VI. CONCLUSION

An oil pipeline will be permitted to charge whatever rates it can negotiate in the marketplace, or market-based rates, if it lacks significant market power in its relevant product and geographic markets.[638] As a general matter, the Commission will analyze an oil pipeline's application to charge market-based rates by first defining the pipeline's product and geographic markets, and then assessing certain factors reflective of the pipeline's market power in those defined markets. The Commission has established over time that the key indicators of market power it will cite to make this determination are market share and market concentration.[639] The Commission has also established the market share and market concentration statistics that will cause it to find market power (generally HHI over 2500, market share over 50 percent, or a combination of HHI close to 2500 and market share nearing 50 percent).[640] Other factors, such as potential competition and excess capacity will generally only be cited in close cases.[641] Therefore, one of the principal disputes now centers on the geographic market and what alternative sources should be included in the market share and market concentration statistics.

In the past, the Commission required cost studies to justify that alternative sources of transportation were good alternatives in terms of price. This ensured that competition was not simply assumed, as foreclosed in *Farmers II*, but established through detailed evidence. The D.C. Circuit Court of Appeals' decision in *Mobil*, however, cast doubt on the continued need for a detailed cost analysis. The court in that case simply relied on the applicant pipeline's market share in actual transportation of the entire source basin's production.[642] In addition, the *Mobil* decision pointed out certain areas in the Commission's required cost analysis that did not meet judicial approval.[643] In response, the Commission clarified that good alternatives in terms of cost necessarily include all alternatives that are actually used.[644] For unused but useable alternatives to be determined cost competitive, the market must not be capacity constrained (otherwise shippers would take advantage of their availability) and their costs must be within an acceptable range to the competitive price as evidenced through a detailed cost study.[645]

[638] *See* Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,186-87.
[639] *See Colonial*, 92 FERC ¶ 61,144; *Mobil*, 133 FERC ¶ 61,192 at P 54.
[640] *See, e.g., Kaneb*, 83 FERC ¶ 61,183 at 61,761; *SFPP*, 84 FERC ¶ 61,338 at 62,494 & n.8; *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,677-78, 61,682-86.
[641] *See Mobil*, 133 FERC ¶ 61,192 at P 54; *Enterprise TE Products*, Opinion No. 529, 146 FERC ¶ 61,157 at P 54.
[642] *Mobil*, 676 F.3d at 1102-03.
[643] *Id.* at 1103-04.
[644] *Enterprise Products Partners*, 146 FERC ¶ 61,115 at PP 53-56, 70.
[645] *Id.* PP 68-70; *Enterprise TE Products*, Opinion No. 529, 146 FERC ¶ 61,157 at P 19.