<u>Williams Pipe Line Company</u>
Opinion No. 391
68 FERC ¶ 61,136 (1994)

In Opinion No. 391, Williams Pipe Line Company successfully proved that it lacked market power in certain of its markets. The Commission affirmed that private pipelines and certain pipelines without terminals could be included in calculating the Herfindahl-Hirschman Index of market concentration. Barges, refineries, and trucks could also be included in the calculation. However, in evaluating other factors that bear on competition, the Commission concluded that exchanges should be given little weight in the post-screening review of markets. Phase II of the proceeding at 75 FERC ¶ 63,016 (1996) involved setting base rates for Williams' remaining markets that were determined to be uncompetitive.

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68 FERC ¶ 61,136

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 391

Williams Pipe Line Company	)	Docket Nos. IS90-21-002,
	)	IS90-31-002, IS90-32-002,
	)	IS90-40-002, IS91-1-002,
	)	SP91-3-002, SP91-5-002,
	)	IS91-21-002, IS91-28-002,
	)	IS91-33-002, IS92-19-001
	)	and OR93-1-000
Enron Liquids Pipeline Company	)	Docket Nos. IS90-39-002,
	)	IS91-3-000 and
	)	IS91-32-000 (Phase I)

OPINION AND ORDER ON INITIAL DECISION,
ON MOTION PROPOSING RATE STANDARDS, AND
ON COMPLAINT AND PROTEST

Issued: July 28, 1994

FERC-DOCKETED
JUL 28 1994

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Williams Pipe Line Company	)	Docket Nos. IS90-21-002, IS90-31-002, IS90-32-002, IS90-40-002, IS91-1-002, SP91-3-002, SP91-5-002, IS91-21-002, IS91-28-002, IS91-33-002, IS92-19-001 and OR93-1-000
Enron Liquids Pipeline Company	)	Docket Nos. IS90-39-002, IS91-3-000 and IS91-32-000 (Phase I)

APPEARANCES

Lawrence A. Miller, David M. Levy, Kevin Hawley, Lorrie M. Marcil, Randolph M. Duncan, William J. Collinsworth, and David P. Batow for Williams Pipe Line Company

Keith R. McCrea, Patrick H. Corcoran, Michael T. Mishkin, Michele F. Joy, and Paul F. Forshay for the Association of Oil Pipe Lines

Gordon Gooch and Dena Wiggins for Texaco Producing, Inc. and Texaco Refining and Marketing, Inc.

John W. Griggs, Thomas L. Albert, Debra B. Adler, Eric W. Doerries, and Eric A. Eisen for Conoco Inc.

James P. Zakoura and Edmund S. Gross for Farmland Industries, Inc.

J. Curtis Moffatt, Howard E. Shapiro, Cheryl M. Feik, and Pamela Anderson for Kaneb Pipe Line Operating Partnership, L.P.

John M. Cleary, Richard D. Fortin, and Susan G. White for Kerr-McGee Refining Corporation

David D'Alessandro, Richard A. Solomon, and Kelly A. Daly for Total Petroleum, Inc.

Irene E. Szopo, Joanne Leveque, Richard L. Miles, William J. Froehlich, and Dennis Melvin for the staff of the Federal Energy Regulatory Commission

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Williams Pipe Line Company	)	Docket Nos. IS90-21-002, IS90-31-002, IS90-32-002, IS90-40-002, IS91-1-002, SP91-3-002, SP91-5-002, IS91-21-002, IS91-28-002, IS91-33-002, IS92-19-001 and OR93-1-000
Enron Liquids Pipeline Company	)	Docket Nos. IS90-39-002, IS91-3-000 and IS91-32-000 (Phase I)

OPINION NO. 391

OPINION AND ORDER ON INITIAL DECISION, ON MOTION PROPOSING RATE STANDARDS, AND ON COMPLAINT AND PROTEST

(Issued July 28, 1994)

On January 24, 1992, the Administrative Law Judge (ALJ) issued an initial decision (ID) in Phase I of this proceeding, which arises from tariffs filed by Williams Pipe Line Company (Williams) proposing changes in rates for movements of crude oil, petroleum products, and propane. 1/ It is only the rates for transportation of petroleum products that remain in dispute here. The parties filed exceptions to the ID and briefs opposing the exceptions. 2/ With respect to the ID, the Commission

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1/ Williams Pipe Line Co., 58 FERC ¶ 63,004 (1992).

2/ Briefs on exceptions were filed by the following parties: Association of Oil Pipe Lines (AOPL); Farmland Industries, Inc. (Farmland); Kaneb Pipe Line Operating Partnership, L.P. (Kaneb); Kerr-McGee Refining Corporation (Kerr-McGee); Texaco Refining and Marketing, Inc. (Texaco); Total Petroleum, Inc. (Total); Williams; and the Commission staff (staff).

Briefs opposing exceptions were filed by AOPL, Kaneb, Kerr-McGee, Texaco, Total, Williams, and staff.

(continued...)

generally affirms the standards established by the ALJ in his market power analysis, but reverses the ALJ's findings relating to market power in certain of Williams' markets.

On June 5, 1992, Williams filed a motion proposing rate standards to apply to Phase II of this proceeding. Various parties filed responses. As discussed below, the Commission denies Williams' motion to establish rate standards for Phase II of this proceeding.

On October 5, 1992, Kerr-McGee, Texaco, and Total filed a complaint and protest seeking to preserve their previous challenge to Williams' proposed rates in light of the pendency of the Energy Policy Act of 1992 (1992 Act). 3/ Williams filed an answer to the complaint and protest, stipulating that the rates in question are clearly subject to protest, investigation, or complaint within the meaning of section 1803 of that act and urging the Commission not to open proceedings on the complaint. We will not grant the complaint and protest because the rates in this proceeding are clearly subject to protest, investigation, and complaint as contemplated by the 1992 Act.

I. Background

A. Williams' System

Williams describes itself as a major independent transporter of refined petroleum products, crude oil, and propane in the Mid-Continent region. According to Williams, its system includes more than 8,000 miles of pipeline linking over 100 origin and destination points in Illinois, Iowa, Kansas, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Minnesota, and Wisconsin. The pipeline serves, directly or indirectly, six major refining centers: Chicago, St. Louis, the Texas Panhandle, the Gulf Coast, Oklahoma/Kansas, and the "Northern Tier" (North Dakota, Minnesota, and Wisconsin). The Williams system also includes 37 terminals in the Mid-Continent region.

2/(...continued)
Conoco Inc. (Conoco), one of the original parties to this proceeding, filed a notice of withdrawal on February 22, 1993.

3/ Section 1803 of the Energy Policy Act of 1992, Pub. L. No. 102-486, § 1803, 106 Stat. 2776 (1992) provides that certain rates of oil pipelines are deemed to be just and reasonable if they are not subjected to protest, investigation, or complaint within a year of the date of enactment, which was October 24, 1992.

B. Procedural History and Bifurcation of Proceedings

This proceeding commenced with the January 16, 1990 filing by Williams of three tariffs (FERC Nos. 49, 50, and 51). Williams proposed to increase its transportation rates by an average of 13 percent. Williams states that the proposed tariffs represent the first significant increase in its rates since 1985 when the Commission approved a settlement freezing both the level and structure of Williams' rates for five years. 4/ The ID fully sets out the history of this proceeding, which will not be repeated here. 5/

Williams elected to bifurcate this proceeding consistent with the procedures adopted by the Commission in Buckeye Pipe Line Company. 6/ The purpose of the two-phased approach is to give the pipeline an opportunity to demonstrate that a detailed review of cost-of-service data is not necessary to establish its rates. In Phase I of such a proceeding, the pipeline has the opportunity to prove that it does not have market power in the relevant markets and is, therefore, entitled to "light-handed" regulation. In the separate Phase II of such a proceeding, the Commission is to review the cost data in light of the market power determination and to establish just and reasonable rates for the pipeline.

The ID is limited to the first phase of the Buckeye bifurcated approach. The ALJ's preliminary review of 32 markets caused him to conclude that Williams likely has market power in nine markets. 7/ The ALJ also reviewed four other markets where he determined that caution warranted closer examination. 8/ Based on his examination of these thirteen markets, he concluded that Williams failed to show that it lacked market power in Duluth, Rochester, Cedar Rapids, Waterloo, Ft. Dodge, Sioux City, Omaha, Grand Island, Sioux Falls, and Aberdeen. Therefore, in Phase II of this proceeding, just and

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4/ Brief on Exceptions of Williams Pipe Line Co. at 2.

5/ 58 FERC ¶ 63,004 at 65,004-05.

6/ 44 FERC ¶ 61,066 (1988) (Buckeye I); order on reh'g, 45 FERC ¶ 61,046 (1988) (Buckeye II); Opinion and Order on Initial Decision, 53 FERC ¶ 61,473 (1990) (Opinion No. 360); order on reh'g, 55 FERC ¶ 61,084 (1991) (Opinion No. 360-A).

7/ Those markets are Duluth, Minneapolis/St. Paul, Rochester, Sioux City, Topeka, Omaha, Grand Island, Sioux Falls, and Aberdeen.

8/ Those markets are Quincy, Cedar Rapids, Waterloo, and Ft. Dodge.

reasonable rates would be established for Williams' services in these markets. As we will discuss in greater detail below, we have reviewed the evidence supporting the ALJ's determinations relating to Williams' market power and have reached different conclusions in certain instances.

II. Discussion

A. Phase I - Phase II: Proper Scope of This Proceeding

In limiting the ID to the first phase of the bifurcated approach, the ALJ rejected arguments that, in the earlier suspension order in this proceeding, the Commission had not objected to Williams' plan to litigate a broad array of issues beyond market power in Phase I. 9/ The ALJ also rejected a contention that a broad Phase I was warranted by a "close nexus" between market power issues and the ultimate issue of rate reasonableness, reasoning that because such a relationship always exists, acceptance of this argument would transform a Phase I proceeding into a far-reaching exploration of cost-oriented rate design details, blurring the meaningful line obviously intended by the Commission. 10/

The ALJ ruled that consideration of long-run/short-run costs and floors would be addressed more appropriately following the Commission's findings on market power and development of a Phase II cost record. 11/ Finally, he rejected the contention that the parties had agreed to Williams' plan for broad litigation as more expeditious and efficient, citing a stipulation among the parties concerning admission of rate design evidence in Phase I. 12/

Because the ALJ declined to adopt Williams' original rate standards proposal in lieu of a market power evaluation and determined the proposal to be beyond the scope of Phase I, Williams filed a motion seeking Phase II application of the same standards in those markets found not workably competitive. A number of parties who oppose Williams' motion advance the procedural objections previously raised against the rate standards proposal in Phase I. For this reason, our discussion

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9/ 58 FERC ¶ 63,004 at 65,006, citing the Commission's order on reconsideration of the suspension order issued in this proceeding, Williams Pipe Line Co., 52 FERC ¶ 61,084 (1990).

10/ 58 FERC ¶ 63,004 at 65,006.

11/ Id.

12/ The stipulation is quoted at 58 FERC ¶ 63,004 at 65,008.

here will address both the proper scope of Phase I and the procedural objections to Williams' motion.

Williams and AOPL urge the Commission to adopt rate standards prior to Phase II. Their position is premised on the argument that the parties were aware of Williams' intent to litigate a broad array of issues in Phase I and further, that while not all parties submitted particular cost evidence, all parties did submit extensive evidence concerning appropriate ratemaking methodologies.

Kaneb, while supporting Williams' desire to litigate a broad array of issues in Phase I, attacks Williams' proposal as permitting Williams to exclude or discipline competition, thereby improperly preserving and extending its market power. Kaneb also states that the ALJ misapplied Buckeye and erroneously concluded that rate design issues have no place in the market power assessment of individual markets. Finally, Kaneb contends that the ALJ misperceived its arguments as merely seeking a rate floor to protect itself.

In its motion, Williams asserts that Commission adoption of its standards prior to Phase II would be consistent with Buckeye. Kaneb disagrees, stating that while rate standards were discussed in Phase I of this proceeding, such standards were not discussed in Phase I of Buckeye. Kaneb also argues that the link between rate design and market power that is present in this case was not present in Phase I of Buckeye. Finally, while claiming that rejection of Williams' motion will not foreclose any party from challenging or developing any cost evidence relevant to other rate designs in Phase II, Kaneb asks the Commission to consider the alternative ratemaking proposals presented in Phase I to establish the rate minimums and maximums to be applied in Phase II.

Farmland, Kaneb, Kerr-McGee, Texaco, Total, and the staff ask the Commission to strike or disregard Williams' motion as procedurally improper, relying heavily on the stipulation among the parties that ratemaking standards would be considered in Phase II.

Additionally, Kerr-McGee argues that the ALJ erred in failing to require Williams to carry its burden of proof that it lacks significant market power under the standards set by Farmers Union Central Exchange, Inc. v. FERC (Farmers Union II). 13/ Williams, however, counters that the record in this case

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13/ 734 F.2d 1486, 1530 (D.C. Cir. 1984), cert. denied sub nom., Williams Pipe Line Co. v. Farmers Union Central Exchange, Inc., 469 U.S. 1034 (1984).

demonstrates that its markets have been carefully and systematically defined and evaluated.

We affirm and adopt the ALJ's decision to limit the scope of Phase I of this proceeding to a determination of Williams' market power in the relevant markets and his refusal to accept Williams' rate standard proposal. The voluntary stipulation of the parties cited above clearly represents their understanding concerning the admission of the cost data in Phase I. We also reject Kaneb's contention that the issue of Williams' rate design is so intertwined with the issue of market power that it must be considered in Phase I of this proceeding. The procedure established by the Commission in Buckeye represents a reasonable and efficient method of case management in a complex oil pipeline rate proceeding, particularly where the parties will have ample opportunity to challenge the justness and reasonableness of the pipeline's proposed rates in Phase II. Further, in the context of Phase II, the ALJ will be better able to examine the floor requested by Kaneb.

Although we will not rule on the merits of Williams' proposed rate standards in the context of our review of Phase I of this proceeding, we will address below Williams' motion to establish rate standards prior to Phase II.

B. Market Power

1. Price Increase Definition

The ALJ defined market power as "a firm's ability to sustain a price increase over a significant period of time, or to exclude competition." 14/ He also stated that Williams' hypothetical 15 percent increase over its proposed rates 15/ had not been satisfactorily tested on the record, basing his conclusion on Williams' admission that the impact of such an increase had been studied only in three markets where Williams' witness felt market concentration warranted further scrutiny. 16/ According to

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14/ 58 FERC ¶ 63,004 at 65,008.

15/ Williams argued that the test should be its ability to sustain a 15 percent increase above its proposed rates over a period of two years. Brief on Exceptions of Williams Pipe Line Co. at 26. In support of its position, Williams cited the testimony of its witness Schink and the staff's witness Alger.

16/ The market areas are referred to as BEAs, which are areas of the contiguous United States that have been established by the Bureau of Economic Analysis of the U.S. Department of (continued...)

the ALJ, neither the Department of Justice (DOJ) Merger Guidelines 17/ nor the DOJ's study, "Oil Pipeline Deregulation" (Deregulation Study) 18/ announced or applied a particular numerical test. Finally, the ALJ stated that the Commission's finding a 15 percent definition to be "adequate" in Buckeye did not mandate that or any other specific percentage for all cases.

Williams, AOPL, and Kerr-McGee contend that the ALJ should have adopted a specific price increase threshold in his market power analysis. While Kerr-McGee argues in favor of five percent, Williams and AOPL recommend 15 percent. AOPL argues that the five percent "small but significant and non-transitory increase in price" (SSNIP) advocated by the shippers fails to recognize that transportation rates are only a small component of petroleum product prices. AOPL and Kerr-McGee seek support for a specific percentage in natural gas orders issued by the Commission. 19/ According to AOPL, in light of the fact that wellhead commodity prices are a significant portion of the delivered cost of natural gas, the Commission's approval of a SSNIP of five to ten percent in those cases supports adoption of an even higher price threshold in the assessment of oil pipeline market power.

