142 FERC ¶ 61,140
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Buckeye Pipe Line Company, L.P. Docket Nos. IS12-185-000
IS12-185-001

ORDER TERMINATING EXPERIMENTAL PROGRAM AND DENYING REHEARING

(Issued February 22, 2013)

1. On March 1, 2012, Buckeye Pipe Line Company, L.P. (Buckeye) filed tariffs, pursuant to the terms of an experimental rate program, to increase rates for the transportation of refined petroleum products, including gasoline and jet or aviation turbine fuel throughout the Northeast and Midwest regions of the United States. On March 30, 2012, the Commission issued an order rejecting the tariffs, and directing 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.[1] This order terminates Buckeye's experimental rate program and denies Buckeye's request for rehearing of the March 30, 2012 order.

Background

2. Opinion No. 360 authorized Buckeye to implement an experimental program for interstate rate regulation.[2] The program consisted of two parts. In markets that were determined to be competitive,[3] Buckeye was permitted to charge market-based rates.

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

[2] *Buckeye Pipe Line Co., L.P.*, Opinion No. 360, 53 FERC ¶ 61,473 (1990); *aff'd on reh'g*, Opinion No. 360-A, 55 FERC ¶ 61,084 (1991).

[3] The 15 markets were: Scranton-Wilkes Barre; Pittsburgh; Harrisburg-York-Lancaster; Philadelphia; Columbus; Lima; Toledo; Detroit; Saginaw-Bay City; Fort Wayne; Kokomo-Marion; Indianapolis; Hartford-New Haven-Springfield; Seattle and Terre Haute.

Such rates were limited to no more than a 15 percent real increase over any two-year period, and no individual rate increase in competitive markets could exceed the change in the GNP implicit price deflator plus two percent. In all other markets,[4] an individual rate increase could not exceed an index composed of the volume-weighted average price change in Buckeye's rates in the competitive markets since the individual rate was last increased. Any volume-weighted decrease in Buckeye's competitive markets was required to be accompanied by a corresponding decrease in the rates charged in the other markets. The experimental program initially operated for three years, and after review, the Commission permitted Buckeye to continue the program beginning January 1, 1995, subject to reevaluation when the Commission conducted its five-year review of the indexing methodology for oil pipeline rates established in Order No. 561.[5]

3. On March 1, 2012, Buckeye filed to increase its rates pursuant to the experimental program. The proposed rate changes in markets where Buckeye had been found to lack significant market power reflected an average volume-weighted increase of 3.0799 percent. Buckeye stated that no individual rate increase in these markets exceeded the rate trigger or rate cap pursuant to the guidelines established in Buckeye's program of rate regulation. All changes in rates in markets where Buckeye had been found to have significant market power were less than the corresponding 3.0799 percent volume-weighted average of increases imposed in the competitive markets during the same period.

4. Delta Air Lines, Inc. (Delta) protested Buckeye's Filing. Delta stated although the Commission stated that it would reevaluate Buckeye's program when it conducted the five year oil pipeline index review, the Commission had not done so nor had it determined whether the program was consistent with the Commission's index price mechanism or results in just and reasonable rates for non-competitive markets. Delta asserted that the rates for aviation or jet fuel to non-competitive markets, including the New York City airports, have been increased for almost two decades under Buckeye's

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[4] Because Buckeye had no tariffs on file to serve the Youngstown-Warren and Buffalo markets, the Commission made no findings with respect to those two markets. The Commission found that the New York City Market should continue to be regulated because the record was insufficient to make a finding of Buckeye's market power in that market. Four markets, Syracuse-Utica, Rochester, Binghampton-Elmira, and Cleveland, were found to be markets in which Buckeye had significant market power.

[5] *Buckeye Pipe Line Co., L.P.*, 69 FERC ¶ 61,302, at 62,163 (1994) (citing *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs., Regulations Preambles, January 1991-June 1996 ¶ 30,985 (1993); *order on reh'g*, Order No. 561-A, FERC Stats. & Regs., Regs. Preambles, January 1991- June 1996 ¶ 31,000 (1994), *aff'd, Assoc. of Oil Pipelines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996)).

experimental program, and these increases were greater than would have occurred under the Commission's indexing methodology.

5. In its March 30, 2012 order, the Commission stated that given that Commission-approved alternative ratemaking methodologies have been made available to all oil pipelines since Buckeye's program was first approved, and are widely used, the Commission questioned whether it is appropriate to continue the experimental program. In light of this, the issues and concerns raised by Delta, and the fact that the Commission has never reevaluated Buckeye's experimental rate program, the Commission directed Buckeye to show cause why it should not be required to discontinue its experimental program and avail itself of the various ratemaking methodologies used by other oil pipelines in Part 342 of the Commission's regulations. Buckeye was directed to show cause why it should not be made to cease using this experimental rate program. Because the Commission determined that it would review the continued efficacy of Buckeye's program, the Commission found it appropriate to reject the tariffs filed by Buckeye.

