B. ***Opinion Nos. 391 and 391-A in Williams Pipe Line Company Proceeding Utilizes Buckeye Market Power Analysis***

The market power analysis pioneered in *Buckeye* was followed by the Commission, with some variations, in the second market power case decided on the merits. The Commission again utilized the basic methodology outlined in *Buckeye* of defining the product and geographic markets, and then analyzing particular factors to assess market power in those defined markets. In this matter, the participants contested what alternative sources of transportation should be included in the pipeline's geographic market in an attempt to either increase or dilute the market power statistics. This would be a recurring theme in subsequent cases. The Commission held cost data that compared the pipeline with proposed alternative sources of transportation was highly relevant to assessing the cost viability of potential competitors and whether those competitors should be included in the market power statistics. In subsequent proceedings, the Commission would make this cost comparison data mandatory in certain circumstances, but ultimately limit when those circumstances would arise to the analysis of a proposed alternative that was unused in a market not facing capacity constraints.[214]

The Commission also evaluated again in this proceeding what factors it would consider in assessing market power in the pipeline's markets, how it would define those factors, and how those factors would be calculated. The participants attempted to test the boundaries of what factors could be considered in determining market power. For example, the participants requested that the Commission consider certain new factors that were contended to be indicative, or not, of market power. These included exchanges, the presence of vertically integrated conglomerate competitors, and low profitability. Generally, the Commission accorded little, if any, weight to these factors. Instead, the Commission relied on the factors it had identified in *Buckeye* to analyze the pipeline's market power in its defined markets. The Commission's determinations regarding what HHI and market share statistics would cause it to find market power would serve as a benchmark for later proceedings.

1. *Opinion No. 391 Builds on the Buckeye Market Power Analysis*

The Williams Pipe Line Company filed an application for market-based rates in conformance with the procedure adopted in *Buckeye*.[215] The judge determined that Williams had made the required showing that it lacked market power in twenty-two of its markets, but failed to satisfy its burden in its remaining ten markets.[216]

Ability to Sustain Price Increase as Threshold for Market Power. Upon exceptions, the Commission first addressed whether its definition of market power, i.e., the ability to profitably sustain a price increase over a significant period of time, should be reduced to a specific number and used as a threshold for determining market power.[217] Williams and several intervenors asserted that a 15 percent price increase above the pipeline's transportation rate, similar to the percentage used in *Buckeye*, should be used as a threshold benchmark of a pipeline's market

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[214] *See Enterprise Products Partners*, 146 FERC ¶ 61,115 at PP 53-56, 68-70.
[215] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,655.
[216] *Id.*
[217] *Id.* at 61,657-59.

power.[218] Trial Staff asserted that Williams had failed in its burden of proof to justify a particular benchmark because it only presented evidence on the inability to raise rates by this threshold in a few of its markets.[219] The judge agreed, holding that a 15 percent price increase threshold had been studied for only three of Williams' relevant markets, and therefore, had not been sufficiently tested in the record.[220] Further, neither the DOJ Merger Guidelines nor the Oil Pipeline Deregulation Study had applied a particular numerical test.[221] And, the 15 percent definition of market power used in *Buckeye* cited by the Commission as "adequate" did not mandate that specific percentage in subsequent cases.[222]

The Commission upheld the reasoning of the judge.[223] In addition, the Commission determined that the use of a specific rate increase as a threshold benchmark of market power was inappropriate. The Commission determined that the ability to sustain a rate increase does not *per se* indicate market power, "any more than the existence of competition prevents a rate increase."[224] The Commission also noted that the DOJ Merger Guidelines do not require a specifically quantified price increase threshold in a market power analysis.[225] The guidelines note that a test to measure whether a pipeline can profitably maintain prices above competitive levels for a significant period of time (often referred to as a SSNIP test) is only a "methodological tool" and that "mechanical application…may provide misleading answers to the economic questions."[226] Instead of a mechanical application of a threshold price increase, "a great deal of judgment is involved in order to examine and weigh all factors…."[227] Therefore, the Commission concluded that the judge "properly relied more on the presence or absence of competition in a given market as an indicator of the ability to sustain a rate increase in that market."[228]

