

139 FERC ¶ 61,174
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Buckeye Pipe Line Company, L.P.

Docket No. IS12-185-000

ORDER ADOPTING PROTECTIVE ORDER AND COMPELLING DISCLOSURE

(Issued June 1, 2012)

1. On March 30, 2012, the Commission issued a show cause order concerning Buckeye Pipe Line Company, L.P.'s (Buckeye) experimental rate program, which was authorized by the Commission in the early 1990s.¹ The order directed Buckeye to show cause why it should not be required to file its rates pursuant to the ratemaking methodologies contained in Part 342 of the Commission's regulations. Buckeye was directed to respond within 30 days of the Commission order and interested persons were permitted to file comments on Buckeye's response 30 days thereafter. On April 17, 2012, Buckeye was granted an extension of time until May 15, 2012 to file its response to the show cause order. Buckeye has since filed its response. On April 18, 2012, in response to a motion by Delta Air Lines, Inc. (Delta) an extension of time until June 29, 2012, was granted to interested parties to file comments and interventions in this proceeding.

2. On May 14, 2012, Delta filed a motion for expedited adoption of a protective order and an order compelling disclosure of Interstate Commerce Act (ICA) section 15(13) information.² Delta seeks the protective order to permit the disclosure of information protected pursuant to Section 15 (13) of the ICA and provide for heightened confidentiality with respect to certain proprietary and highly sensitive competitive data. Delta states that Buckeye and Delta are currently the only parties to the proceeding.

¹ *Buckeye Pipe Line Company, L.P.*, 138 FERC ¶ 61,239 (2012).

² Section 15(13) prohibits the disclosure of any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered to an oil pipeline for interstate transportation, which information may improperly disclose its business transactions to a competitor.

Delta submits that the proposed protective order is based on the Office of Administrative Law Judge's Model Protective Order with two basic modifications: (1) it adds a reference to Section 15(13) of the Interstate Commerce Act in order to permit the production and receipt of certain confidential shipper information; and (2) it allows the parties to designate as "Highly Confidential" information that is competitively sensitive, subject to the restrictions of ICA Section 15 (13), or a trade secret.

3. Delta states that counsel for Buckeye has indicated to the counsel for Delta that Buckeye does not oppose the text of the protective order attached. Delta requests that the protective order be issued on an expedited basis so that information can be obtained in advance of the June 29, 2012 deadline for comments on Buckeye's response to the show cause order. On May 16, 2012, a notice was issued shortening the answer period to Delta's motion to May 21, 2012. No answers were filed.

4. In order to facilitate the exchange of information in this proceeding consistent with the requirements of section 15(13) of the ICA, the Commission grants Delta's motion and the protective order in the Appendix is adopted.

The Commission orders:

Delta's motion is granted and the protective order in the Appendix is adopted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Buckeye Pipe Line Company, L.P.

Docket No. IS12-185-000

PROTECTIVE ORDER

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant during the captioned proceedings. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Presiding Administrative Law Judge (“Presiding Judge”) or the Federal Energy Regulatory Commission (“Commission”).

2. A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury. A Participant shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 C.F.R. § 388.113(c)(1) (“Critical Energy Infrastructure Information”).

3. Definitions -- For purposes of this Order:

(a) The term “Participant” shall mean a Participant as defined in 18 C.F.R. § 385.102(b).

(b) (1) The term “Protected Materials” means: (A) materials (including depositions) provided by a Participant in response to discovery requests, or by agreement in lieu of formal discovery, and designated by such Participant as protected; (B) any information contained in or obtained from such designated materials; (C) any other materials which are made subject to this Protective Order by the Presiding Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants; (D) notes of Protected Materials; (E) copies of Protected Materials; and (F) materials which contain critical energy infrastructure information, as defined in 18 C.F.R. § 388.113(c)(1) (“Critical Energy Infrastructure Information”). The Participant producing the Protected Materials shall physically mark them on each page (or in the case of non-documentary materials such as computer diskettes on each item) as “PROTECTED MATERIALS” or with words of similar import as long as the term “Protected Materials” is included in that designation to indicate that they are Protected Materials. If the Protected Materials contain Critical Energy Infrastructure Information,

the Participant producing such information shall additionally mark on each page containing such information the words “Contains Critical Energy Infrastructure Information - Do Not Release.” Where general access to materials in the offices or other repositories of Participants is provided to duly qualified Reviewing Representatives, all such materials shall be deemed to be Protected Materials without the necessity of marking them as such. Any copies, or any other form of reproduction shall be submitted to the producing Participant for marking with the appropriate legend (if applicable) prior to removal of such materials from the premises. Compilations or notes on such Protected Materials shall be marked as Protected Materials by Reviewing Representatives before leaving the premises.