Williams also asserts that the 15 percent increase should be based on the proposed rates at issue in this proceeding. Staff disagrees with Williams, pointing out that the proposed rates have not yet been found to be just and reasonable. The staff also claims that even if 15 percent over the proposed rates is

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16/(...continued)
Commerce and are intended to represent actual areas of economic activity. The ALJ noted that each BEA has at its center a major city that is the traditional hub of economic activity for the entire BEA. 58 FERC ¶ 63,004 at 65,008-09 n.5.

17/ In an attempt to establish uniformity in analyzing mergers, the Antitrust Division of the DOJ issued a set of merger guidelines in 1984 that include a proposed framework for identifying relevant product and geographic markets. These guidelines were updated by the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines that were issued April 2, 1992 (1992 Merger Guidelines).

18/ U.S. Dep't of Justice, Oil Pipeline Deregulation (1986).

19/ AOPL cites Transcontinental Gas Pipe Line Corp., 55 FERC ¶ 61,446 at 62,396-97 n.27 (1991). Kerr-McGee also cites the Transco order as well as ANR Pipeline Co., 56 FERC ¶ 61,293 at 62,224 n.6 (1991) in support of its position.

the correct measure, Williams only presented such evidence for three markets, thus failing to carry its burden of proof. 20/

Williams relies on Buckeye in support of its position. Kerr-McGee, however, distinguishes Buckeye, claiming that the 15 percent threshold adopted in that case was the product of an agreement among the parties. Williams and AOPL acknowledge the five percent threshold utilized in the 1984 Merger Guidelines, but they emphasize that the appropriate threshold depends on the industry in question.

Williams, AOPL, Kerr-McGee, Texaco, and Total all cite different portions of the record in support of their positions regarding Williams' ability or inability to sustain a price increase. For example, Williams claims that the record contains evidence that would have allowed the ALJ to test the effect of a 15 percent increase in those markets that he subjected to further analysis. Williams also complains of rate decreases in the BEAs where it was found to have market power, as well as a systemwide decrease of 6.6 percent. 21/ Kerr-McGee, on the other hand, cites recent tariff filings by Kaneb and ARCO proposing increased rates, suggesting that Williams' success in this regard has encouraged other firms to seek higher rates. Kerr-McGee also points out that, even though Williams' proposed rates had been in effect for 10 months when the hearing ended, the record contains no evidence that Williams lost traffic to competitors or was forced to lower its rates due to competition.

We will affirm the ALJ's decision because we conclude that he properly rejected any specific rate increase as a litmus test for market power. The ability to sustain a rate increase *per se* does not indicate market power, any more than the existence of competition prevents a rate increase. Relative rate changes for a given service in a given market must be examined, which the parties generally have not done in this proceeding. As noted by the ALJ, Williams studied the impact of a hypothetical rate increase in only three of its markets where market concentration suggested further scrutiny, 22/ and no other party attempted such an analysis. Thus, the ALJ properly relied more on the

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20/ Williams admits that it submitted evidence of its inability to sustain a 15 percent increase in the three BEAs where its unadjusted Herfindahl-Hirschman Index (HHI) suggested that Williams lacked market power.

21/ Williams' claim that its rates have decreased assumes that its rates are measured in real terms and assumes a nine percent rate of inflation.

22/ The ALJ listed the Duluth, Ft. Dodge, and Sioux Falls BEAs. 58 FERC ¶ 63,004 at 65,009.

presence or absence of competition in a given market as an indicator of the ability to sustain a rate increase in that market. This approach is consistent with Buckeye.

The natural gas orders cited by the parties do not require a different result. The Transco and ANR orders involved requests to implement Gas Inventory Charges (GICs), and the Transco order was issued in the context of a settlement. The Transco order describes a significant increase as five to ten percent, declining to adopt a specific number. 23/ And the ANR order, while establishing a 10 percent threshold, acknowledges that the Merger Guidelines do not mandate a specific number. 24/ We are not persuaded that our decisions in those cases require adoption of any specific number in this proceeding.

Our determination not to require a specific rate increase threshold in this case is further supported by the 1992 Merger Guidelines. An examination of the guidelines makes it clear that a specifically quantified price increase threshold is not required in a market power analysis. Market power is defined therein as "the ability profitably to maintain prices above competitive levels for a significant period of time." 25/ The 1992 Merger Guidelines treat the SSNIP as "a methodological tool ... [and] not a tolerance level for price increases," 26/ and, while stating that a five percent price increase lasting for the foreseeable future will be employed in most contexts, the guidelines clearly state that the SSNIP will depend on the nature of the industry being examined and may be larger or smaller than five percent. 27/ As stated in the introduction to the guidelines, "mechanical application ... may provide misleading answers to the economic questions." 28/ The same is true of our market power analysis in the context of an oil pipeline rate case -- a great deal of judgment is involved in order to examine and weigh all the factors in a number of markets. Where, as in this case, the ALJ's determination not to reduce the rate increase factor to a numerical absolute is reasonable, we will not overturn it.

23/ 55 FERC ¶ 61,446 at 62,397 n.27.

24/ 56 FERC ¶ 61,293 at 62,224 n.6.

25/ 1992 Merger Guidelines at 4.

26/ Id. at 7.

27/ Id. at 14.

28/ Id.

2. Product Market

The ALJ observed that all parties agreed that the relevant product is "pipelineable petroleum products," but he added the word "delivered," reasoning that the "delivered product embodies both the physical product and any necessary transportation to get the product to the relevant geographic market." 29/

Kerr-McGee claims the ALJ's definition of the relevant product market is contrary to Commission precedent. Kerr-McGee also asserts that producers and shippers, as the class intended to be protected by oil pipeline regulation, are most directly affected by the cost of transportation, not the delivered price of the petroleum products, and that the Commission's primary concern in a market power analysis is that the customers have genuine alternatives to buying the seller's product. 30/ AOPL and the staff oppose Kerr-McGee's exception, contending that the adopted relevant product market is consistent with Buckeye and that transportation is not a separate product from refined petroleum products.

We will affirm the ALJ's definition of the relevant product market. By adding the word "delivered," the ALJ has acknowledged that a large volume of product arrives in Williams' markets via other modes of transportation and through exchanges, which may or may not include actual transportation. Our decision here is not in conflict with Buckeye; as we stated in Opinion No. 360, "the relevant product market is the transportation of refined petroleum products from all origins to a particular destination." 31/

Our decisions in electric cases are distinguishable. For example, in the Northeast Utilities case cited by Kerr-McGee, we specifically distinguished Buckeye and emphasized a critical difference between electric transmission services and petroleum product transportation, which is the fact that electricity can only be delivered by transmission lines, while petroleum products

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29/ 58 FERC ¶ 63,004 at 65,009.

30/ Kerr-McGee cites Public Service Co. of Indiana, Opinion No. 349, 51 FERC ¶ 61,367 (1990); order on reh'g, Opinion No. 349-A, 52 FERC ¶ 61,260 (1990).

31/ 53 FERC ¶ 61,473 at 62,664. We also stated in Opinion No. 360-A that we would continue to determine the relevant geographic and product markets on a case-by-case basis, at least until we gained some experience with light-handed regulation. 55 FERC ¶ 61,084 at 61,260.

may be delivered in a variety of ways. 32/ Similarly, differences in oil and gas transportation make Kerr-McGee's reliance on Order Nos. 436 and 500 unpersuasive. As we noted in Order No. 436, "[t]here is no known method by which gas in large quantities can be transported except by pipelines. Oil may be moved in pipe lines, tank cars, trucks, and water-floated barges or 'tankers' and packaged in barrels and other small containers for transport by various means." 33/ The same is true of petroleum products.

Further, Kerr-McGee's efforts to focus exclusively on the producers and shippers misses the point. We are indeed concerned that they have genuine alternatives to utilizing Williams' transportation services. In this case, however, it is undisputed that those parties have a variety of genuine alternatives available to them, depending on the particular market in question. Barges, proprietary pipelines, refiners, trucks, and other alternatives may bring different amounts of product into a particular market, but all of these transportation options and Williams compete for the same dollars in that market.

3. Geographic Markets

The ALJ adopted the destination approach in determining the geographic scope of the markets. He stated that a focus on destination correctly recognizes the shipper-customer's real concern, which is the delivered product and its price, rather than factors such as origin, route, and mode of transportation. The ALJ also stated that use of destinations recognizes the role of exchanges in Williams' markets, and he noted that whatever their competitive significance, they should not be excluded at the threshold by definitional strictures. Finally, the ALJ stated that the evidence supports a destination market review and that destination markets were utilized in Buckeye. 34/

Texaco urges the use of corridors in determining the relevant geographic markets. Texaco argues that the rates for an oil pipeline are stated in terms of receipt points (origins) and delivery points (destinations), and because rates to a destination vary by point of origin, the fact that a destination may be served by several pipelines with unused capacity is

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32/ Northeast Utilities Service Co., Opinion No. 364-A, 58 FERC ¶ 61,070 at 61,191-92 (1992).

33/ Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (October 18, 1985), FERC Stats. and Regs. Regulations Preambles 1982-1985 ¶ 30,665 at 31,475 (October 9, 1985).

34/ 58 FERC ¶ 63,004 at 65,009-10.

irrelevant to a shipper who has only one option to ship from his refinery to that destination. In this "captive" situation, Texaco asserts that the shipper may be subject to higher rates that will subsidize lower rates from origins where the pipeline faces competition. According to Texaco, by rejecting corridors, the ALJ failed to follow Buckeye.

Williams, AOPL, and staff support the use of destination BEA markets. AOPL agrees that this approach recognizes the evidence of the shippers' reliance on exchange transactions; in other words, refineries do not supply all of their destination markets by shipping product in their own name in pipelines. AOPL also states that Texaco in fact relies heavily on exchanges in the destination markets served by Williams. Staff argues in favor of destination markets for practical reasons; there literally could be thousands of corridors.

We will affirm the ALJ's use of destination markets. We agree that the real economic concern of the shippers is the delivered product and its price rather than whether the product travels between specific locations via pipeline. Limiting geographic markets to specific origin/destination pairs would fail to recognize this factor and also would eliminate from consideration competitive suppliers who bring product to the markets without utilizing the specific corridors. Similarly, we are unwilling to eliminate exchanges from consideration in our determination of the appropriate geographic markets, although, as we will discuss more fully below, we will not accord a great deal of weight to such transactions in our post-screen review of Williams' individual markets. Many exchanges do occur in Williams' markets, and as AOPL points out, even a shipper such as Texaco, which claims to be "captive" at a particular location, has the exchange option available to it. We note too that Total's manager of supply testified that exchanges are always available as an alternative to shipment on Williams' system. 35/

In addition, Texaco's suggestion that using destinations is inconsistent with Buckeye is simply incorrect. In Opinion No. 360, the Commission stated that "[t]he primary purpose of the geographic market definition is to identify an area in which the price of the relevant product is largely determined by the buyers and sellers within the area." 36/ The Commission also cited the presence of competitive trucking within a BEA as

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35/ Brief of the Association of Oil Pipelines Opposing Exceptions to Initial Decision at 25.

36/ 53 FERC ¶ 61,473 at 62,665.

disciplining a price increase by a pipeline to one point. 37/ Thus, in Opinion No. 360, the Commission adopted the larger geographic areas represented by BEAs as the relevant geographic markets, recognizing that BEAs are "convenient, easily identified and have been used in past studies of the oil pipeline industry." 38/

4. Use of BEAs

The ALJ defined Williams' destinations as the relevant BEAs. He noted that the BEAs are intended to represent actual areas of economic activity and have been recognized in Buckeye and past studies of the oil pipeline industry. 39/

Kerr-McGee states that it does not accept the correctness of using BEAs as properly defined geographic markets for pipelines generally or for Williams in this proceeding. Kerr-McGee urges the Commission to make it clear that the use of BEAs is not a given in any oil pipeline case, and that the appropriate procedure is to start with the location of each of the terminals of the pipeline in issue.

We will affirm the ALJ's adoption of BEAs as the relevant geographic markets in this case. Although our ruling here is limited to this case, we note that BEAs were also endorsed by the Commission in Buckeye as the appropriate means for identifying the pipeline's geographic markets. 40/ Further, as the ALJ found, BEAs have been used in studies of the oil pipeline industry and are reasonably representative of the markets in which competition for Williams' transportation service occurs. 41/

C. Analysis of the Relevant Markets

1. Market Concentration Screens (HHIs)

As the ALJ noted, the Commission uses the HHI as an initial screen for assessing market concentration in each market. Citing Buckeye, the ALJ explained that the HHI calculates market concentration by summing the squares of the individual market shares of all firms included in the market, with a higher HHI

37/ Id.

38/ 53 FERC ¶ 61,473 at 62,665.

39/ 58 FERC ¶ 63,004 at 65,010.

40/ 53 FERC ¶ 61,473 at 62,665.

41/ 58 FERC ¶ 63,004 at 65,010.

number indicating a greater need for concern about market power. 42/

a. Appropriate Screen (1800 vs. 2500)

In this instance, the ALJ considered only two numbers: 2500, as urged by Williams, versus 1800, as argued by the staff and shippers. The ALJ adopted a 2500 HHI screen, partly on the basis that the DOJ utilized this number in its Deregulation Study, 43/ although he acknowledged that the DOJ employed a screen of 1800 in its Merger Guidelines. 44/ According to the ALJ, the examination of market power in this case was closer in purpose to the Deregulation Study than to the question of merger. Further, the ALJ dismissed the shippers' argument that a screen of 1800 was used in Buckeye. He stated that while HHIs in various markets were examined in that case, no particular number was adopted. The ALJ also ruled that the record in this case was not adequate to permit a definitive ruling about tacit collusive behavior. 45/

The parties are divided on the value and application of Commission precedent relating to HHIs. Kerr-McGee and Total argue that, although the Commission did not explicitly adopt a particular HHI value in Buckeye, the use of 1800 is fairly inferable from that case because the Commission cited the DOJ's use of 1800 in the Merger Guidelines 46/ and noted that the same figure had been employed in natural gas cases decided by the Commission. 47/ In response, however, Williams and AOPL argue that no meaningful inference about the appropriate level of the HHI screen threshold can be drawn from the Commission's decision in Buckeye. AOPL also distinguishes the natural gas cases cited by the shippers and the staff as involving proposed GICs in the context of either a paper hearing or a settlement. AOPL reasons that in these cases the Commission did not discuss the

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42/ 58 FERC ¶ 63,004 at 65,010.

43/ Deregulation Study at 29-31.

44/ 1992 Merger Guidelines at 28-29.

45/ 58 FERC ¶ 63,004 at 65,012.

46/ 53 FERC ¶ 61,473 at 62,667 n.46.

47/ Id. at 62,661 n.15. Kerr-McGee, Total, and the staff also cite other natural gas cases, including ANR Pipeline Co., 56 FERC ¶ 61,293 at 62,225 (1991); Transcontinental Gas Pipe Line Corp., 55 FERC ¶ 61,446 at 62,393 (1991); and Utah Power & Light Co., 45 FERC ¶ 61,095 at 61,286 n.127 (1988), order on reh'g, 47 FERC ¶ 61,209 (1989).

development of the methodology for conducting a market power analysis. Finally, AOPL notes that oil pipelines differ from gas pipelines in that they are not now and never have been franchised monopolies; according to AOPL, competition has always been a factor in the oil pipeline industry, where sales of crude oil and petroleum products were "unbundled" from transportation in 1906.

Kerr-McGee, Total, and the staff challenge the ALJ's reliance on the DOJ's Deregulation Study. Kerr-McGee argues that the study is not entitled to deference in this case. Total contends that application of the Deregulation Study methodologies in this case results in distortions because the ALJ included external sources, some of which are far in excess of the 70-mile limit he established. AOPL and Williams, however, dismiss Kerr-McGee's challenge to the Deregulation Study, noting that even if light-handed regulation achieves a more modest reduction of regulatory burdens than complete deregulation, those burdens should still be avoided.

Next, Kerr-McGee complains that the use of an HHI of 2500 eliminates from scrutiny some markets that display characteristics of market power, such as market share and barriers to entry, thereby relieving Williams of the burden of proving its lack of market power. 48/

Williams, on the other hand, argues that while the ALJ purported to adopt a 2500 HHI screen, he failed to apply that screen properly. According to Williams, the ALJ erred by subjecting markets between 1800 and 2500 to a 70 percent market share screen. Further, reasons Williams, to allow market shares to override a below-2500 HHI is antithetical to the very concept of a screen as an irrebuttable presumption of lack of market power. Williams also contends that the appropriate threshold turns on the likelihood that a firm will exercise market power through collusive or interdependent behavior at a given level of concentration, which it claims is unlikely in the oil industry.

