Complaint at P 16).

cannot have meant what it said because it "mistakenly summarized" the Declaratory Order.[286] ESL first rebuts Indicated Shippers interpretation, arguing if they believed language in the Order on Complaint was "mistaken", it was incumbent on them to seek timely review.[287] ESL argues the Commission's background summary was not "mistaken" but rather constituted a considered interpretation by the Commission of its own prior orders.[288] ESL argues the quoted language in the Order on Complaint, plainly confirming the prior declaratory finding that the rate design was not unduly discriminatory, precluded any subsequent argument that the rates resulting from that rate design were not just and reasonable solely because of the different allocation of costs between the two classes of shippers.[289] Indicated Shippers were allowed to challenge the justness and reasonableness of the result by challenging the costs included in the cost of service, but they did not retain the right to relitigate the rate design.[290]

111. ESL contends that the Indicated Shippers' argument against the two-to-one rate design fails to pass muster. ESL explains that these issues of rate design go to the allocation of costs to different movements and different classes of shippers. The issues

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[286] *Id*. at 30 (citing Indicated Shippers Brief on Exceptions at 10).

[287] *Id*. (citing *Central Vt. Pub. Serv. Corp.*, 123 FERC ¶ 61,128, at P 35 (2008) ("Collateral attacks on final orders and relitigation of applicable precedent, especially by parties that were active in the earlier case, thwart the finality and repose that are essential to administrative efficiency, and are therefore strongly discouraged."); *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of N.Y., Inc.*, 112 FERC ¶ 61,117, at P 12 (2005)).

[288] ESL Brief Opposing Exceptions at 30 (citing *CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1034 (D.C. Cir. 1986) ("It is well established that an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous."); *Kentucky Utils. Co. v. FERC*, 789 F.2d 1210, 1217 (6th Cir. 1986) ("In the complex area of ratemaking, [FERC's] construction of its own opinions and orders is entitled to deference."); *FERC v. Triton Oil & Gas Corp.*, 712 F.2d 1450, 1462 (D.C. Cir. 1983) ("Certainly, we are entitled to give deference to an agency's construction of its own opinions and orders - especially in the complex area of ratemaking.")).

[289] ESL Brief Opposing Exceptions at 30.

[290] *Id*. at 31.

with respect to rate design are therefore inherently issues of discrimination (that is, whether one class of shippers is unduly favored or burdened by the difference in treatment accorded another class of shippers). These issues of possible discrimination in treatment between classes of shippers had already been resolved by the Commission, however. ESL points out the Order on Complaint confirmed that "[t]he Commission reviewed the TSA and the rate structure in the Declaratory Order proceeding and determined that the proposed rate design was just and reasonable and not unduly discriminatory *because all potential shippers had the opportunity to become Committed Shippers*."[291]

112. ESL contends the determination of a just and reasonable Uncommitted Rate turns on a different set of considerations, namely whether the cost of service used to establish the Uncommitted Rate is excessive, such that when the approved rate design is applied, the resulting Uncommitted Rate would create an over-recovery of the allowed cost of service. On that score, ESL contends the Indicated Shippers' interests are adequately protected, as summarized in the Order on Complaint: "The Commission also stated in the clarification order that Uncommitted Shippers would be adequately protected because to the extent the Uncommitted Rate was protested, ESL would have to support it with cost-of-service information in a hearing."[292]

113. ESL contends the Commission's orders, far from being "mistaken," are fully consistent with upholding the approved tariff rate structure while protecting the Indicated Shippers' interests. In support, ESL explains the Commission stated in the Order on Complaint, the protection afforded by the right to challenge the cost of service "is sufficient and adequate under the [ICA], and the Uncommitted Shippers are not entitled to be shielded from the consequences of their decision not to choose Committed Shipper status when the opportunity was presented to them."[293]

114. Thus, ESL states, given the Commission's reaffirmance of its prior declaratory rulings in the Order on Complaint, the Indicated Shippers have had sufficient due process

[291] *Id*. (citing Order on Complaint at P 16 (emphasis added)).

[292] *Id*. (citing Order on Complaint at P 16).