(2) The term “Notes of Protected Materials” means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 3(b)(1). Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials except as specifically provided in this order.

(3) Protected Materials shall not include (A) any information or document contained in the files of the Commission, or any other federal or state agency, or any federal or state court, unless the information or document is filed as protected under 18 C.F.R. § 388.112 or is subject to a protective order of such agency or court, or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order. Protected Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

(c) The term “Non-Disclosure Certificate” shall mean the certificate attached to this order by which Reviewing Representatives seeking access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding. The transmittal letter accompanying each Non-Disclosure Certificate shall provide sufficient information about the person identified in the Certificate to permit his or her status under this Protective Order to be ascertained.

(d) The term “Reviewing Representative” shall mean a person who has signed a Non-Disclosure Certificate which has been served in accordance with Paragraph 3(c) and who is:

(1) Commission Litigation Staff;

(2) an attorney who has made an appearance in this proceeding for a Participant;

(3) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in (2);

(4) an expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;

(5) a person designated as a Reviewing Representative by order of the Presiding Judge or the Commission; and

(6) Employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.

In the event that a Participant wishes to designate as a Reviewing Representative a person not described in subparts (1) – (6) above, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached, that person shall be a Reviewing Representative pursuant to this Paragraph with respect to those materials. If no agreement is reached, the Participant may submit the disputed designation to the Presiding Judge or the Commission for resolution.

(e) The term “Section 15(13) Material” means any material or information deemed by a Participant to be subject to Section 15(13) of the Interstate Commerce Act, 49 U.S.C. app. § 15(13) (1988). To the extent necessary in this proceeding, Participants are permitted to produce and receive information governed by Section 15(13) of the Interstate Commerce Act, provided that such information is treated as Protected Materials pursuant to the provisions of this Protective Order. Shipper or consignee retains the right to consent to the release or production of any material or information otherwise qualifying for Section 15(13) protection as non-protected information that is not subject to this Protective Order.

4. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided in Paragraphs 7, 8 and 9.

5. Protected Materials shall remain available to Participants until the date that an order terminating this proceeding (including any consolidated dockets) becomes final and no longer subject to judicial review. Within 30 days after such date, the Participants shall return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in

accordance with Paragraph 6, below. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. To the extent Protected Materials are not returned or destroyed, they shall remain subject to this Protective Order.

6. All Protected Materials shall be maintained by the Participants and Reviewing Representatives in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 7, 8 and 9, as appropriate. The Secretary shall place any Protected Materials filed with the Commission in a nonpublic file in accordance with 18 C.F.R. § 388.112. By placing such documents in a non-public file, the Commission is not making a determination on any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities. For documents submitted to Commission Litigation or other Staff (“Staff”), Staff shall follow the notification procedures of 18 C.F.R. § 388.112 before making public any Protected Materials.

7. Protected Materials shall be treated as confidential by each Participant and by each Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 10. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

8. A Reviewing Representative may not use information contained in or knowledge gained from any Protected Materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.

9. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first Reviewing representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

(b) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

10. (a) Notwithstanding any other provision of this Protective Order, a Participant may designate as “Highly Confidential” any Protected Materials that fall in one or more of the following categories: (1) Section 15(13) materials; (2) trade secrets or other protected forms of intellectual property; or (3) materials which, if revealed to one or more other Participants, could have a detrimental impact on the business or competitive position of the Participant providing such materials or a related entity. This designation shall be indicated by placing on such materials the following legend: “HIGHLY CONFIDENTIAL PROTECTED MATERIALS: DISCLOSURE PROHIBITED BY PROTECTIVE ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION” or words or similar import.