In later proceedings as noted above in the discussion of *Buckeye*, the Commission has used a 15 percent threshold price increase in the transportation component of the competitive rate as the range to determine if proposed alternative sources of transportation are cost competitive.[229]

Geographic Market. The Commission considered in Opinion No. 391 whether the appropriate geographic markets should be origin and destination pairs that the pipeline served, often described as corridors, or, as in the *Buckeye* case, destination markets.[230] The Commission would have to address this issue in later proceedings as well. Intervenor Texaco contended that corridors should be the relevant geographic markets because the rates for oil pipeline

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[218] *Id.* at 61,657.
[219] *Id.* at 61,658.
[220] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,657.
[221] *Id.*
[222] *Id.*
[223] *Id.* at 61,658-59.
[224] *Id.* at 61,658.
[225] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,659.
[226] *Id.*
[227] *Id.*
[228] *Id.* at 61,658.
[229] *See Mobil*, 133 FERC ¶ 61,192 at P 24.
[230] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,660-61.

transportation are stated in terms of receipt points and delivery points.[231] Further, even if a destination market has unused capacity, that is irrelevant to a shipper who has only one option to ship from its origin to a particular destination.[232] Williams, the Association of Oil Pipelines, and Trial Staff supported the use of BEA destination markets.[233] Staff contended that the use of corridors would result in the analysis of "literally…thousands of corridors."[234]

The Commission rejected the request to adopt origin and destination corridors as the relevant geographic markets. The Commission reasoned that the real economic concern of shippers was not whether its petroleum products traveled between specific locations via pipeline, but the delivered price of the product in the destination market.[235] Further, focusing on pipeline corridors would eliminate competitive suppliers that did not provide services over the particular corridor, but still supplied product to destination markets.[236] The Commission ultimately held, consistent with *Buckeye*, that the geographic markets were the pipeline's destination BEAs, although the Commission qualified this determination as "limited to this case."[237]

Alternative Sources of Transportation. The Commission was also confronted with an issue it would have to address numerous times in later proceedings, i.e., what alternative supply sources should be considered in calculating the market power statistics. In this proceeding, the Commission addressed the extent to which barges, refineries, trucking capacity, private pipelines, and pipelines running through the market but without terminals could be considered. The Commission agreed that private pipelines should be considered because "the ultimate customers in destination markets have the option of purchasing product that is delivered from these pipelines."[238] Pipelines without terminals in the market should be considered where construction of a terminal could likely "occur with economic success."[239] The Commission recognized that the requirement to show "economic success" was "somewhat inexact."[240] But, it found it was appropriate, and cited the DOJ's Merger Guidelines for factors to consider in making the assessment (e.g., timeliness, likelihood, magnitude of the entry, and character and scope of the entry).[241]

The Commission accepted the judge's determinations to include barges and refineries in the calculation of market share and HHI to the extent those sources could serve a particular market.[242] For truck-delivered capacity, the judge determined it should be included to the extent trucks can effectively carry products into the BEA, and found trucks were only cost-competitive at a range of 65 to 70 miles.[243] The Commission rejected a specific mechanical mileage limit.[244]

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[231] *Id.* at 61,660.
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.* at 61,660-61.
[236] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,661.
[237] *Id.*
[238] *Id.* at 61,667.
[239] *Id.*
[240] *Id.* at 61,667.
[241] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,667.
[242] *Id.* at 61,667-68.
[243] *Id.* at 61,668-69.
[244] *Id.* at 61,669-70.