[293] Order on Complaint at P 16.

with respect to those issues.[294] ESL argues that due process does not entitle a party to a second bite of the apple when it has already litigated an issue to a final, appealable order.[295] ESL argues further that if the Indicated Shippers believed the resolution of those issues in the Order on Complaint was erroneous, they had the opportunity to seek rehearing or petition for review of that final order.[296] Having failed to do so, Indicated Shippers cannot now insert these issues into this case through their Brief on Exceptions in an effort to justify an untimely appeal of the Order on Complaint.[297] In sum, argues ESL, the Indicated Shippers' contention that their Offer of Proof was incorrectly rejected is without merit. ESL maintains the Presiding ALJ properly rejected the Offer of Proof and there was no reason for the Initial Decision to address the issues raised in that pleading.[298]

Trial Staff

115. Trial Staff also argues the Indicated Shippers' exception lacks merit. Trial Staff contends the Commission identified the sole, substantive issue for hearing was to determine the justness and reasonableness of the Uncommitted Rates proposed by ESL.[299] Trial Staff explains that Indicated Shipper's arguments that the scope of the proceeding should be expanded to address the issues Indicated Shippers now seek to raise

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[294] ESL Brief Opposing Exceptions at 32 (citing Indicated Shippers Brief on Exceptions at 15).

[295] *Id*. (citing *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1174 (9th Cir. 2001).

[296] *Id*. at 33 (citing 18 C.F.R. § 385.206(g); 18 C.F.R. § 385.713).

[297] *Id*. (citing *Pacific Gas & Electric Co. v. Sunnyside Cogeneration Partners, L.P.*, 97 FERC ¶ 61,378, at 62,727 (2001) ("Commission . . . has stated that entities that do not act in a timely fashion to protect their interests must live with the results") (internal citations omitted); *Niagara Mohawk Power Corp.*, 96 FERC ¶ 61,011, at 61,044 (2001) ("Commission simply will not permit parties to sit on their rights and not identify issues of concern until after we have reached a decision.").

[298] *Id*. (citing ID at P 12 & n.27).

[299] Trial Staff Brief Opposing Exceptions at 39 (citing 2011 Suspension Order at P 12).

in their Offer of Proof, were rejected early on in the proceeding.[300] As the Presiding Judge at the commencement of the proceedings found, referring to the scope of the hearing as set out in the orders, "I cannot see how the Commission could be clearer."[301] Thus, the alleged failure of the Initial Decision to address issues not set for hearing, or to re-address issues they would prefer decided differently cannot provide the basis for the Offer of Proof issues claimed by the Indicated Shippers.

116. Trial Staff argues that to the extent Indicated Shippers attempt to argue that they have been denied a meaningful opportunity to challenge the method in which the two-to-one ratio *is applied,* as distinguished from the justness and reasonableness of the rate structure itself, the argument is disingenuous.

117. Trial Staff asserts the Presiding Judge afforded the Indicated Shippers unlimited opportunities to explore the application of the two-to-one rate structure, in their filed testimony, in their cross-examination of ESL and Trial Staff witnesses, and in their post-hearing briefs. Indeed, Trial Staff states the Indicated Shippers' witness expressly addressed the application of the two-to-one ratio in her cross-answering testimony to Trial Staff,[302] the Indicated Shippers' counsel rigorously cross-examined the Trial Staff witness on the issue at hearing,[303] and the Indicated Shippers addressed the application of the ratio in their post hearing briefs.

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[300] *Enbridge Pipelines (Southern Lights) LLC*, "Order on Scope of Issues Set for Hearing and Denying Motion for Certification to the Commission," April 5, 2011 at P 9 & n.14.

[301] *Id*. P 10.

[302] Trial Staff Brief Opposing Exceptions at 41 (citing Exh. No. IS-33, at 19-23 (Crowe) (asserting that Trial Staff's approach to calculating the Uncommitted Rate and Committed Rates is flawed and violates the Commission's statutory mandate and responsibility)).

[303] Trial Staff Brief Opposing Exceptions at 41 (citing Hearing transcript at 278-89, 292-96 (counsel's sustained questioning of how Trial Staff applied the two-to-one ratio)).