We find the ALJ's decision to use an HHI value of 2500 as an initial screen to be adequate in this case in light of his examination of other factors. Although the ALJ initially used the screen to identify markets that might warrant further scrutiny for market power, he also looked at markets with HHIs between 1800 and 2500 and found some of these to be competitive based on other factors, such as market share and lack of competition from external and internal sources. We emphasize too that the HHI is merely an analytical tool, and whatever the

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48/ Kerr-McGee lists Eau Claire, Des Moines, Kansas City, Columbia, Lincoln, Fargo-Moorhead, and Grand Forks, as markets in which Williams has a market share of 49 percent or more.

number utilized, it does not serve as an irrebuttable presumption. In this proceeding, the ALJ applied the HHI screen somewhat more stringently than we did in Buckeye. In our analysis below, we will follow more closely the approach utilized in Buckeye, using the HHI as an indicator to be evaluated along with other factors.

b. Measurement of Market Shares in Calculating HHIs

(1) Delivery vs. Capacity

The ALJ pointed out that the market shares to be squared in calculating the HHIs can be measured either by delivery or by capacity, but he concluded that the use of capacity-based shares is reasonable under the circumstances of this case. While he recognized that the Commission relied on delivery shares in Buckeye, he also emphasized that the Commission did not establish an absolute policy in favor of delivery-based shares. Acknowledging the inherent imprecision in the use of capacity data, the ALJ stated that such data could be modified to conform to known consumption, stressing that practical considerations and judicial guidelines do not require perfection. The ALJ's ruling is based on three additional factors: (1) the availability of evidence relating to capacity shares; (2) the relationship between market power and capacity shares; and (3) the DOJ's reliance on capacity shares where the product is homogeneous and delivery data are unavailable. 49/

Total and Kerr-McGee argue that the absence of delivery data from suppliers does not prevent calculation of delivery-based HHIs because Williams introduced the company's delivery shares and also provided estimated consumption, by county, for each of the states, then for each of the BEAs. Kerr-McGee characterizes the consumption figures as a surrogate for total deliveries, providing evidence of Williams' market share. In response, however, AOPL and Williams, who support the use of capacity data, argue that the delivery data described by the shippers are inadequate for the purpose of calculating the HHIs.

Williams asserts that the Commission has used the equivalent of capacity data (divertible supply) in analyzing market power in natural gas cases, 50/ and Williams claims that the Merger Guidelines also prefer capacity-based measures of market power where the commodity is homogeneous. Kerr-McGee disagrees that

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49/ 58 FERC ¶ 63,004 at 65,010-11.

50/ Williams cites Transcontinental Gas Pipe Line Co., 55 FERC ¶ 61,446 at 62,391-93 (1991); El Paso Natural Gas Co., 49 FERC ¶ 61,262 at 61,909 (1989).

the products in this case are homogeneous, claiming support in the "discrimination" reflected in Williams' tariffs, which Kerr-McGee contends is evidence of market power. 51/

Total contends that the ALJ erred in his restriction on the use of delivery data to markets where Williams was shown to have a market share of 70 percent or more. Total argues that witnesses for the staff and the shippers agreed that where both delivery-based and capacity-based data are available, both should be used as a check, and where either calculation exceeds the screen in a market, further examination is warranted. 52/ Total cites the case of the Des Moines BEA, where the capacity-based HHI is slightly below the 1800 threshold, but where Williams is the dominant firm in the market, with a 78 percent share of deliveries. In that case, the minimum delivery-based HHI is 6084. Exhibit A to Total's Brief on Exceptions purports to review the minimum delivery-based HHIs and staff capacity-based HHIs for 24 markets contested by the intervenors. According to Total, by utilizing both methods, 19 of those markets are shown to have an HHI higher than the 2500 threshold adopted by the ALJ. Total asserts that these markets also include trucking beyond the 70-mile limit adopted by the ALJ, but when the HHIs are adjusted for demonstrable imprecisions and to eliminate sources beyond 70 miles from the BEA borders, the true extent of Williams' highly concentrated market power is revealed.

AOPL states that where capacity data instead of delivery data are employed to calculate market shares, the capacity data should be used for the initial HHI screening purposes as well as the post-screen market review. AOPL also argues that the two-tiered approach exaggerates the significance of market share and defeats the very purpose of the HHI as a screening device. According to AOPL, a market power analysis should focus not on market share, but on market behavior -- the potential competitive response of the market to any attempt by an oil pipeline to exercise market power. AOPL argues that the ALJ erred in suggesting that, when measuring market share, it is appropriate to rely on capacity data only when delivery data are not available.

51/ According to Kerr-McGee, there is discrimination between large and small shippers through volume discounts; discrimination through differential and greater increases from the south versus the Northern Tier; proportioned rate discrimination on volumes that go through terminals to designated counties beyond the terminals as contrasted to other destinations. These issues are addressed later in this order.

52/ Total cites Tr. 51/9038 (Means); Tr. 41/6877 (Alger).

We will affirm the ALJ's decision to utilize capacity data in calculating the HHIs in this case. While use of capacity-based data may result in some imprecision, a market power analysis in general is not an exact calculation and, as we have stated, requires skilled judgment in weighing and balancing the numerous factors.

Additionally, the ALJ correctly read Opinion No. 360, affirmed in Opinion No. 360-A, as enunciating no policy that precludes the use of capacity-based data in the HHI calculation. 53/ The reasons cited by the ALJ in support of his determination to utilize capacity-based data 54/ are sufficient to warrant our affirmation of his decision.

The 1992 Merger Guidelines also are consistent with our decision here. In describing the general approach to be taken in calculating market shares, the guidelines note that "[m]arket shares can be expressed either in dollar terms through measurement of sales, shipments, or production, or in physical terms through measurement of sales, shipments, production, capacity, or reserves." 55/ Further, while dollar sales or shipments will be employed where firms are distinguished primarily by differentiation of their products, the guidelines prescribe the use of physical capacity or reserves if these measures most effectively distinguish the firms. 56/ Despite Kerr-McGee's arguments to the contrary, the petroleum products transported here are not sufficiently distinguishable to cause us to rely on delivery data.

Finally, contrary to AOPL's assertion, we believe that the use of capacity data in the HHI screens and delivery data in determining the market share does not produce a distortion and instead permits each methodology to offset the inherent

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53/ In Opinion No. 360, we stated, "We also conclude that the use of delivery data ... is the best method for calculating HHIs here." 53 FERC ¶ 61,473 at 62,667. In Opinion No. 360-A, we further stated, "Although the Commission determined that the use of deliveries data was the best method for calculating HHIs 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 HHIs." 55 FERC ¶ 61,084 at 61,261.

54/ 58 FERC ¶ 63,004 at 65,012.

55/ 1992 Merger Guidelines at 25.

56/ Id.

deficiencies of the other. Accordingly, we find no reason to reverse the ALJ's use of capacity data in calculating the HHIs.

(2) Measuring Capacity

The ALJ adopted the method of calculating and measuring "effective" capacity that was proposed by the staff's witness, Dr. Alger. 57/ According to the ALJ, this method represented a middle ground between the shippers' use of "actual" or "unadjusted" capacity of all internal sources, which produced larger HHI numbers, and the company's use of "adjusted" capacity, which trimmed down capacity to reflect divided shares of actual consumption and gave full consideration to the capacity of all external sources, 58/ thereby producing smaller HHIs. 59/

Kerr-McGee and Texaco object to the ALJ's decision. Referring to the 1992 Merger Guidelines, Kerr-McGee argues that there is a need to distinguish between uncommitted entrants and committed entrants, 60/ and states that Williams has failed to support the capacities of those it wishes to include as uncommitted entrants. According to Kerr-McGee, the large sunk investment cost required for a pipeline terminal undermines the validity of capacity-based comparisons. Staff, however, supports the ALJ's decision as the best practical measure of capacity under the circumstances, and Williams asserts that because shippers determine where they will market product and thus how

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57/ Dr. Alger explained that the actual capacity is the total physical capacity that could serve the market, while the effective capacity is the actual capacity or total consumption if that is smaller. Ex. 619 at 61.

58/ External sources are sources located outside a BEA.

59/ 58 FERC ¶ 63,004 at 65,012.

60/ The 1992 Merger Guidelines define uncommitted entrants as "firms not currently producing or selling the relevant product in the relevant area ... [who are considered] as participating in the relevant market if their inclusion would more accurately reflect probable supply responses." The 1992 Merger Guidelines further state that "[t]hese supply responses must be likely to occur within one year and without the expenditure of significant sunk costs of entry and exit, in response to a ... [SSNIP]." 1992 Merger Guidelines at 20-21. Committed entrants are distinguished by the fact that they must commit substantial sunk costs, which make entry irreversible in the short term without forgoing that investment. The likelihood of their entry is to be evaluated in light of their long-term profitability. 1992 Merger Guidelines at 9 n.7.

supply capacity is deployed, available capacity best depicts the likely response to an exercise of market power. 61/

We will affirm the ALJ's decision on this issue. Use of actual or unadjusted capacity would produce unrealistically high HHI numbers, 62/ and use of adjusted capacity, as proposed by Williams, overstates the capacity of all external sources and produces smaller and equally unrealistic HHIs. 63/

2. Factors Includable in HHI Calculations

a. Other Pipelines

The ALJ included private pipelines and certain pipelines without terminals in the particular BEA in calculating the HHIs. He rejected three countervailing arguments raised by the shippers. First, he rejected the notion that pipelines could only compete if they served exactly the same points, reasoning that under this narrow theory, virtually every pipeline would have market power unchecked by any other line. Second, the ALJ included private lines in the HHIs, basing his ruling on the Buckeye decision and on the Deregulation Study, which treated private lines as competitive with Williams. Third, the ALJ accepted the staff's contention that pipelines running through BEAs should be included in the calculation only where construction of new terminals could occur economically. He declined to adopt the positions of Williams or the shippers, reasoning that it is unrealistic and inconsistent with the record either to include all pipelines running through a BEA or to assume that no new terminals would be built. 64/

61/ Tr. 28/3881-83.

62/ The ALJ cited the testimony of the shippers' witness Dr. Shepherd who admitted that his use of actual or unadjusted capacity produced HHI numbers that were "embarrassing," "may well be too high . . . may be overstated and in some degree it is overstated." 58 FERC ¶ 63,004 at 65,012.

63/ The ALJ pointed out that use of Williams' adjusted capacity "gave full play to the capacity of all external sources seen as capable of bringing product into the BEA from outside." According to the ALJ, this tended to produce smaller HHIs. Significantly, Williams' expert agreed that staff witness Alger's HHI calculations should be adopted. 58 FERC ¶ 63,004 at 65,012.

64/ 58 FERC ¶ 63,004 at 65,013-14.

Total argues that the effort to determine whether a potential competitor without a terminal would actually enter a market is speculative. However, Total contends that potential competition should be considered as part of the detailed analysis after calculating the HHI screen.

In response, AOPL and Williams maintain that the ALJ properly accounted for the capacity of potential competitive sources by including such sources as private pipelines and pipelines without existing terminals. AOPL states that the 1992 Merger Guidelines make it clear that firms likely to respond to a SSNIP should be included as market participants as long as their supply response is likely to occur within one year and without the expenditure of significant sunk costs of entry and exit. Williams contends that the cost of building a new terminal is insignificant compared to the cost of building a new pipeline, although a number of new pipelines have been constructed or converted in recent years in Williams' markets. According to Williams, the competitive threat posed by such relative ease of entry for terminals clearly constrains any attempted exercise of market power by it. Further, Williams contends that the HHIs relied on by the ALJ did not automatically include pipelines without terminals.

Next, Total asserts that the ALJ erred by including in his HHI calculations capacity committed to other markets. For example, Total states that evidence was presented that the primary purpose of Amoco's pipeline is to ship Amoco's products from its refineries to its branded stations. Total also contends that the merger guidelines recognize that a firm's capacity may be so committed elsewhere that it would not be available to respond to an increase in price in the market. In that case, according to Total, the DOJ would include a smaller part of the firm's available capacity.

AOPL rejects Total's argument that reliance on capacity overstates a firm's ability to deliver and fails to account for the degree to which capacity is committed elsewhere. AOPL acknowledges some imperfection in the calculation, but AOPL contends it is not a fatal flaw in the ALJ's analysis. According to AOPL, for each of its markets, Williams adjusted the capacity of existing suppliers and potential entrants to a level consistent with market demand and assigned an equal market share to each source, subject to the constraint that no source was assigned a market share imputing a volume of deliveries greater than its capacity. Thus, the calculations correct for any bias that may be inherent in reliance on capacity data.

We agree with the ALJ's middle ground approach in including pipelines without terminals in markets where such construction likely could occur with economic success. Merely because an assessment of this nature is somewhat inexact does not mean that

the Commission should adopt a rigid rule of either including or excluding such pipelines in calculating the HHIs. Based on their considerable experience in evaluating such situations, the DOJ and the Federal Trade Commission (FTC) established a group of factors to be examined. For example, the 1992 Merger Guidelines list timeliness, likelihood, magnitude of the entry, and character and scope of the entry. The guidelines then speak in greater detail of the considerations involved in assessing each of these factors. In assessing the need for light-handed regulation in a proceeding such as this, the Commission also has the expertise to assess these factors and determine where potential construction of a terminal is likely.

We also agree that it was proper for the ALJ to include private pipelines. As the ALJ pointed out, the Deregulation Study included such lines as competitors, as we did also in Buckeye. 65/ Clearly, the ultimate customers in destination markets have the option of purchasing product that is delivered from these suppliers. Further, the ALJ's decision is not at odds with the statement in the 1992 Merger Guidelines that a firm's capacity may be so committed elsewhere that the capacity likely would be unavailable to respond to a price increase in the market. Even though existing capacity may be committed, the 1992 Merger Guidelines make it clear that uncommitted supply responses may occur, in part, "by the construction or acquisition of assets that enable production or sale in the relevant market." 66/ It is foreseeable that a firm with its capacity fully utilized to serve a particular market would be in a position to consider an expansion of its assets to serve that market. Expansion of current assets to increase market share differs from initial entry into a market by a firm which does not already have a customer base. As evidence in the record demonstrates, 67/ and as the ALJ noted, 68/ new pipelines have been built or old ones converted in Williams' markets when it was profitable to do

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65/ For example, we recognized that Buckeye faced competition from Inland, a private pipeline, in the Columbus BEA. 53 FERC ¶ 61,473 at 62,670.

66/ 1992 Merger Guidelines at 22.

67/ Williams cites the following: (1) Koch Pipe Line from Pine Bend to Milwaukee and Madison, WI; (2) Koch Pipe Line from Pine Bend to Minneapolis Airport; (3) Heartland Pipe Line from McPherson, KS origins to Lincoln and Des Moines; (4) Kansas City Pipe Line from El Dorado to Kansas City; (5) Razorback Pipeline from Mt. Vernon, MO, to Rogers, AR; and (6) the Cenex Pipeline in North Dakota. Brief on Exceptions of Williams Pipe Line Co. at 65.

68/ 58 FERC ¶ 63,004 at 65,014.

so. We will assess the potential impact of other pipelines in our detailed examination of the individual BEAs.

b. Barges

Rejecting the shippers' arguments that barge deliveries should not be included in the calculations because they consisted of irrelevant product, were subject to freeze-ups, and were of insignificant volume, the ALJ held that barges may be competitive in certain markets. 69/

Total contends that the ALJ erred by relying on HHIs that include barge competition from areas of the Mississippi that are subject to freeze-ups. Further, although the ALJ stated that barges compete with Williams in some BEAs, Total asserts that the ALJ never examined the impact of barge competition in other BEAs where the inclusion of inflated barge capacity in the initial HHIs caused the HHIs to fall below 2500.

Williams asserts that the ALJ correctly included barges in calculating the HHIs. Williams claims that both the staff and the Deregulation Study recognized barges as a significant competitive constraint on Williams. Williams also argues that the Army Corps of Engineers reports that freeze-ups do not affect terminals south of Bettendorf and that even as far north as the Twin Cities, barges can operate all but two to three months per year. Further, according to Williams, internal barge sources were included in the HHIs based on deliveries and were included only to the extent they serve a BEA.