Like barges and refineries the Commission found that truck-delivered capacity should be included to the extent the evidence established they could actually serve the particular market in question.[245] The Commission found that including or excluding external sources from a BEA based on a mechanical mileage limit failed to take into consideration the actual economic ability to compete in a particular BEA or serve the major population centers in a BEA.[246] The Commission found that in the case of some of the larger BEAs, "truck hauls of approximately 100 miles from the BEAs may constitute viable competition in certain instances."[247]

Market Concentration and HHI. The Commission in Opinion No. 391 presented a detailed analysis of the components of HHI and its application as a threshold screening device. The judge adopted an initial HHI screen of 2500, finding that markets above 2500 were likely uncompetitive and subjecting more careful scrutiny to markets with HHIs less than 2500.[248] The Commission found that "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."[249] The Commission emphasized, however, that it had carefully scrutinized all contested markets regardless of the initial HHI. "[C]hoosing any single HHI value as a threshold for screening markets is much less important than carefully weighing…all relevant factors that might contribute to or detract from market power."[250] Therefore, the Commission accepted the 2500 HHI screen as a concept to organize the inquiry into different markets, but subjected all the contested markets to a thorough evaluation of all relevant factors, including HHI. This would be important for the ultimate determination and reflective of the process in later cases, as the Commission recalculated the HHI in numerous markets after concluding that certain alternative sources of transportation should, or should not, be included in the calculation.

The Commission then analyzed the proper calculation of HHIs, including whether the market share used in calculating HHIs should be based on delivery or capacity data. The judge determined that transportation capacity would serve as the basis for calculating market shares, as opposed to the actual deliveries by the relevant participants into the market as was done in *Buckeye*.[251] The judge based his decision on the availability of capacity data and the absence of complete delivery data.[252] Further, the judge cited the lack of an absolute policy of requiring delivery based market shares in *Buckeye*.[253] Acknowledging the "inherent imprecision" in using capacity data because it may be significantly higher than actual demand within a market, the judge "stated that such data could be modified to conform to known consumption…."[254]

The Commission agreed, finding that even though the use of capacity data could result in imprecision "a market power analysis in general is not an exact calculation…."[255] The

[245] *Id.*
[246] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,669-70.
[247] *Id.* at 61,676.
[248] *Id.* at 61,661-63, 61,675-76.
[249] *Id.* at 61,663.
[250] *Id.* at 61,676.
[251] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,663.
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.* at 61,664.

Commission also found support from the DOJ Merger Guidelines' reliance on capacity shares when the product is homogenous. The rationale articulated was that market shares based on actual deliveries is more appropriate when firms' products are chosen based on their differentiated characteristics, but when products are similar, the ability to supply capacity most effectively distinguishes between firms.[256]

The Commission also affirmed the judge regarding the proper method to calculate capacity in determining market share in HHIs. The shippers requested the use of total physical capacity of all internal sources, while the pipeline requested the inclusion of certain external sources to the BEAs and trimmed down certain market participants' capacity to reflect their shares of actual consumption.[257] The Commission and the judge accepted the testimony of the Trial Staff witness that proposed a middle ground of "effective" capacity, which used the capacity of the participant source or total consumption, whichever was smaller, as that participant's capacity number to be used to determine the market power statistics.[258] This finding would serve as the basis for the Commission's effective capacity method for calculating capacity based market share and HHI statistics in later proceedings.

Interestingly, the judge decided, and no one contested, that actual deliveries by the applicant pipeline and alternative sources was the appropriate way to determine market share when considered as a standalone factor, even though capacity was used to calculate market share when determining the HHI.[259] The judge found that this variation was a good check and balance on the use of capacity data in the calculation of market share in determining HHI.[260] In effect, this ensures that capacity data, which may not account for actual demand in a market, and delivery data, which may not account for the ability to increase supply in response to an increase in price, will both be included in the market power statistics in some form. This check and balance between capacity and delivery data in calculating market share for HHI and as a stand-alone metric would later be adopted by the Commission.[261]

<u>Exchanges</u>. Moving from HHIs, the Commission also accepted the judge's refusal to accord much weight to exchanges. Exchanges are not new barrels of petroleum product, but merely the transfer of ownership of the product at a specific location.[262] Noting that the capacity for exchanges was included in the capacity based market share calculation of HHIs, the Commission found "[t]he potential for double counting exists where the capacity is included in the HHI and then the exchange which utilizes that capacity is again…considered a mitigating factor."[263]

