<u>Buckeye Pipe Line Co., L.P.</u>
Opinion No. 360-A
55 FERC ¶ 61,084 (1991)

In Opinion No. 360-A, the Commission granted in part and denied in part requests for rehearing and clarification regarding the approval of a market-based rate program for Buckeye Pipe Line Co. The Commission reiterated its policy to consider a variety of factors in assessing a pipeline's market power. These factors include market share, market concentration, excess capacity, transportation alternatives, potential entry by new competitors, barriers to entry, as well as other factors. This proceeding implements for the first time a form of light-handed regulation permitting price changes by an oil pipeline to be determined by market forces.

[¶ 61,084]

Buckeye Pipe Line Co., L.P., Docket Nos. IS87-14-002 and OR88-3-001

Opinion No. 360-A; Opinion and Order on Rehearing

(Issued April 18, 1991)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

[Note: Opinion No. 360; opinion and order on Initial Decision issued December 31, 1990, appears at 53 FERC ¶ 61,473.]

[Opinion No. 360-A Text]

On December 31, 1990, the Commission issued Opinion No. 360 in this proceeding.[1] Opinion No. 360 affirmed in part and reversed in part the Initial Decision[2] issued by the administrative law judge (ALJ) on February 12, 1990, in which he determined that Buckeye Pipe Line Company, L.P. (Buckeye) lacked significant market power in all of its relevant markets, and it implemented, with modifications, Buckeye's proposed experimental program for rate regulation.[3] On January 30, 1991, Buckeye and the Association of Oil Pipe Lines (AOPL), filed requests for rehearing and/or clarification of several issues addressed in Opinion No. 360. For the reasons discussed below, the Commission is granting in part and denying in part the requests for rehearing and/or clarification.

I. Background

This proceeding is unique in that it implements for the first time for an oil pipeline a form of light-handed regulation that permits price changes by the pipeline to be determined by market forces.

A. *Initial Decision*

The proceeding arose from a Buckeye filing on February 13, 1987, that proposed a six-percent general rate increase and requested relief from section 4 of the Interstate Commerce Act (ICA) in order that Buckeye could charge lower rates at the outer end of its system to meet competition.[4] Buckeye's proposal covered the transportation of petroleum products in and between the states of Washington, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, New York, and Connecticut. On March 13, 1987,

[1] *Buckeye Pipe Line Co., L.P.*, 53 FERC ¶ 61,473 (1990) (hereafter Opinion No. 360).

[2] 50 FERC ¶ 63,011 (1990) (hereafter Initial Decision).

[3] "Motion of Buckeye Pipe Line Company, L.P. For Expedited Adoption Of An Experimental Program For Rate Regulation In Competitive Markets," filed May 1, 1990 (hereafter Buckeye's Proposal).

[4] Under section 4, 49 U.S.C. § 4 (1979), a pipeline may not charge a higher rate for transporting products to a nearer destination than it charges for a farther destination, without obtaining FERC approval.

the Commission's Oil Pipeline Board issued an order that accepted Buckeye's revised filing subject to refund, suspending it for one day, temporarily granted the requested section 4 relief, and set the matter for hearing.

During the initial stages of the proceeding Buckeye had requested that its proposal be evaluated under less strict standards than the ratemaking principles in Opinion No. 154-B.[5] Accordingly, the proceeding was bifurcated to give Buckeye an opportunity to demonstrate that strict cost based ratemaking scrutiny was not warranted. Phase I of the bifurcated proceeding was intended to address the question of whether Buckeye has significant market power in the markets to which it transports, or whether it is subject to effective competition in those markets. Phase II was to address how Buckeye's rates would be regulated, particularly in the markets in which Buckeye lacks significant market power.