We will affirm the ALJ's ruling that, as a general matter, barges may be competitive alternatives to Williams in certain markets. Total repeats the arguments previously rejected by the ALJ, and we reject them for the reasons that the ALJ did.

c. Refineries

Citing Buckeye, 70/ the ALJ ruled that refineries should not be excluded automatically in the HHI calculations. He stated that any reason to disregard a refinery in a particular BEA could be reviewed in the context of that market. 71/

No party excepted to this ruling; however, Kerr-McGee challenges a statement in Williams' brief on exceptions that refineries divert massive volumes from Williams and force

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69/ 58 FERC ¶ 63,004 at 65,014-15.

70/ 53 FERC ¶ 61,473 at 62,666.

71/ Id. at 65,014.

Williams to short-haul much of its volume. Kerr-McGee states that Williams has failed to show a "massive diversion" of volumes from the Williams system to an extent that Williams' prices have or will be restrained. 72/

We will affirm the ALJ's ruling. While we agree that no "massive diversion" has been demonstrated, in the context of a particular market, a refinery may be a competitive alternative to Williams, depending on the situation in that BEA.

d. External Sources Linked By Trucks

The ALJ determined that truck-delivered capacity should be included in a market's HHI calculation to the extent that trucks could effectively carry products from the outside source into the BEA. The ALJ acknowledged that the DOJ's Deregulation Study did not include these extra-BEA sources, but he attributed that to the DOJ's apparent belief that a truck could operate economically only within a 50-mile radius of its origin. However, the ALJ determined that the distance trucks travel is a factual matter and that the record in this case contained substantial evidence of longer truck trips. In his view, such evidence refutes the argument that the high costs of trucking preclude it from serving as a discipline to price increases. For example, Williams submitted a survey of tank truck drivers, which the ALJ, while recognizing its flaws, found to discredit the 50-mile limit/no external sources theory. However, he agreed that there are limits, and he found that trucks could be cost-competitive at a range of approximately 65 to 70 miles. The ALJ also determined that, as a general proposition, these external sources should be included in the HHI calculation because adjustments could be made in specific BEAs to exclude excessive reliance on trucking. 73/

Texaco argues for a 50-mile limit, contending that some evidence of longer hauls does not prove that such longer hauls are economical. Texaco states that Williams' own evidence shows that the vast majority of truck trips are less than 75 miles. Further, Texaco claims that the only independent trucking company witness testified that the average trip is 30.26 miles.

On the other hand, Williams and AOPL both argue for a larger range for truck competition. Williams states that the starting point should have been in excess of 100 miles, depending on the market. And Williams and AOPL contend that the ALJ committed a mathematical error that considerably understates the limit for competitive truck movements. AOPL also asserts that the ALJ

72/ Brief of Kerr-McGee Refining Corp. Opposing Exceptions at 4.

73/ 58 FERC ¶ 63,004 at 65,015-17.

failed to recognize and take into account the fact that feasible trucking distances may be different in urban and rural markets.

Kerr-McGee and Total also claim error in the ALJ's inclusion of capacity from sources beyond 70 miles. According to Total, the ALJ compounded the problem by failing to recognize that inclusion of these sources in the HHI calculations reduced some of the screens to a level that exempted those markets from further analysis. Specifically, Total states that this caused the ALJ to eliminate five markets where the unadjusted screens were below 2500. 74/ Williams contradicts this claim, stating that witnesses included external sources on a conservative, county-by-county basis. Further, where these sources served only a portion of a BEA, they were assigned a market share on that basis.

Staff supports the ALJ's determination and argues that he merely recognized that, as trucking distances increase, the effect of trucking competition decreases. Realizing that a finding of market power will to a great extent deregulate a BEA, staff contends that it is better to err on the conservative side.

It is clear from the record, evidenced by the numerous examples cited by the ALJ, that a considerable amount of product arrives in Williams' markets via trucks. 75/ There is also a great deal of evidence in the record supporting the ALJ's conclusion that such truck trips frequently originate more than 50 miles from a particular BEA. 76/ There is no serious disagreement among the parties on these determinations.

However, we must examine whether the 65 to 70-mile limit established by the ALJ is appropriate. In some cases it is reasonable; as with other factors to be considered, inclusion of such sources in calculating the HHI for a BEA is a question of judgment. As we indicated above, there is a great deal of conflicting testimony in the record concerning the economic

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74/ Total cites the following BEAs: Minneapolis/St. Paul, Des Moines, Kansas City, Fargo, and Grand Forks. Brief on Exceptions of Total Petroleum, Inc. at 25.

75/ 58 FERC ¶ 63,004 at 65,015-16.

76/ The ALJ, while noting the weaknesses of Williams' truck survey, concluded that the truck survey, considered along with other evidence in the record, discredited the 50-mile limit. In addition to Williams' truck survey, the ALJ considered surveys of Amoco stations, studies of bills of lading, and the testimony of witnesses for Williams and the shippers. 58 FERC ¶ 63,004 at 65,015-16.

limits of external source competition. 77/ Thus, we are not inclined to apply a mechanical analysis that utilizes a specific mileage limit as the basis for excluding external sources. Likewise, we will not automatically include external sources whose distance from the border of a BEA may have little bearing on their economic ability to compete in the major population centers of the BEA or whose ability to do so cannot be established by simple extrapolation from a limited sample. In summary, then, judgments about the validity of external source competition in a market are best made on a market-by-market basis in the context of all the facts and mitigating factors in a particular BEA, which we will address more specifically below.

e. Potential Competition

The ALJ rejected the shippers' "generic" challenge to any consideration of potential competition, stating that the shippers were attempting to rehash earlier arguments concerning capacity versus delivery, use of the trucking surveys, and pipelines without terminals in particular BEAs. In the ALJ's view, the Buckeye orders make it clear that potential competition is properly weighed in the analysis of market power, and he further reasoned that this factor is particularly appropriate in an industry where entry is unregulated and, as the record in this case indicates, several entrants have recently built new lines or refurbished old ones. The ALJ concluded that if some particular potential competition is seen as too remote or speculative, it may be challenged in the context of review of a specific market. 78/

Kerr-McGee, Total, and Williams oppose the ALJ's ruling. Williams cites the Mid-Continent area as particularly ripe for entry into the oil pipeline business because it contains many idle or underutilized pipelines that can be converted. However, Williams also asserts that the ALJ properly rejected shippers' claims that no alternatives were available unless they provided transportation from the individual shipper's refinery to a destination; according to Williams, exchanges provide such access.

77/ For example, as the ALJ noted, the shippers urged a 50-mile limit based on their reading of the Deregulation Study, while Williams claimed that trips of 100 to 200 miles are common. 58 FERC ¶ 63,004 at 65,015. Texaco notes that an independent trucking company witness testified that the average truck trip is 30.26 miles. Texaco Refining and Marketing, Inc.'s Brief Opposing Exceptions at 18.

78/ 58 FERC ¶ 63,004 at 65,017.

Kerr-McGee contends that the alleged economic availability of alternatives within the BEAs does not require a finding that Williams lacks market power in a substantial number of its markets. According to Kerr-McGee, Buckeye did not establish binding precedent as to what factors are to be considered or, when considered, what the results should be. Staff points out that there are no absolutes by which to measure whether enough weight has been given to any particular factor.

We will affirm the ALJ's ruling on this issue; the ruling does no more than accept potential competition as a relevant consideration in the market power analysis. And the ALJ correctly determined that any instances of potential competition are best considered and evaluated in the context of a specific market. The arguments raised by the parties on exception are primarily an effort to discuss other issues previously addressed.

3. Other Factors Bearing on Competition

a. Market Share

The ALJ stated that the next inquiry following the HHI screening is a determination of Williams' share of the markets identified for further examination. According to the ALJ, a high HHI and a high market share indicate market power. 79/ Rejecting the idea that "mechanistic notions of consistency" require the use of capacity data in the post-screening process, the ALJ accepted the delivery data presented by Williams. As the ALJ emphasized, using delivery shares in the post-screen analysis provides a check and balance that would neutralize imperfections in the original capacity data. The ALJ also concluded that, for the post-screen review, a market share of 70 percent would be "fairly persuasive" of market power, a market share of 50 to 70 percent would "warrant concern" that might be offset by other factors, and a market share below 50 percent would be "less troublesome." 80/

Kerr-McGee argues that the ALJ has confused the applicable market share standards. Kerr-McGee contends that the ALJ placed too much reliance on the Commission's statement in Buckeye that the market power inquiry should mirror a monopoly power inquiry. In Kerr-McGee's view, market power is significantly less than monopoly power, but the ALJ seems to have utilized the Sherman Act standards and from that, adopted the 70 percent standard for market share. Kerr-McGee states that the Commission has enumerated a variety of factors to be used in the factual

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79/ The ALJ cited Opinion Nos. 360 and 360-A.

80/ 58 FERC ¶ 63,004 at 65,017-18.

evaluation of market power, 81/ but Kerr-McGee contends that selecting the standard against which to judge the factual findings is a matter of law.

AOPL states that the Commission should determine market power by deciding whether a firm would have dominance of a relevant market under the standard of section 2 of the Sherman Act rather than by applying the more rigorous merger-related threshold applied under the Clayton Act. AOPL states that even if the Clayton Act is the correct standard, that is immaterial to the choice between the two HHI threshold values because the assessment of market dominance more closely parallels the market power inquiry in the monopoly contest.

Kerr-McGee next argues that, even if the ALJ correctly judged Williams' market power against the stringent Sherman Act standards, he erred in adopting the 70 percent threshold, rather than the lower thresholds adopted by many courts. According to Kerr-McGee, the market share threshold should have been set at 30 to 40 percent. Total also challenges the 70 percent threshold, reasoning that because the merger guidelines utilize an HHI of 1800, a 42.5 percent market share is an indication of market power because the square of that figure is 1806.

Williams supports the 70 percent market share threshold, claiming that a market share of that magnitude is required to establish significant market power. However, Williams also argues that the ALJ erred in relying solely on delivery-based market shares and ignoring capacity-based market shares, despite his acknowledgment that capacity is a better measure of the ability to respond to a price increase. Williams points out that the consequences of the ALJ's reliance on delivery data are most obvious in those markets with HHIs below 2500 because, as a result of using low market share thresholds, the ALJ found that Williams has market power in the following BEAs: Duluth, Sioux City, Omaha, Grand Island, Sioux Falls, and Aberdeen. 82/ Williams concludes that while several of these BEA's satisfy the

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81/ These factors include market share, maintenance of market share despite product or service inferiority, cost advantages attributable to technology, price leadership, economies of scale, competitor size and performance, entry barriers, pricing practices, market stability, cost of truck transportation between geographic markets, excess capacity, and potential for increased sales by competitors. 45 FERC ¶ 61,046 at 61,162.

82/ In these markets, Williams has delivery-based market shares of 60 percent, 51 percent, 46 percent, 62 percent, 49 percent, and 49 percent, respectively.

ALJ's overly-conservative market share threshold, all would be competitive under a more reasonable threshold.

Finally, AOPL argues that the ALJ overstated the importance of market structure (including market share) in his post-screen examination of particular markets and erroneously relied on Williams' delivery-based market shares for purposes of the post-screen examination.

We will affirm the ALJ's ruling on this issue. Based on our review of the record in this proceeding, we find that the ALJ did not apply an excessively high standard in assessing market share, nor did he establish an absolute threshold of 70 percent. Even markets in which Williams' market share is below 50 percent are not automatically excluded, although they are, in the ALJ's words, "less troublesome." 83/

Additionally, while we stated in Buckeye that the market power inquiry for an oil pipeline would "to a large extent mirror the type of inquiry used by courts in evaluating monopoly power," 84/ that statement should not be taken to mean that we will slavishly follow the guidelines of the courts when circumstances warrant a departure from those guidelines. The Commission is not empowered to enforce the antitrust laws. As we stated in the Northeast Utilities order cited by Kerr-McGee, "the antitrust laws are merely one facet of the broad statutory concept of the public interest." 85/ And we emphasize that the market power inquiry for an oil pipeline in Phase I of a bifurcated rate proceeding is unique and is not suited to a strict application of the antitrust laws. In this case, we see no reason to reverse the ALJ's decision that is reasonable and allows a great deal of flexibility. While it is an important consideration, to be sure, the determination of market power in a particular market is but one of the factors to be assessed.

b. Exchanges

The ALJ determined that exchanges should be given little weight in the post-screening review of the markets. While he recognized that exchanges occur in substantial volumes, he noted that they are generally the product of ad hoc negotiations between the parties. The ALJ stated that the Commission has not endorsed exchanges as a force which disciplines a pipeline's market power, and he further indicated that in the instant case, the evidence tends to show that exchanges do not discipline

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83/ 58 FERC ¶ 63,004 at 65,018.

84/ 45 FERC ¶ 61,046 at 61,162.

85/ 56 FERC ¶ 61,269 at 61,998.

Williams' prices, but instead are negotiated with reference to them. The ALJ also expressed concern that assigning significant weight to exchanges would involve some double counting because the capacity of refineries and other pipelines used for exchanges in a BEA are already included in the HHI calculations for the market. 86/

Williams and AOPL argue that exchanges should be entitled to greater weight, and Williams characterizes exchanges and buy/sells as the economic equivalents of transportation and contends that many refineries rely more on these sorts of transactions than on direct transportation via Williams to dispose of their refinery output. According to Williams, exchanges discipline its rates by facilitating access to alternate sources of product, such as refineries, common carrier pipelines, proprietary pipelines, and private terminals, resulting in a complete or partial bypass of Williams. In contrast, Kerr-McGee, Total, Texaco, and the staff argue that the mere existence of exchanges does not make them a disciplining factor because exchanges do not create barrels or additional competitive sources.

Williams also complains that exchanges "short-haul" it by allowing shippers to forgo direct transportation to destinations on the system. Kerr-McGee, however, points out that exchanges make product available at Williams' origin points for movement within its system. Further, in Kerr-McGee's view, any short-hauling that exists has no effect and no competitive restraint on Williams' pricing activities. Kerr-McGee emphasizes that the existence of an exchange agreement does not mean that physical delivery has been accomplished or that possession of the barrels is taken at the exchange locations. Kerr-McGee states that it is erroneous to conclude that the volumes shown on exchanges are actually transported beyond the main terminals to markets in the surrounding areas.

Williams then asserts that the data in the record on exchanges reflect a consistent pattern of intense price rivalry among the alternative sources of product available to Williams' shippers. Williams contends that the data also prove the economic viability of external sources found by the ALJ to fall outside the economic trucking distance from a BEA. Kerr-McGee disputes this contention, arguing that because most of these exchanges enter Williams' system, that fact proves Williams' dominant position in the area.

Although Williams acknowledges that its rates are a factor in the negotiation of exchange differentials, it contends that a number of other factors are also involved. Accordingly, Williams

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86/ 58 FERC ¶ 63,004 at 65,018-19.

and AOPL assert that the relationship between exchange differentials and Williams' rates is immaterial to the role of exchanges as a potential competitive option. Kerr-McGee and Texaco dispute Williams' claims, stating that evidence in the record demonstrates that exchange differentials tend to follow Williams' rates and that this evidence confirms Williams' market power.

We will affirm the ALJ's conclusion that exchanges should be entitled to little weight in the post-screening review of the markets in this case. The potential for double counting exists where capacity is included in the HHI and then the exchange which utilizes that capacity is again added into the HHI or considered a mitigating factor. As the shippers correctly point out, no new barrels are created; 87/ the exchange merely permits the transfer of ownership of the product at a specific location. As Kerr-McGee also points out, exchanges do not always involve the owner's taking physical possession of the product at the exchange location, particularly when we recognize that multiple exchanges of the same barrels may be involved. 88/

We are also persuaded, as was the ALJ, that exchanges tend to be negotiated with reference to Williams' rates rather than to discipline those rates. 89/ The regularity with which this practice occurs, while not of itself proving market power, does nothing to suggest that Williams' rates are disciplined by exchange transactions.

c. Excess Capacity

Citing Buckeye, the ALJ concluded that the availability of excess capacity is a factor to be considered in examining a particular market. He noted that "[t]he importance of excess capacity for a given BEA lies not in the mathematical precision of a particular number, but in its relative magnitude." 90/

Williams claims that the ALJ did not accord sufficient weight to the evidence of excess capacity in its markets. According to Williams, Buckeye requires that excess capacity be evaluated in absolute, not comparative, terms.