<u>Presence of Vertically Integrated Conglomerates as Competition</u>. Williams also contended that the presence of large vertically integrated companies with pipeline affiliates

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[256] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,665.
[257] *Id.* at 61,671.
[258] *Id.* at 61,665-66, 61,665 n.57.
[259] *Id.* at 61,671.
[260] *Id.*
[261] *See* Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,192; 18 C.F.R. § 348.1(c)(7).
[262] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,673.
[263] *Id.* at 61,672-73.

within its markets justified a finding of a lack of market power.[264] Williams contended these companies enjoyed an inherent competitive advantage by being able to transport refined products at cost. The Commission rejected the contention that this factor alone justified a finding of a lack of market power because it was unsupported in the record.[265]

Low Profitability. Likewise, the Commission was not convinced that Williams' "low profitability" was indicative of a lack of market power.[266] The Commission did not discuss this contention in detail , except to provide that "[t]he mere fact that evidence of supra normal or unreasonably high profits is relevant to determining the existence of market power does not mean that a firm's failure to earn its allowed rate of return proves it lacks market power."[267]

Excess Capacity. Finally, the Commission found that the importance of excess capacity lies not in a particular mathematical number, but in its relative magnitude in comparison to other BEAs. Williams contended that excess capacity should be measured by some absolute numerical threshold, not in terms of the excess capacity number in relation or comparison to other markets.[268] Williams also contended excess capacity should have been given more weight in the analysis.[269] Intervenor Total and Trial Staff asserted that the judge gave more than adequate weight to excess capacity.[270] In addition, Total contended that Williams' excess capacity calculation was flawed because it had failed to subtract capacity that was committed to other BEAs along its pipeline route.[271] Instead, Williams assumed its full pipeline capacity was available to serve each BEA it traversed.[272]

The Commission found that when analyzing excess capacity it should be adjusted to take into account deliveries committed to other markets.[273] In addition, simple statistical comparisons between markets based on physical capacity was insufficient to understand the impact of excess capacity because of the distinction between physical capacity availability and the potential to increase market deliveries.[274] This is because the ability to increase market deliveries is also related to price fluctuations and other economic factors.[275] Therefore, the Commission directed a comparative analysis of excess capacity that relied on judgment, not straight statistical comparisons.[276] The Commission determined that the judge had properly carried out that analysis.[277]

Analysis of Particular Markets. In Opinion No. 391, the Commission found that of Williams' thirty-two markets it lacked market power in thirteen and had market power in

[264] *Id.* at 61,674.
[265] *Id.*
[266] *Id.* at 61,675.
[267] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,675.
[268] *Id.* at 61,674.
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,674.
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,674.

nineteen.[278] In reversing the judge and finding market power, the Commission generally found that the inclusion of certain external sources in the market share and HHI calculations was improper. The Commission would then recalculate the HHIs and market share excluding the improper external sources, and find them excessive without offsetting circumstances. For example, in the Eau Claire BEA, the Commission eliminated two external sources, which based on the record were too far from the BEA (196 miles) or had no viable terminals to serve the market.[279] The recalculated HHI of 3000 coupled with a 59 percent delivery based market share indicated market power, and finding no offsetting circumstances in the record, concluded Williams failed in its burden to show a lack of market power.[280]

Similarly, in sustaining the judge's determinations that Williams had market power, the Commission typically found market shares close to 50 percent and HHIs above 2500. The Commission rejected Williams' contentions that certain alternative supplies were sufficient to offset those market power statistics. The Commission reasoned that those alternative supplies were either properly excluded because they were too far from the BEA to serve as viable alternatives, or were already included in the HHI and market share calculations.[281] In the Duluth BEA for example, Williams contended that certain internal and external alternative transportation sources were evidence of its lack of market power. The Commission determined that Williams' proposed alternatives were insufficient to offset its 60 percent market share and HHI of 2500 given that those alternatives were already factored into the market share and HHI calculations.[282]