Committed Shippers

118. On exceptions, committed shippers argue the Presiding ALJ correctly determined the Indicated Shippers' efforts to expand the scope of the proceeding through the submission of the so-called "Offer of Proof" was procedurally and substantively flawed.[304] Committed shippers explain an Offer of Proof is "an evidentiary rule that enables an aggrieved party to use a ruling excluding evidence as a basis for an appeal."[305] Thus, "[w]hen the exclusion of evidence affects a party's substantial right and the [O]ffer of [P]roof apprised the agency of the substance of the evidence, the agency's decision to exclude the evidence can be reversed."[306] However, committed shippers state an Offer of Proof is inappropriate where it serves as an attempt to introduce evidence directly contrary to prior Commission rulings.[307]

119. Committed shippers maintain that the Presiding ALJ correctly determined the Indicated Shippers' Offer of Proof failed to "identify any ruling of the presiding officer rejecting or excluding proffered oral testimony or excluding evidence in the form of an exhibit or a public document."[308] The committed shippers argue the Presiding ALJ

[304] Committed shippers Brief Opposing Exceptions at 27.

[305] *Id*. at 28 (citing *San Diego Gas & Electric Co. v. Sellers of Market Energy and Ancillary Service Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange*, 127 FERC ¶ 61,269, at P 30 (2009) ("*San Diego Gas & Electric Co.*")).

[306] *Id*.

[307] *Id*. (citing Order Vacating Ruling, *San Diego Gas & Electric Co. v. Sellers of Market Energy and Ancillary Service into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange*, Docket Nos. EL00-95-045, *et al*., (Feb. 5, 2002) (Birchman, J.) ("Testimony which is directly contrary to the Commission's orders is neither relevant nor germane to disposition of the issues. Preservation for the record of matters clearly contrary to the Commission's orders would create confusion with regard to true and adequate disclosure of facts relevant to the issues set for hearing. Consequently, an offer of proof as to such a matter is inappropriate under 18 C.F.R. § 385.510(f) . . . .")).

[308] *Id*. at 27 (citing Order Granting Motion to Strike at P 14).

appropriately determined that the Indicated Shippers' attempt to expand the scope of issues through the submission of an Offer of Proof was improper because "the Offer of Proof is simply a continuation of their ongoing legal arguments regarding the scope of the issues that they assert should have been addressed in this proceeding."[309]

120. Committed shippers also argue the Offer of Proof was properly rejected because it was untimely. Committed shippers explain an offer of proof first requires an attempt to submit evidence at hearing, either through timely pre-filed evidence or through a cross-examination exhibit with a proper foundation.[310] Committed shippers state the Indicated Shippers made no such attempt, and parties had no opportunity to object to the attempt. Next, committed shippers state the Presiding ALJ must rule that such evidence is inadmissible. Because the Indicated Shippers did not attempt to submit any evidence relating to its "Offer of Proof," committed shippers suggest the Presiding ALJ appropriately made no such ruling at the hearing. Finally, committed shippers explain to complete an offer of proof, the offering party must proffer the evidence into the record as an offer of proof.[311] Committed shippers state the Indicated Shippers made no Offer of Proof at any time during the hearing. Rather, the Indicated Shippers waited until the hearing was over and first raised these issues in their Initial Brief. Consequently, committed shippers argue even if the Indicated Shippers' "Offer of Proof" had met the substantive requirements of such a submission it was properly stricken on the grounds that it was untimely.

[309] *Id*. at 27 (citing Order Granting Motion to Strike at P 14).

[310] *Id*. at 29 (citing 18 C.F.R. §§ 385.508, 385.510(f)).

[311] *Id*. (citing Order Making Rulings on Motions and Objections to Proposed Evidence, *N. States Power Co. v. S. Minn. Mun. Power Agency, et al*., Docket Nos. EL91-13-000, *et al*., (Nov. 7, 1991) (Miller, J.) ("Any such offer [of proof] should be made at the hearing at the time the proposed evidence is offered into evidence."). The Commission may look to the Federal Rules of Evidence for guidance on Rule 510(f). *See San Diego Gas & Electric Co.*, 127 FERC ¶ 61,269 at P 30 (discussing Rule 510(f)'s parallel in the Federal Rule of Evidence, Rule 103(a)(2)). The Federal Rules of Evidence require an offer of proof to be provided contemporaneously with the ruling excluding the evidence. *See Pedigo v. Unum Life Ins. Co. of Am*., 180 F.R.D. 324, 328 (D. Tenn. 1997) ("Fed. R. Evid. 103(a)(2) contemplates an offer of proof contemporaneous or nearly contemporaneous with the pertinent evidentiary ruling.")).