87/ E.g., Brief of Kerr-McGee Refining Corp. Opposing Exceptions at 35.

88/ Id. at 39.

89/ See, e.g., Ex. 741 at 5, 39-40, 43, 47; Ex. 762; Ex. 788, n.A; Ex. 799 at 18;

90/ 58 FERC ¶ 63,004 at 65,019.

Total and the staff contend that the ALJ gave more than adequate weight to the evidence of excess capacity in the various BEAs. Total states that Williams' evidence on excess capacity is flawed because Williams failed to subtract the capacity committed to serve the various BEAs and thereby improperly assumed that the pipeline's full throughput capacity is available to serve each BEA that the pipeline traverses. Total also states that the excess capacity is overstated because it includes capacity of pipelines with no terminals in the BEA and proprietary pipelines not transporting for unaffiliated shippers.

We will affirm the ALJ's determination on the issue of excess capacity. While excess capacity is one of a number of factors to consider in the analysis of pipeline's market power, staff has correctly pointed out that there is no precise formula by which to determine whether sufficient weight has been given to this factor. 91/ In weighing excess capacity, we must consider not only physical measures (adjusted for throughput and deliveries), but also the interrelationship of capacity availability and actual and potential market deliveries compared to extra-market commitments and increased prices. Statistical calculations are insufficient for this purpose, and judgment is needed to avoid mere speculation about what might be possible. The ALJ recognized that the data were imperfect. Accordingly, the Commission finds that he properly used these data for comparative purposes only -- relative to the capacity available in a particular BEA.

d. Integrated Company Issues

The ALJ rejected Williams' argument that large integrated companies with pipeline affiliates enjoy a significant competitive advantage and, therefore, that Williams lacks market power. The ALJ stated that the record does not support such a claim and that the Commission has not accepted this proposition in other cases. 92/

Williams argues that the marginal cost to a vertically integrated shipper of moving an additional barrel of product on an affiliated pipeline is merely variable cost -- fuel and power costs. From that, Williams concludes that an integrated company will ship via its affiliate as long as its out-of-pocket cost is lower than the alternative rate. Williams concludes by disagreeing with the ALJ's analysis of the impact of integrated

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91/ Commission Staff Brief Opposing Exceptions at 40.

92/ 58 FERC ¶ 63,004 at 65,019-20.

companies as reflected in Opinion No. 154 93/ and Farmers Union II. Kerr-McGee states an exception on this point, but offers no supporting discussion.

We agree with the ALJ that the record in this case does not support a conclusion that the presence of vertically integrated companies in Williams' markets justifies less regulation of Williams. Williams' claims were not corroborated, and the ALJ's determination finds support in Commission and judicial precedent, the DOJ Deregulation Study, and a prominent antitrust authority. 94/

e. Buyer Power

Citing evidence in the record and a Commission statement in Buckeye, the ALJ concluded that where buyer power is shown, it should be entitled to some weight. 95/

No party challenged this ruling. We find the ruling to be appropriate, and we will accept it.

f. Profitability

Given the facts of this case, the ALJ concluded that Williams' profitability neither proved nor disproved the existence of market power. According to the ALJ, Williams' rates of return were within antitrust and Commission guidelines. 96/

Williams argues that the ALJ should not have concluded that its earnings were a neutral factor. Williams claims that its low profitability, coupled with the evidence that it faces significant competition in all of its markets, confirms its lack of market power. Williams also disputes the ALJ's statement that monopoly power may be possessed but not exercised, claiming it does not possess such power and, even if it did and attempted to

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93/ Williams Pipe Line Co., Opinion No. 154, 21 FERC ¶ 61,260 (1982); reh'g denied, Opinion No. 154-A, 22 FERC ¶ 61,087 (1983); opinion and order on remand, Opinion No. 154-B, 31 FERC ¶ 61,377, (1985); modified, Opinion No. 154-C, 33 FERC ¶ 61,327 (1985).

94/ The ALJ cited the four Buckeye orders, two Texas Eastern orders (48 FERC ¶ 61,108 and 50 FERC ¶ 61,218), Farmers Union Central Exchange, Inc. v. FERC, 734 F.2d 1486, 1507-08 (D.C.Cir. 1984), cert. denied 469 U.S. 1034 (1984), and III Areeda and Turner, Antitrust Law (1971) at 195-96.

95/ 58 FERC ¶ 63,004 at 65,020.

96/ Id.

conceal the power, there would be no way for it to predict the "payoff" in the form of light-handed regulation. It finds the intentional underearnings theory irrational and highly unlikely.

Kerr-McGee and Kaneb support the ALJ's ruling on profitability. Kerr-McGee emphasizes that Williams does have market power, as demonstrated by its ability to increase its rates and effect discriminatory rate structures. Pointing to evidence in the record that Williams is an inefficient carrier, Kaneb urges the Commission to find that Williams has market power even if it is unable to earn its authorized rate of return.

Williams' arguments on this issue are not persuasive. The mere fact that "evidence of 'supra normal' or 'unreasonably high' profits is relevant to determining the existence of market power" 97/ does not mean that a firm's failure to earn its allowed rate of return proves that it lacks market power. The ALJ's conclusion that profitability is a neutral factor in this case is a reasonable one, and we will affirm it.

D. Commission Examination of BEAs

1. Markets with Low HHIs

The ALJ first applied the HHI screen of 2500 and the staff's method of calculating effective capacity. 98/ By doing so, he found the following markets to be competitive based on their low HHIs and did not discuss them separately in the ID: Chicago, St. Louis, Oklahoma City, Tulsa, Wichita, Springfield/Decatur, Peoria, Rockford, Wausau, Dubuque, Davenport, Columbia, Springfield (MO), Eau Claire, Des Moines, Kansas City, Lincoln, Fargo, and Grand Forks. No party contested the ALJ's findings with regard to the Chicago, St. Louis, Oklahoma City, Tulsa, and Wichita markets, and the Commission affirms the ALJ's determinations that Williams lacks market power in these markets.

Kerr-McGee, Conoco, 99/ and Total (collectively the "Shippers") contested the finding of a lack of market power in the Springfield/Decatur, Peoria, and Rockford markets but provided no analysis in support of their objections. On review, the Commission affirms the ALJ's finding that Williams does not have market power in these three markets.

97/ 58 FERC ¶ 63,004 at 65,020.

98/ Id.

99/ Although Conoco withdrew from this proceeding on February 22, 1993, Kerr-McGee and Total previously had adopted the exceptions of Conoco as they related to the individual BEAs.

However, the Shippers challenged the findings that the following markets, which were not discussed separately in the ID, are competitive: Wausau, Dubuque, Davenport, Columbia, Springfield (MO), Eau Claire, Des Moines, Kansas City, Lincoln, Fargo, and Grand Forks. The Shippers' principal objections center on the use of an HHI screen of 2500, the acceptance of Williams' trucking survey as evidence of competition from external sources, the mileage limitation established by the ALJ, and the inclusion of private pipelines as competing suppliers.

While the Commission has found 2500 to be an adequate HHI for initial screening purposes in this case, choosing any single HHI value as a threshold for screening markets is much less important than carefully weighing of all relevant factors that might contribute to or detract from market power. For that reason, the Commission has re-examined all of the contested markets that fell below the ALJ's initial screen, so that no market has escaped scrutiny. Even an initial screen of 1800 would not have identified the seven markets that the ALJ did not examine but where the Commission finds Williams to have market power. This reinforces the Commission's firm belief that numerical thresholds are inappropriate as a sole measure of market power or, as Williams argues, an irrebuttable presumption, and must be coupled with a consideration of other factors. Thus, in our analysis, the Commission has applied the HHI screen somewhat less stringently than did the ALJ, employing it more as an indicator to be evaluated in conjunction with other factors than as a determinant.

As also discussed in greater detail above, the ALJ determined that truck-delivered capacity should be included in a market's HHI calculation to the extent that trucks could economically bring products from outside sources into a BEA.

The Commission has examined the validity of the 65 to 70 mile limit established by the ALJ, and, while we have found it to be reasonable in some cases, we have declined to apply a mechanical analysis utilizing a specific mileage limit for including or excluding external sources in the individual markets.

The Shippers object to reliance on Williams' trucking survey. They also object generally to including as viable market participants sources beyond 75 miles from a BEA border, and they recalculated the HHI values for various markets to exclude these external sources. In many cases, the Commission concurs with excluding distant sources (for example, those more than 200 miles and up to 320 miles from the BEA center) without further evidence of the frequency and number of hauls from this distance. However, in the case of some larger BEAs, the Commission believes that truck hauls of approximately 100 miles from the BEAs may constitute viable competition in certain instances. Thus, in our

review of the individual markets, as detailed below, the Commission has recalculated the HHI values for some of Williams' markets to exclude external sources that the Commission deems inappropriate absent further documentation. While that may alter the numerical HHI, it may not be enough to alter the ultimate determination as to the market's competitiveness.

As discussed above, the Commission agrees with the ALJ's approach of including private pipelines and certain pipelines without terminals in calculating HHIs where construction of new terminals or pipelines likely could occur with economic success. We recognize, as did the ALJ, that new pipelines have been built or old ones converted in Williams' markets when it was profitable to do so.

a. Wausau, Dubuque, Davenport, and Columbia

Based on our analysis of these four markets found to be competitive by the ALJ because of low HHIs, we have concluded, as discussed in greater detail below, that the Shippers' challenges have no merit. In all cases, the Shippers challenge the manner in which the ALJ calculated excess capacity. As stated previously in this order, we have found that the ALJ's consideration of excess capacity in his market assessment was appropriate.

(1) Wausau

The Shippers challenge the finding that Williams does not possess market power in the Wausau BEA, pointing out that Koch, a private pipeline with a terminal in this BEA, is Williams' only significant competition. The Shippers also argue that this market concentration indicates market power, despite the fact that Williams' delivery-based market share is 37 percent. Additionally, they claim that differentials for exchanges negotiated with Koch are tied to Williams' rates. And the Shippers object to the inclusion of external sources that are at distances ranging from 87 to 130 miles from the BEA, which they contend distorts the calculation of excess capacity.

Considering Williams' low HHI of 1801 and low market share of 37 percent, we agree with the ALJ's conclusion that this BEA is a workably competitive market. The ALJ properly attributed minor significance to excess capacity. Any effect of external sources on the calculation of excess capacity and the effect of that on the competitive character of the market will not be significant. Finally, we note that Williams is able to achieve only a 37 percent market share even though, as the Shippers claim, three alternative sources remain from 44 percent to 83

percent more costly than shipping on the Williams system. 100/

(2) Dubuque

The Shippers cite the presence of the Amoco terminal at Dubuque as well as two other pipeline terminals within 100 miles of this BEA. However, they argue that these terminals and pipelines are private and provide no restraint on Williams' rates. They also claim that the barge terminal at Bettendorf provides no competition.

We will reject the Shippers' arguments and affirm the ALJ's finding as to this market. Although the HHI of 2381 is moderately high, the presence of the other pipeline and barge terminals within or near this BEA make it likely that they could respond to a SSNIP imposed by Williams. Our analysis of market concentration must consider all supply sources that may be capable of increasing the total supply of product in the market, regardless of their availability to individual customers. Moreover, as we have previously stated, private pipelines are capable of supplying others in a given market, even if they do not do so normally, particularly if a price increase makes it financially attractive to expand sales. We have also noted that pipelines deliver generic product; therefore, there is no physical impediment to the use of a single pipeline supplier by two competing distributors. Additionally, we find that the barge terminal at Bettendorf is close enough to provide competition for Williams. 101/ Accordingly, Williams' relatively low delivery-based market share of 39 percent combined with these factors causes us to find the Dubuque BEA to be a market in which Williams lacks market power.

(3) Davenport

The Shippers challenge the ALJ's finding that this market is competitive. They cite three private terminals in Bettendorf that are served both by Williams and by barges. They also note the presence of the ARCO pipeline with a terminal in Ft. Madison and the Amoco pipeline, which does not have a terminal in the BEA. They challenge Dr. Alger's inclusion of five rather than eight external sources, which he achieved by combining sources with the same corporate identity, and they also argue that the evidence of these sources came from anecdotal evidence. The Shippers would employ the 70-mile limit for external sources; by

100/ Brief on Exceptions of Conoco Inc. at 71.

101/ See BEA Appendix to the Opening Posthearing Brief of Williams Pipe Line Co. at 8.

doing so they contend that only two potentially competitive external sources should be considered.

The HHI for this BEA is 2048, and Williams' delivery-based market share is 34 percent. These two factors in combination tend to indicate that Williams does not possess market power in this BEA. In addition to the terminals noted by the Shippers, Williams points out that a fourth terminal, owned by Unoven, is served by Williams and by barges in this BEA. 102/ Including this terminal in the calculation would further lower the HHI. As in our previous analysis, our review of this market includes all supply sources that are capable of increasing the total supply in the market, even if they normally do not supply others. And we will not automatically exclude sources more than 70 miles from the BEA, as urged by the Shippers. However, even if all sources more than 100 miles from the BEA are excluded, the HHI would still be less than 2500. Given the low HHI and Williams' moderate share of this market, in combination with the presence of several potential competitors, we will affirm the ALJ's finding that the Davenport market is workably competitive.

(4) Columbia

The Shippers note that Phillips and ARCO have pipelines with terminals in this BEA. They also point out that the Amoco pipeline has no terminal in this BEA and contend that one could not be built economically. They argue that the external sources are too distant to serve as economic competition.

The HHI for the Columbia BEA is 1738, and Williams' delivery-based market share is 49 percent. We find it reasonable to include Amoco in the calculation of the HHI even though it does not currently have a terminal in this BEA, given Dr. Alger's determination that it would be economical for Amoco to construct such a terminal and the inclusion in his calculation of a return on investment. 103/ We also note that the distances attributed by the Shippers to the external sources represent the distances to the city of Columbia, rather than to areas of the BEA which they might serve economically. Consideration of these factors leads us to conclude that the ALJ properly found the Columbia BEA to be competitive.

b. Springfield (MO), Eau Claire, Des Moines, Kansas City, Lincoln, Fargo, and Grand Forks

Our review of these seven markets, presumed by the ALJ to be competitive, causes us to find that Williams has failed to

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102/ Brief Opposing Exceptions of Williams Pipe Line Co. at A-13.

103/ See Ex. 627 at 2; Ex. 631.

demonstrate that it lacks market power in these markets. For the reasons stated below, the Commission reverses the ALJ's determinations as to these markets.

(1) Springfield (MO)

The Shippers claim that the Springfield (MO) BEA is not competitive, pointing out that Williams has two terminals in this BEA. They also argue that the Explorer pipeline should not be considered a competitor because it does not have a terminal in the BEA or nearby. Further, they contend that the Farmland refinery is at too great a distance to be competitive, even though it is an internal source, and that the ALJ included external sources that are more than 75 miles from the BEA.

The HHI for the Springfield BEA is 1317 and Williams' delivery-based market share is 38 percent. These rather low figures could indicate that Williams does not possess market power; however, this is a large BEA and five of the external sources included in the ALJ's HHI calculation are, in our judgment, at too great a distance from the BEA border to provide economic competition. 104/ When these sources, as well as private pipelines without terminals or the potential for terminals in the BEA, are excluded from the recalculation of the HHI, it is over 3000. Thus, we find that Williams has not substantiated its claim that it lacks market power in the Springfield (MO) BEA.