At the hearing one issue was litigated: whether Buckeye has significant market power in any of its relevant markets. The ALJ found that "Buckeye has shown it lacks significant market power in each of its relevant markets at the present time."[6]

B. *Opinion No. 360*

1. Phase I

On exceptions the Commission conducted an analysis of Buckeye's market power based on the evidentiary record developed at the hearing. The Commission first affirmed the ALJ and defined the relevant product market as the transportation of refined petroleum products and the relevant geographic markets as the areas that include all supplies of transportation from all origins to United States Department of Commerce, Bureau of Economic Analysis Economic Areas (BEAs).[7]

The Commission then evaluated whether Buckeye has significant market power in each relevant geographic market. As the first step the Commission screened for market concentration in each market by using the Herfindahl-Hirshman Index (HHI) based on actual deliveries into the market. Then, unless the market had a particularly low HHI, the Commission considered and weighed various other factors such as the potential entry of competitors into the market, available transportation alternatives, market share, availability of excess capacity, and the presence of large buyers able to exert downward monopsonistic pressure on transportation rates. After completing this analysis for each market, the Commission then reached a conclusion as to whether, on balance, these factors established that Buckeye has significant market power in that market such as to necessitate continued close regulatory oversight of its rates in that market.

Of the 22 relevant markets considered, the Commission affirmed the ALJ's finding that Buckeye lacks significant market power in the following 15 markets: Scranton-Wilkes Barre; Pittsburgh; Harrisburg-York-Lancaster; Philadelphia; Columbus; Lima; Toledo; Detroit; Saginaw-Bay City; Fort Wayne; Kokomo-Marion; Indianapolis; Hartford-New Haven-Springfield; Seattle; and Terre Haute. The Commission made no findings with respect to the Youngstown-Warren and Buffalo markets since Buckeye

[5] *Williams Pipe Line Co.*, 31 FERC ¶ 61,377 (1985); *see also* Opinion No. 154-C, 33 FERC ¶ 61,327 (1985). Because the Commission approved a complete settlement of the underlying Williams case, 30 FERC ¶ 61,262, Opinion No. 154-B has not been reviewed by the court of appeals, but it remains as the Commission's standard for regulating oil pipelines.

[6] 50 FERC ¶ 63,011, at p. 65,064 (1990).

[7] BEAs are geographic regions surrounding major cities that are intended to represent areas of actual economic activity.

has no tariff on file for those markets and does not serve them. The Commission found that the New York City market should continue to be regulated because the record was insufficient to make a finding of Buckeye's market power in that market. Finally, the Commission found that in the remaining four markets, Syracuse-Utica, Rochester, Binghampton-Elmira, and Cleveland, Buckeye has significant market power.

2. Phase II

In fulfillment of Phase II of this proceeding, the Commission considered and accepted, with modification, an experimental program proposed by Buckeye for regulation of its rates in competitive markets. The proposal basically advocated using price changes in markets where Buckeye lacks significant market power to set caps for price changes in the markets where it does have market power. The essential features of Buckeye's experimental proposal were;

> (1) The change in the average price in Buckeye's competitive markets (excluding prices which do not apply to the minimum annual volume) would cap the allowed change in the average price in less competitive markets. Increases or decreases in the average price in competitive markets would be mirrored by corresponding increases in the average price in less competitive markets.
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> (2) Individual price changes in the less competitive markets could deviate from the competitive average by a predetermined amount.
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> (3) Price changes over a two-year period may not exceed 15 percent in real terms, and price changes not exceeding the change in the GNP deflator plus two percent would not be subject to suspension.

In adopting Buckeye's proposal, the Commission expressed two concerns with the proposed cap on rate increases in markets in which Buckeye does have significant market power. First, it considered that Buckeye's calculations of average price in the markets in which it does not have significant market power could give undue weight to small volume markets and thereby give Buckeye an incentive to manipulate prices in those markets for gain in its larger volume markets in which it has significant market power. Second, it considered that the price flexibility advocated for markets where Buckeye does have significant market power would not be an effective protection against Buckeye's potential to use its market power to price discriminate.

Accordingly, the Commission accepted a modified version of Buckeye's proposal for a period of only three years. The Commission also required that Buckeye file annual reports to enable the Commission to judge whether light-handed regulation succeeds in protecting shippers against market power abuses.