121. Thus, committed shippers characterize the Indicated Shippers' so-called "Offer of Proof" as yet another collateral attack on prior Commission orders.[312] Committed shippers explain that, as is relevant here, the Commission's Declaratory Order, Clarification Order, and Complaint Order have already determined that the rate design and size of the discount afforded to Committed Shippers were permissible under the ICA and not unduly discriminatory.[313] In addition, committed shippers explain that the Commission reiterated in its 2010 and 2011 Suspension Orders that the fact that the tariffs were being set for hearing did not undermine the Commission's prior approval of the rate structure and there was no issue of discrimination.[314] Committed shippers note that the Indicated Shippers did not request rehearing of any of these orders and they have now become final and non-appealable. Committed shippers argue that the Indicated Shippers' attempt to relitigate the same issues determined in the Complaint Order is barred by the doctrines of res judicata and collateral estoppel.[315]

122. Committed shippers also explain that the law of the case doctrine prohibits parties from relitigating issues that were previously decided in the same proceeding.[316] Committed shippers detail the early rejection of Indicated Shipper's request that the scope of the proceeding be expanded to address the issues Indicated Shippers now raise again in their Offer of Proof -- whether the provisions of the TSA were discriminatory or

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[312] Committed Shippers Brief Opposing Exceptions at 30 (citing *Alamito Co*., 41 FERC ¶ 61,312, at 61,829 (1987) ("The Commission's position on relitigation of issues is one where in the absence of new or changed circumstances requiring a different result, it is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been finally determined."); *Keyspan-Ravenswood, Inc*., 107 FERC ¶ 61,142, at P 22 (2004) (explaining that collateral attacks on final orders thwart the finality and repose that are essential to administrative efficiency)).

[313] Declaratory Order at PP 30-31, Clarification Order at PP 11, 13, and Order on Complaint at PP 16-17.

[314] 2010 Suspension Order at P 16; 2011 Suspension Order at P 12.

[315] Committed Shippers Brief Opposing Exceptions at 30 (citing *Exxon Co., U.S.A. v. Amerada Hess Pipeline*, 83 FERC ¶ 63,011, at 65,093 n.59 (1998)).

[316] *Id*. at 32.

anticompetitive, the Refund Mechanism, the Right of First Refusal, and the interplay between the U.S. Tariff and the Canadian tariff.[317]

C. Commission Decision

123. We find Indicated Shippers' contention that their Offer of Proof was incorrectly rejected is without merit. The Presiding ALJ properly rejected the Offer of Proof and there was no reason for the Initial Decision to address the issues raised in that pleading.[318] Moreover, the Presiding ALJ appropriately determined that the Indicated Shippers' efforts to expand the scope of issues through the submission of an "Offer of Proof" was improper as the Offer of Proof represented "a continuation of their ongoing legal arguments regarding the scope of the issues that they assert should have been addressed in this proceeding."[319]

124. Indicated Shippers' argument that the Declaratory Order and Clarification Order did not address whether the application of the two-to-one rate design methodology to determine the Uncommitted Rate was just and reasonable is unavailing, and was already rejected. The Order on Complaint unequivocally held that "[t]he Commission reviewed the TSA and the rate structure in the Declaratory Order proceeding and determined that the proposed rate design was just and reasonable and not unduly discriminatory."[320] While Indicated Shippers were permitted to challenge the justness and reasonableness of the result by challenging the costs included in the cost of service, they did not retain the right to relitigate the rate design. As noted above, the Indicated Shippers' have expressly waived any challenge to the cost of service calculated by the Trial Staff and approved by the Initial Decision.[321] As the Commission explained in the Order on Complaint, the protection afforded by the right to challenge the cost of service "is sufficient and adequate under the Interstate Commerce Act, and the Uncommitted Shippers are not

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[317] *Enbridge Pipelines (Southern Lights) LLC*, "Order on Scope of Issues Set for Hearing and Denying Motion for Certification to the Commission," April 5, 2011 at P 9 & n.14.