(2) Eau Claire

The Shippers state that Koch has a pipeline through this BEA although it has no terminal. They also note the existence of two other private terminals connected to the Williams system within the Eau Claire BEA. The Shippers argue that Dr. Alger's HHI of 2003 is too low and that, although the staff found the market to be not workably competitive based on Williams' high market share and the high degree of market concentration, the ALJ ignored this conclusion. The Shippers also complain that the truck sources relied on by Williams are based on inadequate data. Further, they contend that on the basis of the 70-mile limit, the Badger

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104/ Kerr-McGee and Williams report different figures as the distances of these sources. Kerr-McGee cites Phillips at Kansas City (163 miles); Conoco at Belle, MO (144 miles); Phillips at Jefferson City, MO (138 miles); Sun at Tulsa, OK (166 miles); and Shell at Woodriver, IL (243 miles). Brief on Exceptions of Kerr-McGee Refining Corp. at 46. Williams claims that the Conoco and Sun terminals are less than 75 miles from the BEA border and that the Phillips terminals are only 90 miles from the BEA. Brief Opposing Exceptions of Williams Pipe Line Co. at A-17.

terminal should be excluded as potential competition. Finally, the Shippers state that, contrary to Williams' assertions, exchanges do not discipline its rates in this BEA.

Williams enjoys a 59 percent delivery-based market share in the Eau Claire BEA. We have recalculated the HHI for this market, eliminating the Koch pipeline, which has no terminal, and also eliminating the Badger terminal which, based on the limited evidence in the record, appears to be at too great a distance -- 196 miles -- to serve as competition for Williams. Our recalculated HHI is over 3000. The high market share coupled with the high HHI value is strongly indicative of market power. Because we find no other factors present to offset these considerations, we conclude that Williams has failed to prove that the Eau Clair market is workably competitive.

(3) Des Moines

The Shippers' principal objection to the ALJ's finding the Des Moines market to be competitive is that Williams has a 78 percent delivery-based market share. They claim that based on the relatively low HHI of 1704, the ALJ declined to review this market in detail. The Shippers also point out that the DOJ's Deregulation Study assigned Des Moines an HHI of 5556. 105/ They object to inclusion of external sources that are far more than 70 miles from this BEA. According to the Shippers, Amoco provides little competition for Williams in this market and, further, that a new Conoco terminal on the Heartland Pipeline is the only practical alternative to Williams in this market.

As stated above, Williams enjoys a 78 percent market share in this market. While this factor alone would cause serious concern, we emphasize that our recalculated HHI, eliminating two external sources, is also high -- greater than 2500. These two external sources, which are barge terminals at Dubuque and Bettendorf and are approximately 160 miles from Des Moines, are too distant to constitute effective competition in this BEA. Williams has not established any other considerations that would adequately offset these two high numbers, and thus, we will reverse the ALJ's ruling and hold that Williams has failed to prove that it lacks market power in this BEA.

(4) Kansas City

The Shippers ask the Commission to reverse the ALJ's ruling, given Williams' 63 percent delivery-based market share, the staff's HHI of 1340, and the fact that external sources included in the ALJ's HHI calculation are in excess of 90 miles from the

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105/ We note, however, that this predated the construction of the Heartland pipeline.

BEA border. The Shippers also point to the actual behavior of the market as demonstrating a lack of competitiveness, noting that ARCO recently filed to increase its rates in this market.

We have recalculated the HHI to eliminate the sources that are more than 100 miles from this BEA. The record does not indicate that they serve as competition to Williams. The recalculated HHI number is more than 2500, and as we have previously stated, a high HHI number in conjunction with a high market share strongly indicates a lack of competition in the market. Therefore, no offsetting circumstances having been established, we will reverse the ALJ's determination and find that Williams has failed to carry its burden of proof in the Kansas City market.

(5) Lincoln

The Shippers contend that, while four pipelines traverse this BEA, Williams' delivery-based market share is 65 percent. They also point to the fact that Williams has been able to increase its rates in this market.

We have also recalculated the HHI for the Lincoln BEA, removing the NCRA pipeline, which does not have a terminal in the BEA, as a potential supplier. Further, Exhibit 627 indicates that this market would not be competitive even with an NCRA terminal. The recalculated HHI, which is over 3000, combined with the high market share, and without evidence of any other constraints on Williams' rates, causes us to reverse the ALJ's ruling and find that Williams has not met its burden of proof in the Lincoln market.

(6) Fargo

The Shippers assert that Williams has market power in the Fargo BEA. They state that this BEA is served by Kaneb and Amoco in addition to Williams. In addition, they point out that Williams has two terminals in the BEA, while Kaneb has one. Although Cenex has a new pipeline in this BEA, the Shippers contend that there is no evidence that it will have a terminal in the BEA. However, although Amoco does not have a terminal in this BEA, the Shippers urge its inclusion in the HHI calculation because it is an active exchange partner. Finally, the Shippers challenge the inclusion of external sources that are at great distances from the BEA border.

The Fargo BEA covers a large geographic area. Williams delivery-based market share is 51 percent. The external sources on which Williams bases its claim of competition appear to be too distant to constitute viable alternative sources. The Ashland and Koch refineries are 167 miles from the BEA boundary and 272 miles from its population center, and the Cenex terminal is 129

miles from the boundary. 106/ Amoco is included in the HHI calculation as an internal source. 107/ Given Williams' relatively large market share, a recalculated HHI greater than 3000, and the absence of significant external competition, we find that Williams has failed to prove that the Fargo BEA is a workably competitive market.

(7) Grand Forks

The Shippers state that Williams' delivery-based market share in the Grand Forks BEA is 56 percent. They also claim that the HHI calculation improperly included four external sources in excess of 70 miles from the BEA border. 108/

The Grand Forks BEA also covers a large geographic area, and Williams' 56 percent market share is fairly high. Williams has not demonstrated that the distant external sources serve as effective competition, and our elimination of those sources in excess of 150 miles from Grand Forks results in an HHI greater than 3000, causing us to find that the Grand Forks market is not workably competitive. Therefore, we will reverse the ALJ's decision.

2. Markets With HHIs Above 2500

The ALJ applied the initial HHI screen of 2500 and determined that high HHIs suggested that Williams likely has market power in nine BEAs, which he then examined closely. Those BEAs included Duluth, Minneapolis/St. Paul, Rochester, Sioux City, Topeka, Omaha, Grand Island, Sioux Falls, and Aberdeen. 109/ Based on his detailed review, the ALJ concluded that Williams had failed to show a lack of market power in Duluth, Rochester, Sioux City, Omaha, Grand Island, Sioux Falls, and Aberdeen. 110/

106/ See Brief on Exceptions of Conoco Inc. at 78, citing Williams' BEA Appendix and Ex. 330.

107/ Ex. 621 at 31.

108/ The Murphy, Koch, and Ashland refineries are between 158 and 189 miles from the BEA border. The Kaneb terminal is 98 miles from the BEA border and 173 miles from Grand Forks. Brief on Exceptions of Total Petroleum, Inc., at 46, citing Williams' Appendix at 28.

109/ 58 FERC ¶ 63,004 at 65,021.

110/ Id. at 65,028.

a. Minneapolis/St. Paul and Topeka

The Shippers contest the ALJ's findings that Williams lacks market power in Minneapolis/St. Paul and Topeka. Their objections again center on the ALJ's use of the 2500 HHI initial screen, his alleged reliance on Williams' trucking study, and his inclusion of proprietary pipelines in calculating the HHIs.

(1) Minneapolis/St. Paul

The ALJ found that Williams has only a 35 percent market share in this BEA. He also noted the presence of two refineries in the BEA and a competing common carrier pipeline near the southern boundary of the BEA, concluding that Williams does not have market power in this BEA. 111/

The Shippers' claim that the Koch and Ashland refineries do not serve to restrain Williams' rates. According to the Shippers, these companies responded to Williams' increase by increasing their exchange differentials. The Shippers also argue that the ALJ's finding that exchanges are negotiated with reference to Williams' rates is inconsistent with his finding that these sources are competitive within the Minneapolis/St. Paul BEA. The Shippers object to the inclusion of the proprietary Amoco pipeline in the HHI calculation and argue that Kaneb's terminal is too far from the Twin Cities to provide economic competition.

The Shippers' objections to this decision are not persuasive. Our review of this BEA leads us to agree with the ALJ. Minneapolis/St. Paul is a large BEA in which Williams has a relatively low market share. That fact, coupled with the presence of viable competitors leads us to agree that Williams does not have market power in the Minneapolis/St. Paul BEA. We also reject the Shippers' argument concerning exchanges. The ALJ made no mention of exchanges in the ID, and as we stated above, the fact that exchanges tend to be negotiated with reference to Williams' rates neither proves nor disproves market power, although exchanges may be entitled to some weight in a market power assessment.

(2) Topeka

The ALJ found that Williams demonstrated a lack of market power in this BEA even though it has a market share of 46 percent. His decision was based primarily on his determination that the market share calculation did not include the

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111/ Id. at 65,021.

subsequently-constructed Heartland pipeline and that significant excess capacity exists in the BEA. 112/

The Shippers assert that Williams is the only pipeline with a terminal in this BEA. They also claim that the ALJ failed to remove from his HHI calculation several trucking sources more than 70 miles from the BEA.

Our review of this BEA causes us to reverse the ALJ. As the staff's witness Alger notes, external sources relied on by the ALJ in his finding of lack of market power include Heartland terminals 75 to 87 miles from the border of the BEA, but 125 to 142 miles from Topeka. 113/ When these external sources are excluded from the HHI calculation, the resulting HHI value is 3333. Along with Williams' 46 percent market share, this is an indication of market power that is persuasive and is not controverted. The Commission finds in this instance that Williams has not successfully proved that it lacks market power in the Topeka BEA.

b. Duluth, Rochester, Sioux City, Omaha, Grand Island, Sioux Falls, and Aberdeen

Williams objects to the ALJ's finding that it failed to show lack of market power in all seven of these markets, arguing that the ALJ's conclusions, based primarily on HHI values and market share data can be overcome by an analysis of other factors in these BEAs. Williams asks the Commission to consider the availability of economic alternatives within and outside of the BEAs, the existence of potential competition, and the effect of a hypothetical 15 percent SSNIP.

(1) Duluth

The ALJ found that Williams had failed to prove a lack of market power in this BEA, given its 60 percent market share and the presence of only one other internal supplier. The ALJ also found external truck sources to be at too great a distance to constitute economic competition, and he noted a relatively small amount of excess capacity in the BEA. 114/

Williams complains that the other internal supplier is a 27,000 barrel per day refinery that is capable of supplying the needs of the entire BEA. Williams also cites other external sources that it claims are close enough to portions of the BEA to

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112/ Id. at 65,022.

113/ See id., citing Tr. 9739.

114/ 58 FERC ¶ 63,004 at 65,021.

supply it more effectively than Duluth. Additionally, Williams claims that Conoco has significant buyer power, which accounts for 45 percent of Williams' shipments into this BEA.

We are not persuaded by Williams' arguments concerning these potential competitors. These alternatives already have been included in the HHI values and market share data. Further, as stated above, we have rejected Williams' hypothetical 15 percent SSNIP. Thus, we will affirm the ALJ's finding that Williams has failed to prove a lack of market power in the Duluth BEA.

(2) Rochester

The ALJ determined that Williams had failed to carry its burden of proof as to the Rochester BEA. The ALJ cited Williams' 86 percent market share as the highest in any of the nine BEAs that he examined in greater detail. The ALJ also determined that neither the external sources nor the excess capacity cited by Williams was sufficient to overcome the huge market share. 115/

Williams lists as potential competition the Koch and Ashland refineries that are 51 miles from the BEA border, noting that Koch has increased its capacity within the last five years. Williams would also include the Amoco terminal at Spring Valley and a barge terminal at LaCrosse.

We will affirm the ALJ's decision as to the Rochester BEA because of the high market share, because of the fact that alternative sources already have been included in the HHI, and because we previously have rejected Williams' hypothetical SSNIP.

(3) Sioux City

The ALJ also found that Williams had failed to demonstrate that it lacks market power in this BEA. Significant in the ALJ's decision was Williams' 51 percent market share combined with the fact that Williams was able to increase its business in the BEA despite a substantial price increase. Further, the ALJ noted that the DOJ's Deregulation Study expressed serious concern about Williams' competitive position in all of Iowa, specifically citing Sioux City. 116/

Williams' argument focuses primarily on the three Kaneb terminals within this BEA, which have already been considered in determining the HHI. Thus, on review of the facts relevant to this BEA, we will affirm the ALJ's decision.

115/ Id. at 65,021.

116/ Id. at 65,022.

(4) Omaha

The ALJ found the Omaha market not workably competitive and ruled that Williams had failed to prove a lack of market power in this BEA. Central to the ALJ's decision was the high market concentration, despite the presence of Heartland and Amoco terminals at Des Moines, within trucking distance of the Omaha BEA borders. The ALJ found that truck trips from these terminals to Omaha would be long and expensive. Williams' market share is 46 percent, and the ALJ found that, in light of the other circumstances present in the BEA, that level of market share is significant. 117/

Our review of the ALJ's ruling leads us to the same conclusion, despite consideration of the arguments raised by Williams concerning the existing Heartland, Kaneb, Amoco, and NCRA terminals and a possible Conoco terminal. Including all of these sources still results in an HHI of 2786. We also reject Williams' argument that it has decreased its rates to Omaha because the alternative sources have created a competitive cap. As we have previously indicated, a rate increase or decrease per se does not prove or disprove market power. Thus, we will affirm the ALJ's determination with respect to the Omaha BEA.

(5) Grand Island

Based on Williams' 62 percent market share, coupled with the distance of other sources and a less than average amount of excess capacity, the ALJ found that Williams had not demonstrated that it lacked market power in the Grand Island BEA. 118/

Williams argues that competition from Kaneb and Farmland terminals restrains its rates. Williams also notes the presence of the Heartland pipeline. However, we will affirm the ALJ's ruling because we agree with his assessment that other pipelines in the BEA are too far (approximately 140 miles) from the Williams' Grand Island terminal to serve as effective competition. Additionally, witness Alger's HHI includes these sources because he combined internal and external sources representing the same corporations. Finally, we also note that the 62 percent market share is the second highest of the nine markets that the ALJ specifically examined.

117/ Id.

118/ Id. at 65,023.

(6) Sioux Falls

Williams' 49 percent market share and the relatively low amount of excess capacity in the Sioux Falls BEA led the ALJ to conclude that Williams had not proved that it lacked market power in this market. The ALJ also rejected Williams' reliance on external sources, reasoning that some of the truck connections cited by Williams were at too great a distance to serve as economic competition. Further, the ALJ declined to accept Williams' reliance on truck connections with Kaneb and Amoco from terminals outside the BEA because those companies also operated terminals inside the Sioux Falls BEA and were unlikely to be competing against themselves for business in the BEA. 119/

We agree with the ALJ that evidence of the alleged competition cited by Williams is entitled to little weight in light of these facts. Additionally, as the ALJ noted, the 49 percent market share is close to the 50 percent threshold that causes us concern. Other factors present in this market are not sufficient to overcome this market share and the high HHI, and we will affirm the ALJ's determination.

(7) Aberdeen

The ALJ found that Williams had failed to carry its burden of proof in the Aberdeen BEA. Williams also has a 49 percent market share in this market and seeks to rely on external sources with terminals in the BEA as evidence of competition. 120/ The ALJ noted that some of the external truck connections were very long -- a Kaneb terminal 116 miles from the BEA border and refineries 167 miles from the BEA border. Williams cites no other factors that would overcome these considerations, thus, we will reject Williams' arguments for the reasons expressed in our assessment of the Sioux Falls BEA.

3. Markets With HHIs Between 1800 and 2500

Following his examination of the markets with HHIs above 2500, the ALJ then noted that, because Williams has a market share in excess of 70 percent in certain other markets, an examination of those markets in which the HHI screen fell between 1800 and 2500 was warranted. Those markets included Quincy, Cedar Rapids, Waterloo, and Ft. Dodge. 121/ Of these markets, the ALJ concluded that Williams had failed to show a lack of market power in Cedar Rapids, Waterloo, and Ft. Dodge.

119/ Id.

120/ Id.

121/ Id. at 65,023.

a. Quincy

The Shippers do not contest the ALJ's determination with respect to Cedar Rapids, Waterloo, and Ft. Dodge. They do, however, contest the finding of lack of market power in Quincy, claiming that Williams has been able to increase its rates without suffering a loss of business. The Shippers also claim that ARCO was not shown to be effective competition and that the ALJ improperly relied on trucking from Ft. Madison, which is more than 75 miles away.