In sustaining the judge's determinations of a lack of market power, the Commission generally found that the external sources included were appropriate, HHIs below or near 2500, and market shares less than 50 percent. For example, in the Minneapolis/St. Paul BEA, the shippers contested the inclusion of certain external sources in the market share and HHI calculations.[283] The Commission found they were properly included and coupled with a market share of 35 percent and the presence of viable competitors, the Commission found Williams lacked market power even with an HHI over 2500.[284]

Therefore, generally, the Commission found that an HHI over 2500, a market share of close to 50 percent, or some combination thereof, without mitigating circumstances, was sufficient evidence to establish market power.[285] However, as noted above, the Commission

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[278] *Id.* at 61,675-86.
[279] *Id.* at 61,679.
[280] *Id.* at 61,679.
[281] *Id.* at 61,682-85.
[282] *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,683.
[283] *Id.* at 61,682.
[284] *Id.*
[285] Viewed from a purely market share and market concentration perspective, the Commission found that Williams had significant market power in the following BEA markets:

- Topeka (HHI 3333; market share 46 percent);
- Duluth (HHI above 2500; 60 percent market share);
- Rochester (HHI above 2500; 60 percent market share);
- Sioux City (HHI above 2500; market share 51 percent);
- Omaha (HHI 2786; market share 46 percent);

found Williams lacked market power in the Minneapolis/St. Paul BEA even where the HHI was over 2500 because of the presence of other mitigating factors, including a market share of 35 percent.

Form of Lighthanded Regulation. With respect to the form of lighthanded regulation permitted in the thirteen markets where Williams lacked market power, the Commission left the rates in those markets free from any ongoing rate constraint.[286] In contrast to *Buckeye*, no price caps or monitoring requirements were imposed on Williams in those markets. The Commission remanded the issue of the appropriate base rates for the remaining nineteen uncompetitive markets.[287]

2. *Opinion No. 391-A Further Clarifies and Modifies the Market Power Analysis*

Upon rehearing, Williams and several intervenors urged the Commission to reconsider certain markets, primarily contending that various alternative transportation sources should be included or excluded from the analysis, which would subsequently change the HHI and market share calculations. The Commission made several important findings on the appropriate market power analysis, particularly in regards to the evidence that would support alternative sources of transportation. The Commission's reliance on detailed cost data to justify alternative sources of transportation would later lead to a requirement for such data in certain limited circumstances.

Market Concentration and HHI. Again, parties requested that the Commission set certain HHI numbers as a threshold for a lack of market power. In this case, Williams requested a

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- Grand Island (HHI above 2500; market share 62 percent);
- Sioux Falls (HHI above 2500; market share 49 percent);
- Aberdeen (HHI above 2500; market share 49 percent);
- Quincy (HHI 2026; market share 74 percent);
- Cedar Rapids, Waterloo, and Ft. Dodge (HHIs between 1800 and 2500; market shares 81 percent, 99 percent, and 98 percent, respectively);
- Springfield (HHI over 3000; market share 38 percent);
- Eau Claire (HHI over 3000; market share 59 percent);
- Des Moines (HHI over 2500; market share 78 percent);
- Kansas City (HHI over 2500; market share 63 percent);
- Lincoln (HHI over 3000; market share 65 percent);
- Fargo (HHI over 3000; market share 51 percent);
- Grand Forks (HHI over 3000; market share of 56 percent).

Williams, Opinion No. 391, 68 FERC ¶ 61,136 at 61,682-86. Viewed from a purely market share and market concentration perspective, the Commission found that Williams lacked significant market power in the following BEA markets:

- Minneapolis/St. Paul (HHI over 2500; market share of 35 percent);
- Wausau (HHI of 1801; market share of 37 percent);
- Dubuque (HHI of 2381; market share of 39 percent);
- Davenport (HHI of 2048; market share of 34 percent);
- Columbia (HHI of 1738; market share of 49 percent).

Id. at 61,677-78, 61,682.

[286] *Id.* at 61,695-96.