[318] ID at P 12 & n.27.

[319] Order Granting Motion to Strike at P 14.

[320] Order on Complaint at P 16.

[321] Indicated Shippers Brief on Exceptions at 12 & n.32.

entitled to be shielded from the consequences of their decision not to choose Committed Shipper status when the opportunity was presented to them."[322]

V. The Just and Reasonable 2010 and 2011 Uncommitted Rate

Initial Decision

125. The Initial Decision found that ESL's as-filed rates for 2010 and 2011 were just and reasonable.[323] The Presiding Judge found that Indicated Shippers' argument that the Uncommitted Rate for 2010 should be $2.45/bbl, and that the Uncommitted Rate for 2011 should be $2.33/bbl, implied that uncommitted shippers should pay rates that are less than half the rates that the committed shippers actually paid in 2010 ($5.025/bbl) and in 2011 ($5.4872/bbl).[324] The Presiding Judge rejected the Indicated Shippers' argument, inasmuch as the Indicated Shippers made no effort to explain how that was fair, reasonable, or appropriate, either for the committed shippers who bore the risks of the Southern Lights Pipeline throughout the 2010 and 2011 period, or for the uncommitted shippers, who avoided those risks and chose not to ship at all in 2010 and 2011.[325]

126. The Presiding Judge noted that both ESL and Trial Staff concluded that the 2010 Uncommitted Rate of $10.0526/bbl and the 2011 Uncommitted Rate of $10.9744/bbl were just and reasonable for those periods, though each reached the result differently.[326] The Presiding Judge explained that Trial Staff reached this conclusion by comparing the tariff rates proposed by ESL with the Uncommitted Rates Trial Staff calculated using a methodology consistent with Opinion No. 154-B and by using data provided by the

[322] Order on Complaint at P 16.

[323] ID at PP 551-553.

[324] ID at P 551.

[325] ID at P 551.

[326] ID at P 552 (citing Exh. ESL-7 at 64; Exh. S-15 at 16). The Presiding Judge noted that ESL reached its result by using relatively high cost-of-capital parameters to directly calculate the maximum Uncommitted Rate, which was shown to be higher than the filed rate. Exh. ESL-44 at 9:2-15. However, Trial Staff reached its result by calculating the cost-of-service for ESL and then allocating that cost-of-service in accordance with the Commission-approved two-to-one rate ratio. Exh. S-15 at 9-10.

pipeline in accordance with Part 346 of the Commission's oil pipeline regulations. In all cases, the ID noted, ESL's proposed uncommitted tariff rates were lower than the effective Uncommitted Rates calculated by Trial Staff.[327] Since ESL's proposed TSA uncommitted tariff rate of $10.0526 per barrel was shown to be even lower than Trial Staff's Opinion No. 154-B cost-based rate of $11.32 per barrel, the Presiding Judge held the 2010 tariff rate was cost justified.[328] Moreover, the Presiding Judge observed that for the 2011 period, Trial Staff's calculations showed that Committed Rates at various throughput levels were all lower than Opinion No. 154-B, cost-based Uncommitted Rates at any level of throughput. Accordingly, the Presiding Judge concluded that the proposed 2011 TSA uncommitted tariff rate of $10.9744 per barrel was cost justified. [329]

127. Accordingly, the Presiding Judge found that TSA-derived tariff rates proposed by ESL for 2010 and 2011 uncommitted service in Docket Nos. IS10-399-003 and IS11-146-000 were just and reasonable, consistent with and supported by record evidence in this proceeding.[330]

Exceptions

A. Briefs on Exceptions

Indicated Shippers

128. Indicated Shippers argue the ID erred by relying on Staff's calculated Opinion No. 154-B cost-based rates for 2010 and 2011 to find that ESL's proposed uncommitted rates for 2010 and 2011 were cost-justified and just and reasonable.[331] Indicated Shippers contend the ID provided no support for this finding other than Trial Staff's evidence showing Opinion No. 154-B cost-based rates for 2010 and 2011.[332] Indicated

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[327] ID at P 567.