II. Discussion

A. *Market Power Findings*

1. New York City

In Opinion No. 360 the Commission noted that Buckeye only makes intra-BEA deliveries of products transported into the New York City BEA by other pipelines or water carriers, and that it receives gasoline, jet fuel, and distillate fuel oil in Linden, N.J. and transports it to Long Island City, N.Y., Inwood, N.Y. and to La Guardia, JFK, and Newark airports. The Commission also concluded as to these types of markets that it is reasonable to presume that Buckeye would be unable to affect the price of delivered product in a BEA if it made only intra-BEA deliveries since, among other things, it has no control over the amount of product flowing into the BEA. The presumption was contested with respect to the New York market. The Commission found that the record did not clearly support the presumption and that, accordingly, Buckeye's rates in the New York City BEA would continue to be regulated.

Buckeye argues that in analyzing the New York City market, the Commission focused solely on the delivery of jet fuel to the three major airports, and overlooked or failed to consider Buckeye's substantial deliveries of gasoline and fuel oil in this market at Long Island City and Inwood. Buckeye contends these delivery points are actively served by barge, including barges owned or controlled by Buckeye's major shippers, and that Buckeye has lost substantial business to these competitors. Buckeye asserts that barge competition clearly constrains its rates to Long Island City and Inwood, and that no party submitted any contrary evidence. Buckeye maintains that even if the Commission wishes to consider treating the New York City airports as submarkets, the Commission should find that based on the uncontested record regarding Long Island City and Inwood, Buckeye lacks significant market power over the other nonjet fuel deliveries to those points within this market. AOPL makes a similar argument with respect to competition from barges.

The Commission does not agree. In Opinion No. 360 the Commission stated that Buckeye was presumed to be unable to affect the delivered price in a BEA if it makes only intra-BEA deliveries. However, this presumption was contested as to deliveries in the New York City BEA, "especially" as applied to jet fuel delivered to the three airports. Accordingly, the Commission concluded that the evidence of record was not sufficient to support a finding that the presumption was justified for the New York City BEA as a whole.[8] Although the Commission gave special attention to the contested airport deliveries, it clearly also gave consideration to the BEA in its entirety, including Buckeye's deliveries to Long Island City and Inwood.[9] In fact, the Commission of necessity focused on the New York market as a whole, rather than as individual submarkets, simply because there was not enough evidence submitted regarding transportation movements, competition, transportation alternatives, capacity, and other analytical factors within the various claimed submarkets to enable a more differentiated analysis. In this regard, the Commission rejected arguments by the Air Transport Association (ATA) that the relevant geographic markets should be the individual airports, and adopted Buckeye's position, advanced throughout this proceeding, that relevant markets, including the New York City market, should be defined as BEAs.

Buckeye now argues that the Commission should consider the New York City BEA as a number of submarkets, but it relies only on the record as now made to support its arguments. It has offered nothing that the Commission has not already considered in finding the record insufficient to support a determination that Buckeye does not exercise significant market power. In other words, Buckeye, now that it is to its advantage, for the first time advocates splitting the New York City BEA into submarkets based on a record that contains no more evidence in support of this position than that offered by ATA, which the Commission already has found to be inadequate. The problem is that the Commission has been, and continues to be, faced with a lack of record evidence to support either the competitive presumption as to the New York City

[8] 53 FERC ¶ 61,473, at p. 62,674 (1990).

[9] The ALJ, in support of his finding that barging presented a feasible alternative to shipping on Buckeye's line, indicated that the rates to "Long Island" were comparable to those to La Guardia. Thus, the importance of barge competition was clearly considered in the evaluation of the New York City BEA.

market as a whole, or the differentiation of the New York City market as a number of submarkets that can be separately analyzed as to Buckeye's ability to exercise significant market power in them.

In Opinion No. 360 the Commission offered Buckeye the opportunity to attempt in the future to show that it does not exercise significant market power in the New York City market, but Buckeye has not yet done so. Nevertheless, our conclusions here should not be viewed as a withdrawal of that offer or as a determination that Buckeye can never establish through convincing record evidence that the New York City market, either in whole or in part, should receive light-handed regulatory treatment. We are only affirming the Commission's findings that the evidence in this case does not warrant that treatment, and that New York City consequently will continue to be regulated as a single market. Accordingly, the requests for rehearing with respect to the New York City BEA are denied.