(b) Materials designated as Highly Confidential shall be provided solely to: (i) Commission Staff; (ii) outside counsel for each Participant who have entered an appearance in this proceeding; and (iii) outside consultants or experts who are otherwise qualified Reviewing Representatives under Paragraph 3(d).

(c) The Presiding Judge or the Commission may order that an otherwise qualified Reviewing Representative who is an officer, director or employee of a Participant be allowed to review Highly Confidential materials where: (i) review by outside counsel and/or outside consultants/experts is demonstrated to be inadequate; and (ii) the proposed Reviewing Representative is not directly involved in, and has no supervisory or advisory responsibilities with respect to the transportation, purchase, sale, marketing or exchange of Petroleum or the pricing of such transportation, purchase, sale, marketing or exchange. In addition, to allow such officer, director or employee of a Participant access to any Section 15(13) material, the Presiding Judge or Commission must find that allowing such access will not be to the detriment or prejudice of a shipper or consignee or improperly disclose a shipper or consignee’s business transactions to a competitor. If a Participant files an interlocutory appeal of such an order or requests that the issue be certified to the Commission, such officer, director, or employee shall not have access to the Protected Materials until such appeal or request is ruled upon. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Presiding Judge’s or Commission’s decision.

11. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraphs 3(d), access to Protected Materials by that person shall be terminated. Even

if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

12. Subject to Paragraph 17, the Presiding Judge or the Commission shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Presiding Judge or the Commission, the parties to the dispute shall use their best efforts to resolve it. Any Participant that contests the designation of materials as protected (including the designation of materials as Highly Confidential) shall notify the party that provided the protected materials by specifying in writing the materials whose designation is contested. This Protective Order shall automatically cease to apply to such materials (or in an appropriate case such materials shall cease to be treated as Highly Confidential) ten (10) business days after the notification is made unless the designator, within said ten-day period, files a motion with the Presiding Judge or the Commission, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the Participant seeking protection. If the Presiding Judge or the Commission finds that the materials at issue are not entitled to protection, the procedures of Paragraph 20 shall apply. The procedures described above shall not apply to protected materials designated by a Participant as Critical Energy Infrastructure Information. Materials so designated shall remain protected and subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's Critical Energy Infrastructure Information Coordinator that such materials need not remain protected.

13. Subject to Paragraph 11, all copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to Protected Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked PROTECTED MATERIALS and shall be filed with the Commission under seal and served under seal upon the Presiding Judge, Commission Staff, and all Reviewing Representatives who are on the service list. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information – Do Not Release". For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such, will also be filed with the Commission and served on all parties on the service list and the Presiding Judge. Counsel for the Producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

14. If any Participant desires to include, utilize or refer to any Protected

Materials or information derived therefrom in testimony or exhibits during the hearing in these proceedings in such a manner that might require disclosure of such material to persons other than Reviewing Representatives, such Participant shall first notify both counsel for the Producing Participant and the Presiding Judge or Commission of such desire, identifying with particularity each of the protected materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Presiding Judge or Commission.

15. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

16. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge, the Commission, or any other body having appropriate authority, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The Presiding Judge or Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

17. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge or the Commission.

18. All Protected Materials filed with the Commission, the Presiding Judge, or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information – Do Not Release."

19. If the Presiding Judge or the Commission finds at any time in the course of this proceeding that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for five (5) business days from the date of issuance of the Presiding Judge's or Commission's decision, and if the Participant seeking protection files an interlocutory appeal or requests that the issue be certified to the Commission, for an additional ten (10) business days. None of the Participants waives its rights to seek additional administrative or judicial remedies after the Presiding Judge's or Commission's decision respecting Protected Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof. The provisions of 18 C.F.R. § 388.112 shall apply to any requests for Protected Materials in the files of the Commission under the Freedom of Information Act (5 U.S.C. § 552).

20. Nothing in this Protective Order shall be deemed to preclude any

Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

21. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

22. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this (these) proceeding (s). Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Buckeye Pipe Line Company, L.P.

Docket No. IS12-185-000

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Title: _____

Representing: _____

Date: _____