[328] ID at P 553.

[329] *Id*.

[330] ID at P 567.

[331] Indicated Shippers' Brief on Exceptions at 14, 71.

[332] *Id*. at 14.

Shippers argue the Trial Staff testimony on this issue was "based upon Staff's mistaken belief that both the two-to-one ratio itself was approved by prior Commission orders as just and reasonable, and, more importantly, that the method of application of the two-to-one ratio was likewise compelled by Commission orders."[333]

129. Indicated Shippers ask the Commission to reverse the ID, find that ESL's Uncommitted Rates for 2010 and 2011 are not just and reasonable, and require ESL "to submit a compliance filing reflecting the proper ratemaking methodology that results in a just and reasonable, cost-based uncommitted rate consistent with the Commission's prior orders (including utilization of pipeline design capacity), from which a just and reasonable committed rate may be 'derived' through proper application of the TSA's two-to-one ratio, i.e., by dividing the uncommitted rate by two, as required by the Commission's prior orders."[334]

B. Briefs Opposing Exceptions

Enbridge Pipeline (Southern Lights) LLC

130. On exceptions, ESL argues that when the Commission's prior orders – the Declaratory Order, Clarification Order, and the Order on Complaint – are properly taken into account, it is evident that ESL's Uncommitted Rate for 2010 and 2011 are just and reasonable and cost-based, as the Presiding ALJ correctly determined.[335] ESL argues the Indicated Shippers – who have yet to transport a single barrel of diluent on the Southern Lights Pipeline – are seeking to pay much lower rates for service on the Southern Lights Pipeline than even the committed shippers actually paid in 2010 and 2011.[336] ESL argues the Indicated Shippers erroneously disregard both the significance of the committed shippers' financial obligations and the impact of the Commission orders approving key aspects of ESL's tariff structure, namely the two-to-one ratio. ESL contends the

[333] *Id*.

[334] *Id*. at 71-72.

[335] ESL Brief Opposing Exceptions at 3.

[336] *Id*. at 4. Specifically, ESL states the committed shippers actually paid rates of $5.0263/bbl in 2010 and $5.4872/bbl in 2011, which will not change regardless of the outcome of this proceeding since no uncommitted shipper volumes were transported in those years.

Indicated Shippers are seeking both to relitigate the Commission's prior orders and to proceed as though those prior orders had been rescinded or do not apply to them.[337] ESL argues the Indicated Shippers seek to benefit from the financial obligations undertaken by the committed shippers, even though the Indicated Shippers bear none of those obligations, a classic example of free-riding the Commission discourages, as it has here.

131. Specifically, ESL argues the Commission has already approved a tariff structure with two classes of shippers, committed and uncommitted, and a rate design that allocates the cost of service between those classes on a two-to-one ratio. The Commission has also approved a tariff mechanism under which ESL refunds virtually all of the revenue from uncommitted volumes using the approved two-to-one ratio, so that there is no possibility of ESL over-recovering its cost of service, regardless of the volumes it transports. When these rulings are properly understood and taken into account – the resulting rates for uncommitted shippers are just and reasonable, given the fact that the costs of bringing the project to fruition were undertaken by the committed shippers, and over-recovery of costs by ESL is not possible.

132. With this context in mind, now that construction is complete and a body of actual cost and throughput data is available, the case turns on whether the Uncommitted Rates are justified under the Opinion No. 154-B methodology embodied in Part 346 of the Commission's oil pipeline regulations. ESL states that the Commission made clear in the recent Order on Complaint, the "Indicated Shippers are adequately protected in the ongoing hearing on the Uncommitted Rate, in that they can *challenge the reasonableness of any cost* proposed to be included in the Uncommitted Rate."[338] While the Indicated Shippers have every right to argue about those cost elements, they have no basis to challenge Trial Staff's cost-of-service calculation as adopted by the Initial Decision, which is fully consistent with the Commission's directives and declaratory framework.[339]

Trial Staff

133. On exceptions, Trial Staff argues the Presiding ALJ correctly determined that ESL's as-filed rates for 2010 and 2011 were just and reasonable. Contrary to the claim of

[337] *Id*. at 4-5.