6. On April 23, 2012, Buckeye filed a request for rehearing of the Commission's March 30, 2012 show cause order. Buckeye does not challenge the Commission's ability to investigate the experimental rate program to determine whether the program should continue. Rather, Buckeye's rehearing request is limited to its argument that the Commission erred in rejecting all of the tariffs filed in Docket No. IS12-185-000 without making a finding that they violated a regulation, order, or policy of the Commission.

7. Buckeye filed its response to the show cause order on May 15, 2012. On June 29, 2012, Delta filed comments to Buckeye's response. In addition, comments in support of Delta were filed by Continental Airlines, Inc., United Airlines Fuels Corporation, and United Airlines, Inc.; and the JFK Fuel Committee.[6] Buckeye and Delta also filed subsequent answers after the initial round of comments.

8. Buckeye asserts that the experimental rate program has been a success. Buckeye states that the Commission clearly has the authority to terminate the program and, given the alternatives under Order No. 561, there is less necessity for the program than when it was first established in 1991. However, Buckeye argues that given the substantial benefits of the experimental rate program, and specifically the meshing of the program with both the Commission's goals for market-based rates and the streamlined regulatory

[6] The JFK Fuel Committee consists of shippers, sellers, customers and/or consumers of jet or aviation turbine fuel shipped to the New York City area airports, including at J.F. Kennedy International Airport, LaGuardia Airport and Newark International Airport via the Buckeye pipeline system. The J.F. Kennedy Airport is administered by the Port Authority of New York and New Jersey. The JFK Fuel Committee is an advisory body that consults with the Port Authority on fuel services and related issues.

regime contemplated by the Energy Policy Act of 1992 (EPAct of 1992), Buckeye submits that the Commission should not terminate the program and should not consider as a factor in its decision the extent the Buckeye program fails to conform to the Commission's generic oil pipeline ratemaking methodologies, which were established after the Buckeye experimental rate program was initiated. Indeed, Buckeye submits that given what it considers the beneficial results of the program, it would be appropriate to allow other pipelines that serve both competitive and non-competitive markets to apply for a similar alternative program.

9. Buckeye, however, acknowledges that whether to continue the program is the Commission's prerogative, and Buckeye recognizes that the Commission may elect to align Buckeye's ratemaking with the generic alternatives of Part 342 of the regulations. Should the Commission so decide, Buckeye submits that it should have the same ratemaking flexibility in its competitive markets as other market-based pipelines. For the less competitive markets, Buckeye asserts that indexation and its alternatives should govern the rates from the date of termination of the program -- including Buckeye's right to seek market-based rate authority in other markets (Cleveland, upstate New York) as well as in New York City, for which the Commission made no finding as to competition in Opinion No. 360. Finally, Buckeye contends that any changes to the rates set under the program should be prospective only.

10. Delta submits that Buckeye has failed to demonstrate that the experimental rate program should be retained. Delta asserts that the rates resulting from the experimental rate program appear to be yielding excessive returns and creating cross-subsidies between competitive and noncompetitive markets. Delta asserts that Buckeye's rates increased at a faster rate than those rates would have under the Commission's indexing regulations, while Buckeye's costs increased less than its rates and less than industry costs, leading to excessive returns. Delta contends that as a result the Commission should require Buckeye to file its rates using the Commission-approved alternative methodologies set forth in Part 342.

Discussion

11. Buckeye's experimental rate program arose from a proceeding where Buckeye sought market-based rates for 22 markets. The rate program was proposed as an experiment so the Commission could obtain information as to the strengths and weaknesses of the program. The Commission determined that the use of price changes in markets where Buckeye lacked significant market power to set caps for price changes in markets where it did have market power was a regulatory approach that could be supported on a limited experimental basis.[7] Thus, the Commission allowed Buckeye to proceed with its experiment for a three-year period. Due to the success of the program

[7] Opinion No. 360, 53 FERC at 62,680.

during the initial three-year period the Commission allowed Buckeye to extend the program beginning on January 1, 1995. The Commission had recently issued Order No. 561, which, among other things, provided for a provided a simplified and generally applicable approach to changing rates through use of an index system to establish ceiling levels for such rates. The Commission stated that "When the Commission reviews the operation of the index established for oil pipelines generally as provided in Order No. 561, it will also reevaluate Buckeye's program. If at that time it appears that Buckeye should be required to cease operations under the experimental program, the Commission will so order."[8]

12. In the seventeen years since the experimental program was reauthorized, the tariff filings made by Buckeye pursuant to experimental program have not been protested and have been accepted by the Commission until the filing in Docket No. IS12-185-000. However, during that same time period, while there were several five year reviews of the Commission's Oil Pipeline Index, the Commission did not review the operation of the experimental program as anticipated in the 1994 order extending the rate program. Delta's protest of the Docket No. IS12-185-000 tariff filing and its highlighting of the lack of Commission reassessment of the program led the Commission to issue its show cause order.