The ALJ found that Williams had sustained its burden of proof in this BEA, despite the fact that its market share is 74 percent and the HHI is 2026. He noted that there is a great deal of excess capacity in this BEA, and that the DOJ concluded that water traffic provided competition for Williams at Quincy. 122/ However, we disagree with the ALJ's assessment and will reverse his finding of lack of market power in this BEA. The high market share, coupled with the HHI value in excess of 2000 causes us concern. Further, we note that Williams has the only pipeline terminal in the BEA, and the staff's witness Alger determined that it would not be profitable for Amoco, whose proprietary pipeline transverses the BEA, to build a terminal there. 123/

b. Cedar Rapids, Waterloo, and Ft. Dodge

The ALJ found that Williams had failed to prove that it lacked market power in these BEAs. The ALJ relied in part on the DOJ's Deregulation Study, which concluded that Williams raised serious competitive concerns in Iowa. 124/

Williams challenges the ALJ's findings as to these BEAs. Williams claims that external sources at Spring Valley, Minnesota, and Dubuque, Iowa, provide competition in the Waterloo BEA, and it also asserts that an ammonia pipeline could be converted. As to the Cedar Rapids BEA, Williams contends that the Heartland pipeline makes the Deregulation Study obsolete and, further, that an Amoco terminal at Cedar Rapids should be included in the calculation. Williams also argues that Kaneb competes with it at Milford in a sparsely populated area of the Fort Dodge BEA.

In Cedar Rapids, where Williams' market share is 81 percent, Williams is the only common carrier, although Amoco has a

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122/ Id. at 65,023-24.

123/ See Ex. 627; Tr. 41/6906.

124/ 58 FERC ¶ 63,004 at 65,024.

pipeline in the BEA. In Waterloo, where Williams' market share is 99 percent, Williams is the only pipeline of any kind, and in Ft. Dodge, where the company's market share is 98 percent, there is another common carrier in the BEA, but it is over 100 miles from Ft. Dodge. The ALJ also noted that there is a relatively small amount of excess capacity in these BEAs and that truck connections cited by Williams are lengthy and entitled to less weight. 125/ While the market share is generally only one of the factors to be analyzed in a BEA, the fact that Williams has such an extraordinarily high market share in each of these markets has somewhat more significance. The potential competition cited by Williams is based on a 15 percent SSNIP, which we have already rejected. Therefore, given Williams' inability to demonstrate that economic competition exists in these BEAs, we will affirm the ALJ's rulings as to these BEAs.

E. Discrimination Claims

1. General Objections to the ALJ's Rulings on Discrimination Claims

The ALJ addressed several claims of discrimination raised by the intervenors, who also filed exceptions to the ALJ's decision. We will address general concerns first and then will review specific exceptions to each ruling.

The first rate discrimination claim addressed by the ALJ involves Williams' "Group 3" rates, which consist of various origins in Kansas and Oklahoma that have been priced equally since 1915. 126/ Under changes proposed by Williams, rates for service from Oklahoma origins to certain destinations would increase by five or ten cents per barrel more than service from Kansas origins. For other destinations, the rates from Oklahoma and Kansas origins would remain equal. Williams claims it proposed these changes to equal the variable costs of transportation from Oklahoma to Kansas via its competitors. The ALJ found that competitive developments provided sufficient reasons to eliminate the equalized rate treatment. 127/

Second, Williams historically charged northern origins higher rates than southern origins. Williams proposed tariffs increased rates from southern origins without corresponding increases in rates from the north, making the southern and northern per mile rates almost equal. Williams proposes to hold northern rates down primarily because of the prospect of the Koch

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125/ Id. at 65,024.

126/ Id. at 65,024-28.

127/ Id. at 65,025.

refinery creating a competitive presence in the heart of Williams' service area. The ALJ determined that the potential for this competition was sufficiently real to support eliminating the differential between rates for northern and southern origins. 128/

Third, Williams also proposed different rate increases to rural and urban destinations. Rejecting claims of discrimination, the ALJ determined that the proposed rate changes were driven only by differences in competition among the markets. 129/

Fourth, Williams proposed a volume contract program that gives shippers the following volumetric discounts: (1) a five percent discount for 700,000 through 1,399,999 barrels per year, (2) a 15 percent discount for 1,400,000 through 2,099,999 barrels per year, and (3) a 25 percent discount for 2,100,000 or more barrels per year. In response to claims that the volume discounts are discriminatory, the ALJ found there is nothing inherently illegal about volume discounts. 130/ Furthermore, he determined that the volume discounts were implemented in response to competition. 131/

Fifth, Williams proposed proportional rate discounts for destinations that are reachable from competitors' lines. The ALJ found that these rate differences take on less significance to the extent they are justified by competition. 132/

Finally, Williams has an "open stock" policy under which a shipper having sufficient inventories on the pipeline can, upon tender of product at an origin, withdraw product of like kind without awaiting the physical movement of the actual batch of product tendered. Aside from the issue of ratemaking for open stock (which the ALJ deferred to Phase II), the ALJ upheld the policy of open stock, finding that it had long preceded the present rate filing throughout the common carrier pipeline industry. 133/ He also determined that the policy of open stock has nothing to do with market power and no relationship to the rates at issue.

128/ Id. at 65,025-26.

129/ Id. at 65,026.

130/ Id.

131/ Id. at 65,027.

132/ Id.

133/ Id. at 65,028.

AOPL and Williams contend that the ALJ found the alleged discriminations justified by Williams' competitive circumstances alone. Therefore, they argue that the cost data behind the discriminations and cross-subsidies need not and should not be further scrutinized in Phase II. In addition, Williams asserts that the discrimination claims may be resolved fully using the cost information already in the record. Williams alleges that the kinds of cost allocations required for Phase II proceedings are not necessary to resolve these claims.

Kerr-McGee points out that the ALJ deferred to Phase II any decisions on the cost support for the alleged discriminatory rates. Kerr-McGee argues that the Commission must review the relationship between varying rates and the related variable costs in Phase II to determine whether the magnitude of the alleged discrimination is justified by the level of competition.

The ALJ cited Associated Gas Distributors v. FERC, (AGD v. FERC) 134/ for the proposition that competitive considerations can sustain Williams' burden of justifying differential rates. 135/ In AGD v. FERC, the United States Court of Appeals for the District of Columbia Circuit pointed to the following equity and efficiency considerations in favor of differential ratemaking:

> [t]he equitable argument in favor of such differentials is that they may benefit captive customers by making a contribution to fixed costs that otherwise would not be made at all. (The efficiency argument is that such differentials will raise total volume closer to the level it would attain if all sales were priced at marginal cost.) 136/

The court also pointed out that for nearly 100 years, the Interstate Commerce Act (ICA) has been interpreted to allow the Interstate Commerce Commission (ICC) to approve rate differentials justified exclusively by competition. However, the court stated that this does not mean that the Commission is free to uphold every price distinction based on different demand elasticities. Rather, the court indicated that the Commission should explore whether rate differentials based exclusively on competition between transporters with similar cost functions may force captive customers to bear disproportionate shares of fixed costs without any offsetting gain in efficiency.

134/ 824 F.2d 981, 1011 (D.C. Cir. 1987), cert. denied 485 U.S. 1006 (1988).

135/ 58 FERC ¶ 63,004 at 65,025.

136/ 824 F.2d at 1011.

The ALJ determined that each of the alleged forms of discrimination was intended to meet competitive conditions and was not an abuse of Williams' market power. 137/ However, the ALJ's findings that the rate differentials are not exercises of market power does not establish that the rate differentials are lawful. Concerning each claim of discrimination, the ALJ reserved the following for evaluation in Phase II: (1) whether one service cross-subsidizes another and (2) whether differences in cost justify the alleged discrimination. 138/ We affirm the ALJ in these determinations.

As discussed earlier in this order, the parties have reserved their rights to test Williams' cost and cost allocation evidence in Phase II. Phase I reviewed only Williams' market power to determine whether competition entitles Williams to be regulated by something less rigorous than traditional cost-of-service regulation. Because facts showing Williams' market power were being produced in Phase I, it is administratively efficient to consider here whether Williams had the market power to create discriminatory rates. However, the evidence is not sufficient to meet the requirements of AGD v. FERC, and the Commission will not decide in Phase I whether the rate differentials are discriminatory. Rather, Phase I will make only one discrete finding: that Williams' alleged discriminatory pricing was in response to differences in the actual or potential competition faced by Williams. The Commission will review Williams' rate differentials in Phase II using the cost information required there to determine ultimately whether the proposed rates are just and reasonable or unjustly discriminatory.

2. Group 3

Kerr-McGee takes exception to ending Group 3 rate equality, alleging that origin rate equality in Group 3 permits the maximum number of competitors to participate on equal terms in any given destination market. Kerr-McGee argues that disrupting this

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137/ 58 FERC ¶ 63,004 at 65,025-28.

138/ The ALJ stated that discrimination claims about the following rates must be finally decided in Phase II in light of the cost information to be reviewed there: (1) Group 3 rate differentials, (2) rural versus urban rate differentials, (3) volume discounts, (4) proportional rate discounts, and (5) "open stock" rates. The ALJ also addressed rate increases from southern origins that were not matched by rate increases from northern origins. In this case, the ALJ found that cost justification for the north/south rate structure was not significant because the rates are being made close to equal on a per-mile basis. 58 FERC ¶ 63,004 at 65,025-27.

equality is unreasonable, unduly preferential, and prejudicial, because it served as the basis for historical investments, market evaluations, and marketing decisions. Kerr-McGee also contends that changing Group 3 rates will cause considerable confusion in exchange negotiations and differentials. Finally, Kerr-McGee claims that Williams' rate differentials are not justified by competitive circumstances.

Williams replies that any commercial disadvantage suffered by Oklahoma refiners is offset by the cost advantage of their proximity to crude oil supplies. In any event, although the change from equalized rates became effective one and one-half years ago, Williams points out that Kerr-McGee has not offered any proof of competitive injury from the change in Group 3 rates. Moreover, Williams asserts, evolving competitive circumstances warrant an end to Group 3 rate equality. Williams states that shippers should not have relied on continued rate equality to make market and investment decisions because, as noted in the ID, they knew that Williams had tried to change these rates in the 1960's and that it might try again at the end of the 1985-90 rate moratorium.

The ALJ found that Kansas City and Heartland pipelines (new competing lines) have captured from Williams significant volumes from Group 3 origins. He also determined that the potential competition from a dormant Texaco line was sufficiently likely to influence Group 3 rates. The ALJ's reasons for concluding that competition makes Group 3 rate equality no longer appropriate are adequate for us to decide that the proposed Group 3 rates are not per se discriminatory. However, the Commission will decide in Phase II whether the proposed Group 3 rates force captive customers to bear disproportionate shares of the fixed costs without any offsetting gain in efficiency and thus, are discriminatory.

3. North/South

Kerr-McGee claims that Williams' proposed rates prefer the northern origins in Minnesota and Chicago to the prejudice of competing Oklahoma and Kansas origins. Kerr-MCGee also states that the proposed rates must be analyzed on the basis of comparative costs, not simply mileage, particularly because it believes that the greater volumes and lower per-mile costs are from the southern Oklahoma/Kansas origins.

Williams rebuts Kerr-McGee's argument, stating that Kerr-McGee has not shown an undue preference, prejudice, or unjust discrimination because it has not shown a disparity in the resulting rates. It notes that Kerr-McGee has only shown a disparity in the amount of the rate changes.

The ALJ found that many pipeline projects had recently been completed in Williams' market areas, including construction by Koch. He also decided that the incremental costs of pipeline construction in the region were low because of under-used crude and fertilizer lines that could easily be converted into oil pipelines. We conclude that the ALJ stated sufficient reasons to find that, due to the effect of competition, differences between rates in the north and south may no longer be just and reasonable. However, as discussed above, the Commission will determine in Phase II whether the proposed North and South rate changes force captive customers to bear disproportionate shares of the fixed costs without any offsetting gain in efficiency.

4. Urban/Rural Issue

Farmland argues that these proposed differences are discriminatory because rural shippers will pay a disproportionate share of Williams' rate increase. Specifically, Farmland alleges that Williams proposes to increase rates to rural destinations 17.22 percent on average while decreasing urban discounted rates 11.63 percent on average. Farmland asserts that the urban/rural rate differentials are not justified by differences in the cost of providing the services to the respective areas. Finally, Farmland contends that the proposed rate differentials are not otherwise justified by differences in transportation conditions, relative distances, and equalization of competitive opportunities among customers as well as producers.

Williams avers that Farmland misstates the rate disparity by comparing rural service at the full base rate to urban service at the fully discounted rate. Williams also argues that anti-discrimination requirements apply to disparities in rates, not rate changes. It contends that statutory prohibitions against unreasonable preference or prejudice do not apply because rural and urban areas do not compete with one another. Williams also argues that rate disparities are appropriate among urban and rural destinations because it ships more volumes to urban destinations and does not charge any shipper a different charge at the same destination. Even if Farmland has established a prima facie discrimination claim, Williams insists that its competition justifies the rate differentials.

We note that the ALJ rejected a contention that the proposed rate increases violate section 3(1) of the ICA, 139/ and he found no evidence that Williams had singled out any farm or rural interest or raised rates to any destination merely because it was rural rather than urban. In addition, the ALJ pointed out that

139/ Section 3(1) prohibits "any undue or unreasonable preference or advantage to any particular . . . locality . . . region, district, [or] territory . . . ."

territorial rate differences can be justified by differences in territorial conditions. 140/ He found that such differences existed in this case because Farmland had differentiated the urban and rural areas by the different types of industry, activity, or commerce which occur in such areas. Finally, the ALJ stated that the record showed that Williams' rates were driven only by competitive considerations and that competitive inroads may be greater in urban areas.

While the ALJ stated several reasons that argue in favor of a rate differential, the Commission will decide ultimately in Phase II of this proceeding whether the proposed urban and rural rate differentials are discriminatory.

5. Volume Incentive Discounts

Kerr-McGee argues that the volume discounts discriminate in favor of and grant a preference to large shippers, to the disadvantage of small shippers. Kerr-McGee alleges that volume discounts are an illegal rate disparity because different shippers will pay different charges even though they receive the same service and the costs of the service are identical.

Texaco maintains that Williams' volumetric discounts are not discriminatory because Williams will allow shippers to pool their volumes to qualify for the discount and will offer volume discounts at all destinations on its system. According to Williams, volume discounts do not discriminate against or give a preference to customers because shippers which tender differing volumes for transportation are not similarly situated customers. However, even if volume discounts are discriminatory, Williams asserts that the record amply justifies William's volume discounts on competitive grounds.

Kerr-McGee contends that the ALJ did not determine where volume discounts are necessary, identify competitors, or judge the accuracy of Williams' projections to determine whether transportation circumstances justify discrimination. Further, Kerr-McGee argues that the ALJ did not look critically at the projections of competitors' costs and rates that Williams used to support the proposed discounts. Thus, Kerr-McGee asserts that the volume discounts cannot be approved in this phase of the hearing and on this record. Finally, Kerr-McGee believes that the ALJ did not address the potential for discrimination in the volume discount program. In particular, Kerr-McGee objects to Williams' approach to pooling because Williams will not encourage pooling by operating the pool or providing the names of pool operators to smaller shippers that want to join. Kerr-McGee points out that a pool operator does not have an incentive to add

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140/ Citing New York v. U.S., 331 U.S. 284, 299-300 (1946).

another member to a pool once the 25 percent discount volume level is achieved. For these reasons, Kerr-McGee concludes that Williams favors a few large shippers who can receive the discounts without pooling. If the Commission upholds Williams' volume discounts, Kerr-McGee advocates standards and conditions that would allow small shippers to participate in pooling arrangements.

As discussed earlier, Williams presented compelling evidence that, in general, significant new pipeline competition has entered its market. Williams proposes to offer the discounts throughout its market, not just in competitive locations. For these reasons, the ALJ did not need to determine where volume discounts are necessary or identify specific competitors.

Under section 2 of the ICA, whether a rate is unduly discriminatory turns on whether Williams is providing a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Section 3(1) rules out only those preferences that are "undue." As with the other claims of rate discrimination, the Commission will decide in Phase II whether the volume incentive discounts are discriminatory.