[338] ESL Brief Opposing Exceptions at 7 (citing Order on Complaint at P 17 (emphasis added)).

[339] *Id*.

Indicated Shippers, Trial Staff points out the calculation of the Uncommitted Rate from the Committed Rate based on a two-to-one ratio squares with prior Commission rulings, which found that the ratio reflects the differences in service between the pipeline's two shipper classes.[340] Furthermore, Trial Staff argues the ID produces cost-based rates, since the rates generate revenues equal to the Opinion No. 154-B cost-of-service approved in the ID.[341] Moreover, Trial Staff notes the Presiding Judge appropriately evaluated the Uncommitted Rate, not on the cost-of-service agreed to by the pipeline and committed shippers in the TSAs, but on the very different Opinion No. 154-B cost-of-service developed at the hearing.[342] Therefore, Trial Staff states the Uncommitted Rate is fully consistent with a traditional oil pipeline cost-of-service rate.[343]

Committed Shippers

134. On exceptions, committed shippers also maintain the Presiding ALJ correctly determined that ESL's as-filed rates for 2010 and 2011 were just and reasonable. Specifically, the Committed Shippers state the pipeline's costs were appropriately reviewed and determined pursuant to Part 346 of the Commission's regulations applicable to oil pipelines and from that, the Committed and Uncommitted Rates were calculated by applying the Commission-approved two-to-one rate design ratio to the those costs.[344] Committed shippers argue the Commission-approved rate design produces just and reasonable rates because it allows ESL to recover its costs while adhering to the Commission's prior orders that repeatedly upheld the two-to-one rate design ratio as not unduly discriminatory, while preventing over-recovery of costs, and therefore just and reasonable.[345]

135. Moreover, committed shippers contend that the Indicated Shippers' rate proposal on the other hand would result in the substantial under-recovery of ESL's cost-of-

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[340] Trial Staff Brief Opposing Exceptions at 16.

[341] *Id*. at 17.

[342] *Id*. at 36.

[343] *Id*.

[344] Committed Shippers' Brief Opposing Exceptions at 11.

[345] *Id*. at 11-12 (citing Order on Complaint at P 16).

service.[346] Thus, committed shippers argue the Indicated Shippers' method of applying the two-to-one rate design ratio must be rejected because it does not yield a just and reasonable uncommitted rate.[347]

C. Commission Decision

136. We affirm the Presiding Judge's finding that ESL's as-filed rates for 2010 and 2011 are just and reasonable.[348] Indicated Shippers' contentions that the ID erred by relying on "Staff's mistaken belief that both the two-to-one ratio itself was approved by prior Commission orders as just and reasonable, and, more importantly, that the method of application of the two-to-one ratio was likewise compelled by Commission orders" are without merit.[349] At bottom, Indicated Shippers' argument is yet another effort to overturn the basic tariff structure that has been approved by the Commission on the merits on at least three separate occasions – the Declaratory Order, the Clarification Order, and the Order on Complaint. For all of the reasons discussed above in Sections II and III, the Indicated Shippers' arguments also fail here in challenging the 2010 and 2011 rates.

137. Simply stated, the Commission's orders only required ESL to demonstrate that its proposed Uncommitted Rates were compliant with the Commission's regulations applicable to oil pipelines when applied to the costs, revenue, throughput, and other Commission-approved TSA assumptions underlying ESL's proposed Uncommitted Rates. In other words, "if the uncommitted rate is protested, [ESL] must comply with section 342.2(b) *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."[350] ESL did precisely this, and Commission Staff showed that ESL's filed rates were consistent with the cost data and with the overarching declaratory framework, and these rates were properly held by the Presiding Judge to be just and reasonable. We therefore

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[346] *Id*. at 13.

[347] *Id*. at 8.

[348] *See* ID at PP 551-553, 567.

[349] Indicated Shippers' Brief on Exceptions at 14.

[350] Clarification Order at P 13.

affirm the Presiding Judge's finding that ESL's as-filed rates for 2010 and 2011 are just and reasonable.

The Commission orders:

The Initial Decision is affirmed and adopted in its entirety. To the extent this order omits discussion of particular exceptions; they have been considered and are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.