13. The courts have given the Commission special deference in the use of experiments to obtain data developed in the real world.[9] Given the length of time that has elapsed since Buckeye's program was first authorized and Buckeye's desire to continue the program in the face of strenuous objection of its shippers, it is not simply a case of the Commission exercising its discretion to allow experiments. Rather, the issue appears to be whether Buckeye's experimental program should be made permanent.[10] When viewed in that light, the Commission's authority is more constrained. As the courts have found, "we expect FERC to support its decision with substantial record evidence to justify a

[8] *Buckeye Pipe Line Co.*, 69 FERC ¶ 61,302, at 62,163 (1994).

[9] *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 at 30 (D.C. Cir. 2002).

[10] It is important to note that allowing the experimental program to become permanent has implications beyond Buckeye. In the Opinion No. 360 proceeding, Buckeye stated its "proposal is not, however, intended to be generically applicable to other oil pipelines." Opinion No. 360 at 62,677. However, in its response to the show cause order Buckeye states that "given the results of the program, it would be appropriate to allow other pipelines that serve both competitive and non-competitive markets to apply for a similar alternative program." Buckeye's May 15, 2012 Response at 43.

permanent change in policy, rather than a *temporary* experiment."[11] After the experimental rate program was introduced, oil pipelines were offered a wide variety of ratemaking methodologies pursuant to Order No. 561. Oil pipelines can follow the generally applicable indexing methodology or can file rates under one of the alternative ratemaking methodologies (cost-of-service rates, market-based rates, or settlement rates). The Commission finds that the ratemaking methodologies in Part 342 provide oil pipelines with a variety of choices to meet varying conditions and have worked well. The Commission, therefore, as a policy matter declines to make any permanent changes to its oil pipeline ratemaking methodologies by permanently adopting Buckeye's experimental rate program. Accordingly, the Commission finds that Buckeye's experimental rate program must be discontinued.

14. Because Buckeye's experimental program is being terminated, any future changes to Buckeye's rates must be filed rates pursuant to the methodologies available in Part 342 of the Commission's regulations. Buckeye must also delete Item 120 (which memorializes the experimental program authorized in Opinion No, 360) from its Rules and Regulations tariff. For the markets that were found competitive pursuant to Opinion No. 360, Buckeye will not have to re-qualify for market-based rates and will be allowed to continue to charge market-based rates. However, as with any other market-based rate, this finding does not prevent a shipper from filing a complaint (with its attendant burden of proof) asserting that a market is no longer competitive because of changed circumstances and that Buckeye, in fact, does not lack significant market power. With respect to the markets where Buckeye was found to have significant market power, Buckeye may file future rates pursuant to any of the methodologies available in Part 342 of the Commission's regulations. However, the rates for the New York City market will be addressed in two pending filings before the Commission.[12]

15. The final issue to be addressed is Buckeye's assertion in its rehearing request that the Commission erred in rejecting the rates filed in Docket No. IS12-185-000. The Commission finds that this issue is moot because Buckeye's experimental program is being terminated. Given the Commission's broad discretion over experiments, the authority the Commission retained to terminate the experiment, and Buckeye's acknowledgment of the Commission's clear authority to terminate its rate program, the Commission could have simply terminated the program and rejected the tariff sheets in

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[11] *Interstate Natural Gas Ass'n of America v. FERC*, 617 F.3d 504 at 509 (D.C. Cir. 2010).

[12] In Docket No. OR12-28-000, several airlines filed a complaint alleging that Buckeye's rate to the New York City airport destinations are unjust and unreasonable, and request the establishments of just and reasonable rates. In Docket No. OR13-3-000, Buckeye filed an application to charge market-based rates for the same New York City market destinations.

Docket No. IS12-185-000 rather than issue a show cause order. The show cause order, however, allowed the Commission to consider the arguments of the parties as well as review the broader policy implications of Buckeye's rate program outside of the 30-day statutory period for oil pipeline filings. Currently, Buckeye is still charging rates previously approved under its experimental program, but can no longer adjust those rates pursuant to its experimental program, which is being terminated as of the issuance date of this order. Any future changes in those rates must be made pursuant to the Commission's generic oil pipeline rate methodologies and procedures. Because these are Buckeye's current legal rates on file, the pipeline will be permitted to continue to charge such rates until it chooses to file a future rate change pursuant to Part 342 of the Commission's regulations, or the rates are changed as a result of a successful complaint against those rates.

The Commission orders:

(A) Buckeye's experimental rate program is terminated pursuant to the discussion above.

(B) Buckeye's request for rehearing of the March 30, 2012 show cause order is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.