2. Cleveland

The Commission concluded that Buckeye can exercise significant market power in the Cleveland BEA. Its conclusions were based on consideration of a highly concentrated market as indicated by a very high HHI, an over 75-percent market share enjoyed by Buckeye, and the amount and quality of competitive service provided by three other pipelines.

Buckeye contends that the Cleveland market vividly illustrates why HHI figures do not necessarily measure the degree of actual market competition. Buckeye further contends that the overwhelming record evidence in this proceeding demonstrates intense competition in this market despite the high HHI. Buckeye argues that the Cleveland market is served by five pipelines,[10] a local refinery, one major refinery in Lima, Ohio, two major refineries in Toledo, and active petroleum products port facilities. Buckeye maintains that major oil company shippers responsible for over 87 percent of Buckeye's 1987 deliveries own or control competing pipelines serving this market. Buckeye asserts that over 62 percent of its deliveries to the Cleveland market are on behalf of a single shipper, Inland Corporation, which operates a private, competing pipeline, and has bargained Buckeye's rate down to an extremely low level. Accordingly, Buckeye reiterates its claim that it does not have significant market power in this BEA.

Buckeye avers that significant excess capacity also exists in this market and this provides a strong incentive for vigorous competition. Buckeye maintains that it is undisputed that trucks could also serve this market economically from refineries in Lima and Toledo, Ohio, and could easily expand deliveries and increase market share if Buckeye were to raise its prices unreasonably. Buckeye contends that any potential market power it would exercise in this market is more than fully offset by the countervailing market power of its major oil company shippers.

The arguments made by Buckeye in support of its contention that the Cleveland market need not be regulated are unavailing since these arguments merely restate factors that were considered and discounted in our original analysis of this BEA. The very high HHI of 5976 for the Cleveland BEA, while indicating a highly concentrated market, was only one factor considered by the Commission in determining that

[10] The five pipelines indicated by Buckeye are Buckeye, Inland Sun Pipe Line, ARCO Pipe Line and, since July 10, 1989, Ohio River Pipeline.

Buckeye has significant market power. The Commission also evaluated the potential for competition from other pipelines as well as long-haul trucking from Toledo refineries and the viability of barging and determined that the HHI for the Cleveland market was still in excess of 2400, which clearly indicated that Buckeye could exercise significant market power in this BEA. Thus, any excess capacity that exists in this market is offset by its intense concentration. The Commission also noted that the other pipelines serving this market, including Inland, account for only about a quarter of the deliveries into the market. The record in this proceeding shows that Buckeye is the only common carrier pipeline serving this market with connections to Detroit, Lima, and Lebanon. Indeed, the only other common carrier pipeline transporting product to Cleveland was Sun pipeline from Toledo.[11] Thus, Buckeye's contention that Inland, a proprietary pipeline, is a serious competitor in this market, continues to be, as we noted in Opinion No. 360, an overstatement.

The Commission considered and discussed each of the factors advanced by Buckeye on rehearing in support of its position. It specifically weighed each of these various factors and determined, on balance, that the Cleveland market is one in which Buckeye can exercise significant market power. Buckeye has presented no new evidence nor raised any matters regarding the Cleveland market that were not considered by the Commission. Accordingly, Buckeye's request for rehearing with respect to the Cleveland BEA is denied.

3. Upstate New York

The Commission found that Buckeye has significant market power in the upstate New York markets (Syracuse-Utica-Rochester and Binghampton-Elmira). In reaching this conclusion the Commission considered several factors such as market share, market concentration, excess capacity, the number and type of transportation alternatives available to customers, potential entry by new competitors and natural barriers to entry.

Buckeye, however, argues that the Commission's findings were based primarily on the rejection of Atlantic Pipe Line ("Atlantic") as a meaningful competitor. Buckeye contends that the extensive record on these markets fully supports the ALJ's conclusions that Atlantic provides strong competition in this market and has taken substantial business away from Buckeye. Buckeye maintains that this fact and other competitive evidence, such as competition from trucking, shows that it lacks significant market power in upstate New York.