[287] *Id.*

holding that an HHI of 1800 should serve as irrebuttable evidence of a lack of market power.[288] Again, the Commission declined for the time being.[289]

Exchanges. On rehearing, the Commission put to rest that exchanges, which are transfers of ownership of oil or a refined petroleum product at a specific location, are entitled to little weight in the market power analysis. Specifically, the Commission stated that "[w]hile exchanges may obviate the use of specific pipeline corridors between two markets, they do not obviate the need for ultimate delivery into [a market]."[290] Further, the Commission stated that the consideration of exchanges as a mechanism to combat market power is the equivalent of "double counting" because the use of supply capacity to calculate HHI already considers the alternative sources of delivery into a market, including exchanges.[291]

Ability to Sustain Price Increase as Threshold for Market Power. Intervenor, Texaco, also requested rehearing regarding the Columbia BEA based upon Williams' 49 percent market share and evidence that Williams had recently raised the rates within this market by 44 percent.[292] Again, the Commission found that significant price increases alone are not indicative of market power.[293] "The existence of competition does not automatically imply an inability to raise rates or even that low rates should prevail. The existence of competition means that price increases above efficient, market-driven equilibrium prices will not be sustainable for any length of time."[294] The Commission found that Texaco had failed to proffer evidence to show that the price increases were evidence of a lack of competition.[295] For example, Texaco neglected to discuss a price freeze that occurred on the pipeline and its relation to the recent increase in price.[296] Importantly, Texaco failed to compare Williams' rates with other alternatives in the market.[297] Absent any showing the price increase was indicative of market power or incongruent with competitors' prices, the Commission declined to grant rehearing.[298]

Alternative Sources of Transportation and Analysis of Particular Markets. Williams contended that the Commission's various findings on the viability of truck transportation of petroleum products were overly conservative.[299] Williams submitted surveys of gas station operators, refineries, and truck transportation providers that supported the cost and capacity viability of truck transportation in excess of 100 miles from BEAs.[300] In perhaps its most important finding in Opinion No. 391-A, the Commission granted rehearing on this issue to consider Williams' evidence on the economic viability of truck transportation where appropriate in the market:

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[288] *Williams*, Opinion No. 391-A, 71 FERC ¶ 61,291 at 62,127.
[289] *Id.* at 62,128.
[290] *Id.* at 62,129.
[291] *Id.*
[292] *Id.* at 62,144.
[293] *Williams*, Opinion No. 391-A, 71 FERC ¶ 61,291 at 62,145.
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Williams*, Opinion No. 391-A, 71 FERC ¶ 61,291 at 62,145.
[299] *Id.* at 62,123.
[300] *Id.*

> [I]n reassessing the viability of external sources, we have carefully examined the record evidence highlighted by Williams in its rehearing request concerning truck deliveries to the individual BEAs and the relative costs of truck, barge, and alternative pipeline deliveries into these markets. Williams['] sponsored exhibits… validate its claim that specified external sources competitively serve the individual BEA markets and, thus, should be included in the assessments of those markets. Williams' exhibits include refinery, truck, and gas station surveys that document truck shipments by origin and destination, as well as extensive tables for each BEA that compare transportation costs for Williams with those of a number of internal and external sources. These cost tables provide pipeline tariffs and a consistent reference guide to trucking costs for distances ranging from eight to 425 miles. On rehearing, the Commission is now persuaded that these comparative cost tables provide a sound basis on which to evaluate the ability of external sources to serve a market competitively, as the comparative costs are highly relevant in determining whether a source can represent effective competition.[301]

In utilizing the data on cost competitiveness of truck transportation, the Commission reassessed Williams' market power in several markets. For example, in Opinion No. 391, the Commission had excluded alternate sources from consideration that were in excess of 100 miles from the Kansas City BEA, recalculated the HHI and market shares for that region, and concluded Williams had market power.[302] Upon rehearing in Opinion No. 391-A, the Commission included a refinery and pipeline terminal as external sources that were more than 100 miles from the BEA on the basis that truck transportation from these sources to the BEA was economically viable pursuant to Williams' cost and delivery surveys.[303] The Commission recalculated the HHI to be 2400 and Williams' market share to be 36 percent.[304] Based on these figures, the Commission found that Williams demonstrated its lack of market power in the Kansas City BEA.[305] This reliance on cost comparison data to justify alternative sources of transportation in excess of the BEA would later become a requirement in specified circumstances.[306]