Pooling arrangements can enhance a volume discount program by giving small shippers an incentive to maximize use of the pipeline. The Commission is concerned whether Williams is presenting shippers with a realistic opportunity to participate in pooling. The Commission does not intend to decide the volume discount issue here and thus need not establish pooling requirements in Phase I. However, Williams should make proposals in Phase II that give shippers a realistic opportunity to participate in pooling.

6. Proportional Rate Discounts

Farmland opposes Williams' proportional rate discounts for destinations that are reachable from competitors' lines. Farmland fears that the proportional rate discounts will be subsidized by revenue from rural destinations. However, the Commission agrees with the ALJ that such rate differences take on less significance to the extent they are justified by competition. As discussed above, the Commission will determine in Phase II of this proceeding whether the proportional rate discounts are discriminatory.

7. Fungibility

Kerr McGee opposes Williams' open stock policy. In particular it protests Williams' proposed rates for service from the Minneapolis/St. Paul origin group to nine destinations, contending that Williams can physically provide this service only

from other origins. Kerr-McGee asserts that such service is impossible without reverse flow capability, which it says Williams does not have on this part of its system. In the event these rates are finally decided in Phase I, Kerr-McGee asks the Commission to rule that it is unlawful for Williams to publish rates for services which it cannot physically perform. Kerr-McGee also contends that such rates are for the advantage of Minneapolis/St. Paul origin refiners and are therefore discriminatory.

Williams contends that the ICA does not prohibit filing rates for movements over routes that cannot be physically delivered. Williams points out that such services are analogous to backhaul or displacement service offered by natural gas pipelines and that such services benefit both Williams and its shippers. The Commission has long recognized the validity of backhaul and displacement service. Thus, Williams may publish rates for open stock service. We will decide in Phase II whether the proposed open stock rates are discriminatory.

III. Proposed Rate Standards for Phase II

A. The Proposed Rate Standards

In its motion, Williams proposes a standard for adjudicating in Phase II the maximum reasonable level of rates in any market not found workably competitive in Phase I. As part of a rate filing, Williams would have to make two showings: (1) that the overall earnings generated by the proposed rates do not exceed the revenue requirement permitted by Opinion No. 154-B and its progeny, 141/ and (2) that the total of its proposed rates do not exceed the stand-alone costs of its services in total. 142/ Williams would have to show that its proposed rate maximums in total do not exceed the lower of its Opinion No. 154-B revenue requirement or the stand-alone costs of its services in total.

In general, stand-alone costs are the minimum costs that an efficient, low-cost, state-of-the-art pipeline would incur for facilities if built today to provide services tailored to a discrete set of customers. Although Williams bears the ultimate

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141/ Williams Pipe Line Co., Opinion No. 154-B, 31 FERC ¶ 61,377 (1985), *modified*, Opinion No. 154-C, 33 FERC ¶ 61,327 (1985); ARCO Pipe Line Co., Opinion No. 351, 52 FERC ¶ 61,055 (1990), *reh'g denied*, Opinion No. 351-A, 53 FERC ¶ 61,398 (1990).

142/ Williams claims that the total stand-alone costs would equal a rate of return ceiling based on a current replacement cost rate base for the pipeline as a whole.

burden of proof on all matters in this case, Williams' proposal would not require it to perform a separate stand-alone cost study for each individual service (or combination of services on Williams' system). Instead, Williams would show that the total systemwide stand-alone cost would equal a rate of return ceiling based on a current replacement cost rate base for the pipeline as a whole. 143/ Shippers would have the right to rebut Williams' showing of the total stand-alone costs with evidence that particular Williams' rates exceeded the stand-alone cost of any individual service or combination of services of the shippers' choosing, based on whatever configuration the shippers believed would minimize the stand-alone costs to them. Williams would then have the burden of refuting any stand-alone cost data submitted by the shippers and would bear the ultimate burden of proof.

Williams also proposes a standard for adjudicating in Phase II the minimum reasonable level of rates in any market not found workably competitive in Phase I. The minimum standard would be short-run marginal 144/ or incremental costs. Williams proposes a one-year time horizon to measure short-term marginal costs. It states that such short-term costs consist only of variable fuel and power costs.

The proposal would give Williams the flexibility to charge any customer any price falling between the maximum and minimum rate standards. Williams asks the Commission to adopt its proposed rate standards now, before further evidentiary proceedings in Part II. Williams does not propose to apply any ratemaking standard to markets found workably competitive. Rather, rates in those markets would be assumed to be just and reasonable on the basis of competition.

B. Positions of the Parties

Williams desires to price its services using "differential" pricing, which involves pricing different services in varying

143/ The Commission assumes that by "current" cost, Williams means the assets may be either new plant or depreciated current plant because an efficient new entrant would not necessarily purchase all new assets. Ex Parte No. 347 (Sub-No. 1), Coal Rate Guidelines, Nationwide, 1 ICC 2d 520, 545 (1985), aff'd, Consolidated Rail Corp. v. United States, 812 F.2d 144 (3d Cir. 1987). In addition, the Commission assumes that Williams means the replacement cost rate base that an efficient, low-cost, state-of-the-art pipeline would incur to substitute for Williams' facilities as a whole.

144/ Marginal cost is the cost of producing one more or one less unit.

proportions over their marginal costs. 145/ Williams states that the nature of its costs require that it price in this manner. Namely, it claims that rates calculated based on fully-allocated costs would be confiscatory and unworkable because most of its costs are sunk and common to multiple services, it has large economies of scale, 146/ and it faces significant and non-uniform competition in its markets. Texaco 147/ responds that Williams has not analyzed the costs of and demand for services to prove that rates based on fully-allocated costs would in fact be confiscatory.

Williams also declares that rates based on fully-allocated costs are not economically efficient. If it must price some services above marginal cost to recover costs, Williams contends that it would maximize economic efficiency by charging the highest markups for services whose demand is least sensitive to an increase in price (i.e., the least "elastic"). 148/ Accordingly, Williams seeks to price services differentially by setting rates below fully-allocated costs where competition requires and above fully-allocated costs where the market permits.

Although some of the protesting parties generally support the concept of differential pricing (or some form of pricing flexibility), they dispute whether Williams' rate standards will produce economically efficient rates. 149/ Texaco challenges

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145/ This practice is also referred to as "economic price discrimination." Coal Rate Guidelines, Appendix A.

146/ In other words, the average cost of service declines as the size of the plant increases. Coal Rate Guidelines, Appendix A.

147/ Total and Kerr McGee support Texaco's comments in their entirety.

148/ This economic rule is known as the "inverse elasticity rule" or "Ramsey" pricing.

149/ Williams claimed that Dr. Alfred E. Kahn (an expert witness for Kaneb and Kerr-McGee) agreed that the proposed rate standards will produce the most economically efficient rates. Dr. Kahn concurred with the general theory that rates based on marginal cost will send customers the most efficient price signals. Tr. 39/6357-58 (Kahn). In general, Dr. Kahn also agreed with differential pricing. Ex. 508 at 12; Tr. 39/6360 (Kahn). Nevertheless, Dr. Kahn did not agree that the proposed rate standards would produce economically efficient rates when applied to Williams'

(continued...)

differential pricing or any other pricing mechanism if captive customers would subsidize service to other shippers and underwrite the risk of competition for the pipeline's shareholders. Some of the parties propose alternatives to Williams' proposal.

Williams maintains that a century of precedent under the ICA recognizes the need for differential pricing and upholds rates above fully-allocated costs in captive markets. Williams believes that its proposed rate standards are consistent with the ICC's 1985 standards governing the maximum rates for railroads hauling coal, the Coal Rate Guidelines, 150/ and cases leading up to and interpreting those standards. Williams asserts that the maximum rate it proposes will fully satisfy the Commission's duty under section 1(5) of the ICA to ensure reasonable maximum rates. Williams insists that its proposed rate flexibility is not discriminatory because it claims it has shown the rate disparities are justified by competitive differences. 151/

Kaneb opposes Williams' proposal, contending that the ICC never regulated oil pipeline rates using the standards it applies

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149/(...continued)
markets. Ex. 508 at 12, n.3; Tr. 39/6431-32 (Kahn). Because of the possibility of predatory pricing and the problems created by the differing levels of competition among Williams' markets, Dr. Kahn did not think that a minimum rate standard based on short-run marginal cost (even though combined with the proposed maximum rate standard) would protect captive customers from paying higher rates than they would otherwise pay based purely on economic efficiency or differential or Ramsey pricing. Tr. 39/6431-32, 6445-47 (Kahn). Instead, Dr. Kahn recommended setting the minimum standard at long-run incremental costs, although he warned that even that measure may not be sufficiently high to protect captive customers. Tr. 39/6448 (Kahn).

Dr. Kahn also opposed Williams' proposal because it assumes that Williams' marginal costs are limited to variable fuel and power costs. He submitted that if Williams' system does not experience congestion costs or incremental capacity costs, it probably has excess capacity. Ex. 508 at 6; Tr. 39/6421 (Kahn). Dr. Kahn was concerned that Williams has proposed this measure of marginal costs in order to transfer to captive customers the costs of excess capacity. Tr. 39/6500-01 (Kahn); Ex. 508 at 9.

150/ See supra note 143.

151/ 49 App. U.S.C. §§ 2 and 3(1).

to railroads. Citing Farmers Union I, 152/ Kaneb argues that the ICC's precedent is no longer viable for regulating oil pipeline rates.

Total objects to Williams' proposal because it concludes that it would deregulate the antidiscrimination provisions of the ICA. Texaco argues that Williams' proposal would effectively deregulate the rates for interstate pipelines because Williams' proposal does not establish cost-based rates. Texaco also contends that under Farmers Union II, 153/ rate regulation should begin with an inquiry into costs. Thus, Texaco says Williams should prove a cost-of-service and then allocate costs fairly and properly to the services. However, it does not urge adopting some preestablished cost-allocation formula, instead it says Williams should propose one. Then, under Farmers Union II, it submits that the Commission can adapt the cost allocation methodology to the requirements of the public interest.

Kerr-McGee and Texaco challenge the use of earnings generated by Opinion No. 154-B as a maximum rate standard. Texaco states that, although the individual point-to-point rates would produce the total Opinion No. 154-B cost of service, this does not indicate whether individual point-to-point rates are just and reasonable. Kerr-McGee opposes the Opinion No. 154-B methodology itself as fundamentally flawed and points out that it has not been subject to judicial review. Kerr-McGee also objects to applying an Opinion No. 154-B cap to Williams because Williams' current rates produce total revenues exceeding a cost of service calculated using the declining depreciated original cost of Williams' rate base. Kerr-McGee maintains that a switch to a trended original cost rate base under Opinion No. 154-B in the "mid-life" of this very old products pipeline system would inflate the rate base compared to amounts already recovered. Thus, it says that the rates produced would be excessive. Kerr-McGee insists that the parties are entitled to see and evaluate the level of the proposed rate maximums in light of the review in Phase II. The staff argues that the ratemaking method that the Commission applies to gas pipelines offers rate flexibility. Staff disagrees that Williams' proposed method is more efficient and less conjectural and believes that the stand-alone method is too conjectural and complex.

152/ Farmers Union Central Exchange, Inc. v. FERC, 584 F.2d 408 (D.C. Cir. 1978), cert. denied sub nom., Williams Pipe Line Co. v. FERC, 439 U.S. 995 (1978).

153/ Farmers Union Central Exchange, Inc. v. FERC, 734 F.2d 1486 (D.C. Cir. 1984), cert. denied sub nom., Williams Pipeline Company v. Farmers Union Central Exchange, Inc., 469 U.S. 1034 (1984).

Texaco objects to shippers bearing the cost of proving the stand-alone costs. It points out that, in Phase I alone, Williams has spent over $8 million for experts for this purpose. Williams answers that requiring it initially to perform a separate stand-alone cost study for each service would be impractical and an unreasonable burden because it offers service between thousands of origin/destination pairs.

The intervenors also challenge the proposed burden of proof as contrary to 49 App. U.S.C. § 15(7), which places the burden of proof on carriers in investigations of proposed rates. Williams responds that this burden of proof fully complies with § 15(7) in that once the shippers' studies are submitted, Williams will bear the burden of rebutting them and the ultimate burden of persuasion. According to Williams, this comports with ICC and the Commission's precedent where the regulated entity bears the ultimate burden of proof and with general rules of evidence, under which a party with the ultimate burden of proof, by making a prima facie showing, may compel its adversary to come forward with responsive evidence.

C. Discussion

While Williams' motion was pending before the Commission, the 1992 Act was signed into law. Section 1801 of the 1992 Act charged the Commission with establishing a simplified and generally applicable ratemaking methodology for oil pipelines. Further, section 1803 of the 1992 Act deemed many effective rates to be just and reasonable. However, it did not deem just and reasonable rates such as Williams' that had been in effect subject to protest, investigation, or complaint.

The rate standards proposed by Williams would not only govern setting base rates in this case, but also would establish how Williams' rates are judged in future cases. The Commission has adopted a final rule 154/ that institutes a simplified and generally applicable ratemaking methodology, pursuant to the 1992 Act. The final rule establishes the method by which oil pipelines will change their rates in filings beginning January 1, 1995. In this rulemaking, the Commission considered a request by AOPL, supported by Williams, to establish a stand-alone maximum rate standard for changing rates. However, the rulemaking established a rate indexing approach to determine rate changes, finding that approach more generally applicable than a stand-alone method. In addition, like the method here proposed, the indexing method will establish a maximum rate cap under which pipelines will have pricing flexibility. Because the rate change

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154/ Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992. Order No. 561, FERC Stats. & Regs. Preambles ¶ 30, 985 (1993).

method adopted in the rule is inconsistent with the stand-alone method, the Commission will reject Williams' use of the stand-alone method as the principal basis to justify future rate changes. Therefore, the only question remaining is what base rates will be allowed for Williams in this case and will serve as the basis for Williams' future indexing. The Commission will set for hearing in Phase II the method to be used for establishing base rates. 155/ In developing such a method, the ALJ and the parties should give particular attention to the allocation of costs between the competitive and noncompetitive markets to ensure that customers in the noncompetitive markets do not subsidize customers in the competitive markets.

The purpose of the two-phase procedure established in Buckeye was to give pipelines the benefit of light-handed regulation in markets found competitive. For these reasons, the Commission finds Williams' rates in its workably competitive markets to be just and reasonable on the basis of competition alone. No additional review of those markets will be required. Pursuant to the ICA, Williams must file with the Commission the rates for its competitive markets and charge the filed rate. 156/

The Commission orders:

(A) The initial decision is affirmed or modified as stated in the body of this order.

(B) No further rate review is required of the following markets where Williams has established that it lacks market power: Chicago, St. Louis, Oklahoma City, Tulsa, Wichita, Springfield/Decatur, Peoria, Rockford, Wausau, Dubuque, Davenport, Columbia, and Minneapolis/St. Paul.

155/ The parties have proposed several alternatives to Williams' proposal. The Commission is not granting Williams' motion and therefore need not consider or rule on the validity of these alternatives at this juncture.

156/ 49 App. U.S.C. § 6(1) and (3), respectively. See also Maislin Industries v. Primary Steel, 497 U.S. 116 (1990) (in spite of new legislation that significantly deregulated the motor carrier industry, the Supreme Court found that a privately negotiated rate, which was lower than a carrier's filed rate, violated the filed rate doctrine and was discriminatory due to the carrier's duty to file rates with the ICC and the obligation to charge only those rates on file pursuant to 49 U.S.C. §§ 10762 and 10761, respectively).

(C) The ALJ is directed to proceed with Phase II of this proceeding for the purpose of establishing base rates for the following markets in which Williams has failed to establish that it lacks market power: Springfield (MO), Eau Claire, Des Moines, Kansas City, Lincoln, Fargo, Grand Forks, Duluth, Rochester, Sioux City, Topeka, Omaha, Grand Island, Sioux Falls, Aberdeen, Quincy, Cedar Rapids, Waterloo, and Ft. Dodge.

(D) Williams' motion proposing rate standards to apply to Phase II of this proceeding is denied as stated in the body of this order.

(E) The complaint and protest filed by Kerr-McGee, Texaco, and Total is denied.

(F) With respect to Williams' markets found to be competitive, the investigation and refund obligation in this proceeding are terminated.

By the Commission.

(S E A L)

Lois D. Cashell,
Secretary.