Buckeye clearly misstates the Commission's reasoning with respect to its market power findings in the upstate New York markets. As to the Rochester BEA, the Commission noted that the HHI for this market was 5378, indicating a very highly concentrated market, and that no potential entrants could be found to come into the market at a reasonable cost so as to reduce this very high HHI. In addition, the Commission found that Buckeye's share of this market is over 71 percent. The Commission's reasoning with respect to the Syracuse-Utica and Binghampton-Elmira BEAs was similar, where the HHI's were 4783 and 3401 respectively, with no viable competition to be found in either market.

With respect to Atlantic, the Commission noted that it could not be assumed that shippers would change their shipping arrangements and have their products delivered

[11] Exhibit ATA-15, Schedule 3; exhibit B-64, Table B-64-1.

to Philadelphia, rather than Linden, to use the Atlantic pipeline rather than Buckeye, since this would likely involve some additional expense to shippers. The Commission also noted that the record failed to show that any analysis was conducted that would support a conclusion that Buckeye faces significant competition from Atlantic. The Commission also pointed out that it had not been shown that Mobil could become an effective competitor if Buckeye were to increase its rates, noting, among other things, that Mobil's 18 MBD operating capacity is 90 percent utilized. In fact, the only factor that weighed in favor of a finding of competitiveness in the Rochester and Syracuse-Utica BEAs was the presence of USAir, and its likely ability to exert some downward pressure on Buckeye's pricing. The Commission also pointed out, however, that it could not be assumed that USAir's position would allow it to control prices. In its analysis of the Binghampton-Elmira BEA, the Commission noted that the only justification the ALJ gave for finding that other pipelines could take away Buckeye's business was the use of drag reducing additive by those pipelines to increase capacity, and that this argument had little validity since Buckeye could use the same methods itself, to its own benefit.

Thus, in analyzing the upstate New York markets and concluding that Buckeye can exercise significant market power in them, the Commission clearly considered factors other than the presence of Atlantic and its potential, or lack thereof, as a competitive force. Buckeye has not presented any new evidence that would warrant a modification of our original findings with respect to these markets, and its request for rehearing is denied.

B. *Pricing Flexibility*

Buckeye and AOPL request rehearing of the Commission's decision to limit the flexibility Buckeye had sought to establish above average individual rate increases in markets where Buckeye has significant market power. In Opinion No. 360 the Commission expressed concern about Buckeye's proposal for price flexibility, stating that Buckeye could use its market power to price discriminate or for cross-market subsidization. Thus, the Commission rejected Buckeye's proposal to restrict individual rate changes to the "inner-quartile range" of changes in markets where Buckeye does not have significant market power.[12]

Buckeye contends that it does in fact face substantial competition in these "less competitive" markets, and cannot be considered a "monopolist." Buckeye maintains that any concern about cross-market subsidization is fully accounted for by limiting rate increases in competitive markets. Buckeye maintains that its "inner-quartile" range proposal fully addresses the Commission's concerns over price discrimination by assuring that the range of increases in markets where it does have significant market power will be substantially less than the range of increases in markets where it does not have significant market power. Buckeye asserts that in order to meet overall cost increases attributable to each market, it should have some flexibility to raise some rates above the average increase.

Buckeye also states that it would be willing to accept different, more restrictive limits on the range of increases in less competitive markets. Buckeye argues that at a minimum, an experimental proposal of this type should not absolutely prohibit all

[12] Under its proposal Buckeye would restrict its pricing flexibility in markets where it has significant market power so that the maximum rate increase allowed would not exceed the 75th percentile of the entire range of price increases in markets where it has no market power.

flexibility for above average increases in markets where it has significant market power. AOPL makes similar arguments.

The Commission denies the requests for rehearing. As noted, the Commission's primary concern has been that Buckeye could exercise its market power to price discriminate. None of the arguments raised in the requests for rehearing are new, and therefore they do nothing to allay those concerns. Under these circumstances, we are still unwilling to allow Buckeye the pricing flexibility it seeks. We reiterate that any average decrease in rates in Buckeye's markets where it does not have significant market power must be accompanied by a corresponding decrease in all of Buckeye's rates in markets where it does have significant market power. However, we acknowledge that this is an experimental program. Accordingly, during the experimental period the Commission will evaluate on an ongoing basis the impact of rate increases and decreases on the rates Buckeye charges in the markets where it has market power, and will entertain any data that Buckeye wishes to present in the future to support changes to allow it the pricing flexibility it wants.