In the Commission's revaluation of the Quincy BEA, it found that a presumption of competitiveness arises from the presence of a waterborne transportation alternative that is significant, accounting for at least 10 percent of deliveries, and expandable. Williams contended in its request for rehearing that the Commission erred in not recognizing the strong competitive effects of barge facilities located in the center of the BEA.[307] The Commission noted that the DOJ report on Oil Pipeline Deregulation determined that "the existence of waterborne traffic, coupled with expandable capacity for waterborne deliveries, makes an oil market

[301] *Id.* at 62,124.
[302] *Id.* at 62,134-35.
[303] *Williams*, Opinion No. 391-A, 71 FERC ¶ 61,291 at 62,135.
[304] *Id.* at 62,134-35.
[305] *Id.*
[306] *See TE Products*, 92 FERC ¶ 61,121 at 61,465-67; *Enterprise Products Partners*, 146 FERC ¶ 61,115 at PP 53-56, 68-70.
[307] *Williams*, Opinion No. 391-A, 71 FERC ¶ 61,291 at 62,137.

competitive."[308] The Commission adopted a modified presumption advanced by Trial Staff. "The staff in the past has suggested a more conservative approach, holding that expandable waterborne capacity, coupled with waterborne deliveries that account for at least 10 percent of total deliveries into a market, create a presumption of competition in that market. We will adopt this more conservative approach."[309] The Commission found that "barge deliveries into this BEA account for some 28 percent of total deliveries."[310] "Accordingly, because the conditions in the Quincy market satisfy [the] presumption, we find that Williams does not have significant market power in this market….[d]espite the seemingly high HHI for this BEA [of 3100]…."[311]

While declining to establish particular thresholds or benchmarks of market power, the Commission generally found in analyzing particular markets that an HHI above 2500, or the combination of an HHI of 2500 with a market share nearing 50 percent, without mitigating circumstances, was sufficient evidence to establish market power.[312] The market share and market concentration statistics found indicative of market power in the Williams proceeding would later be cited with approval by the Commission in numerous matters.[313] The Commission also made a significant finding that alternative sources of transportation outside the BEA should be included where it was shown that they are cost competitive through studies on truck transportation from those sources to the BEA. In addition, the Commission created a presumption that a market is competitive if there is a significant and expandable waterborne source of competition.

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[308] *Id.* at 62,137-38, 62,138 n.71.
[309] *Id.* at 62,138.
[310] *Id.* at 62,137.
[311] *Id.* at 62,138.
[312] *Williams*, Opinion No. 391-A, 71 FERC ¶ 61,291 at 62,138-39, 62,143-44. From a purely market share and market concentration perspective, the Commission found Williams had significant market power in the following BEA markets:

- Des Moines (HHI of 2897; recalculated market share unclear);
- Grand Forks (HHI of 3500; recalculated market share unclear).

From a purely market share and market concentration perspective, the Commission found Williams lacked significant market power in the following BEA markets:

- Springfield (HHI of 1800; market share of 38 percent);
- Kansas City (HHI of 2400; market share of 36 percent);
- Lincoln (HHI of 1542; recalculated market share unclear);
- Quincy (HHI of 3100; recalculated market share unclear; significant and expandable waterborne presumption applicable);
- Omaha (HHI of 2300; recalculated market share unclear);
- Eau Claire (HHI of 2500; recalculated market share unclear);
- Fargo (HHI of 2500; recalculated market share unclear);
- Columbia (HHI of 1800; market share 49 percent).

Id. at 62,133-45.
[313] *See, e.g., Kaneb*, 83 FERC ¶ 61,183 at 61,761; *SFPP, L.P.*, 84 FERC ¶ 61,338, at 62,494 & n.8 (1998).