C. *Relevant Markets*

In Opinion No. 360 the Commission found that the relevant product market was the transportation of refined petroleum products and that the relevant geographic market was an area at least as large as a BEA. AOPL requests that the Commission establish rebuttable presumptions that, in future market power determination proceedings, these definitions will be accepted as to the product[13] and geographic markets.

AOPL's proposal may have some merit, but this is the first proceeding in which product and geographic markets have been defined for use in market-based ratemaking for oil pipelines, and it is too early for us to take the step that AOPL requests. Also, this proceeding is clearly not the appropriate forum for making such a generic finding. Thus, the Commission will continue to determine the relevant product and geographic markets on a case-by-case basis, at least until we can gain some experience with light-handed regulation of oil pipelines and appropriate methodologies for allowing market-based rate determinations for them. Accordingly, AOPL's request is denied.

AOPL also argues that there is overwhelming evidence of a substantial level of competition in the oil pipeline industry as a whole which would support the Commission's establishment, as a matter of policy, of a rebuttable presumption that "enough" competition exists to warrant reliance upon competition as regulation in particular markets. AOPL contends that it would be appropriate for the Commission to conserve its resources and those of the parties to the proceeding by ensuring that market power determinations are limited to those markets in which there is prima facie evidence that a pipeline may exercise significant market power.

AOPL's approach would require those wanting a pipeline's rates to be determined based on cost factors to justify use of this traditional methodology, rather than require the pipeline to demonstrate that strict ratemaking scrutiny is not warranted and that some lighter-handed regulatory approach should be used. This would be contrary to the mandate of *Farmers Union II*.[14] There the court stated:

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[13] AOPL states where the pipeline involved is a crude oil pipeline, the relevant product market would be the transportation of crude oil instead of the transportation of refined petroleum products.

[14] *Farmers Union Central Exchange v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984).

> Most fundamentally, FERC's statutory mandate under the Interstate Commerce Act requires oil pipeline rates to be set within the "zone of reasonableness;" presumed market forces may not comprise the principal regulatory constraint. Departures from cost-based rates must be made, if at all, only when the non-cost factors are clearly identified and the substitute or supplemental ratemaking methods ensure that the resulting rate levels are justified by those factors.[15]

Accordingly, the Commission will continue to follow its current practice which requires an oil pipeline that seeks the benefit of reduced regulation to bear the burden of demonstrating that it lacks significant market power in each market in which it seeks light-handed regulation.

D. *Analytical Framework*

AOPL argues that the Commission should clarify the analytical framework within which it will consider all relevant factors in its analysis of a pipeline's market power. AOPL indicates that while it strongly supports the Commission's decision to consider a variety of factors when it undertakes a market power determination, it believes that the Commission should establish thresholds for both adjusted and unadjusted HHI's below which no further analysis would be deemed necessary.

The Commission will continue to consider a variety of factors such as market share, market concentration, excess capacity, the number and type of transportation alternatives available to customers, potential entry by new competitors and natural barriers to entry as well as other factors rather than adopting an automatic threshold which would preclude such an analysis. The Commission believes that only by conducting this type of an analysis in each case can we ensure that all relevant factors are weighed in making a market power determination.

AOPL also requests that the Commission clarify that, in other oil pipeline market power analyses, data other than delivery data (such as pipeline capacity) may be used as a basis for calculating HHI's. This request for clarification is granted. Although the Commission determined that the use of deliveries data was the best method for calculating HHI's in the Buckeye case, we readily acknowledge that circumstances may be different on other pipelines, and they are free to propose using delivery data or any other appropriate data for the purposes of calculating HHI's.

E. *Alternative Ratemaking Methodologies*

AOPL asks that the Commission clarify that it will look favorably upon ratemaking methodologies similar to the one adopted for Buckeye for pipelines that wish to follow the "trail blazed" by Buckeye, and also will be receptive to alternative ratemaking methodologies proposed by other pipelines that are tailored more closely to their circumstances.

The Commission adopted Buckeye's proposal with modifications on an experimental basis. The purpose of this procedure was to allow the Commission an opportunity to evaluate the proposal on an ongoing basis for the three-year experimental period. However, as the Commission recognized in Opinion No. 360, Buckeye's proposal was not intended to be generically applicable to other oil pipelines and the proposal may not fit other pipelines' circumstances. Thus, the Commission will be receptive to alternative ratemaking methodologies which might be proposed by other pipelines that are tailored more closely to their circumstances.

[15] Farmers Union II, 734 F.2d at 1530.

F. *Rate Caps*

AOPL argues that the Commission should reaffirm its willingness to raise Buckeye's rate cap, if necessary, during the term of the Buckeye experimental program. The Commission clearly stated its willingness to adjust the rate cap if necessary during the experimental period. Thus, there is no need to reaffirm our position with respect to this issue.

AOPL also requests that the Commission clarify the process by which such adjustments to the rate cap would be made during the term of Buckeye's experimental program. AOPL contends that the reporting requirements placed on Buckeye are not likely to yield information by which the Commission could readily determine that the rate cap thwarted Buckeye's efforts to raise rates in response to market forces. AOPL's request for clarification is denied.

It would clearly be premature for the Commission to attempt to describe a process by which it would adjust the rate cap without having had the opportunity to review any aspect of the experimental program. With respect to the reporting requirements during the experimental period, Buckeye is required to submit annual reports, on January 20 of each year, detailing price and revenue changes under each of its tariffs in all its markets and relevant GNP inflation calculations. Specifically, for each tariff in each market, Buckeye must give the initial rate ($/Bbl), volume (MBD), and revenue ($/yr.). Then, Buckeye must give any percentage change in each rate during each 12-month experimental period and corresponding changes in revenue. Buckeye must also show how it calculated applicable price caps for its markets in which it does have significant market power for each experimental period. The Commission will carefully evaluate this data which should clearly alert us to any instances in which Buckeye is unable to raise rates in response to market forces. This review will allow us to determine what, if any, adjustments are necessary for the rate cap. However, Buckeye is free to submit in its annual report any additional data that it deems necessary for the Commission's ongoing review of this issue.

AOPL also maintains that the Commission should clarify in general terms what may happen after the three-year term of the Buckeye program. AOPL argues that in particular the Commission should indicate its willingness to eliminate rate caps altogether if the Buckeye experimental program is successful.

Buckeye's program is an experimental one that is intended to last for a three-year term. The success of that program is unknown at this time and, accordingly, it would be presumptive and speculative for the Commission at this date, at the very outset of the program, to reach the conclusions that AOPL asks us to reach. The Commission will monitor the experimental program as it progresses and evaluate its success on an ongoing basis. At the end of three years, the Commission then will determine what the next step should be for Buckeye. Accordingly, AOPL's requests for clarification with respect to this matter is denied.

Late Intervention

On February 8, 1991, Kaneb Pipe Line Operating Partnership, L.P. (Kaneb) filed in this proceeding: (1) a motion to intervene out of time for the limited purpose of addressing certain proposals contained in AOPL's petition for rehearing and clarification of Opinion No. 360; (2) a motion for leave to respond to the petition of AOPL for rehearing and clarification of Opinion No. 360; and (3) an answer to AOPL's request for rehearing and clarification of Opinion No. 360.

Kaneb's motion to intervene in this proceeding is solely for the purpose of filing an answer to AOPL's request for rehearing. However, Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2), does not permit answers to requests for rehearing. Therefore, Kaneb is seeking to intervene solely for a purpose not permitted by the Commission's rules. Kaneb has not shown good cause for being permitted to intervene for this purpose or waiver of Rule 213(a)(2), and, accordingly its motion to intervene out of time and its motion for leave to respond to the petition of AOPL for rehearing and clarification of Opinion No. 360 are denied.

The Commission orders:

(A) The requests for rehearing and/or clarification filed in this docket are granted in part and denied in part as discussed in the body of this order.

(B) Kaneb's motion to intervene out of time is denied.

(C) Kaneb's motion for leave to respond to the petition of AOPL for rehearing and clarification of Opinion No. 360 is denied.