

A. **Opinion Nos. 360 and 360-A in the Buckeye Pipe Line Company Proceeding Adopt Market-Based Rates on a Case-by-Case Basis**

The Commission's allowance of market-based rates on a case-by-case basis originated in a series of orders related to Buckeye Pipe Line Company's request for a general rate increase. The Commission detailed in this proceeding the methodology it would use to assess a pipeline's market power, how it would define the pipeline's product and geographic markets, and the factors it would assess in analyzing a pipeline's market power. The Commission continues to rely on Opinion Nos. 360 and 360-A for the proper overall methodology to employ, the analysis to define the product market, and the basic underpinnings for defining the geographic market. In addition, while some of the factors the Commission used to analyze Buckeye's market power have been cited less and less, how the Commission calculated and analyzed the factors that have risen to the forefront of the analysis is highly relevant today.

1. *Interlocutory Order Recognizes Market-Based Rates on a Case-by-Case Basis*

In 1987, in accordance with Opinion No. 154-B methodology, Buckeye filed a proposed six percent general rate increase.¹³³ As part of its presentation, Buckeye filed certain cost allocation data relating to individual rates on its system pursuant to a protective order that prevented public disclosure of the information.¹³⁴ The judge ordered Buckeye to disclose its cost allocation data by the date of the evidentiary hearing on the basis that such cost of service data was of the type usually released to the public.¹³⁵ Buckeye filed an interlocutory appeal to the Commission, arguing in part that "it should not be forced to suffer the serious competitive injury the ALJ found likely to occur from disclosure of the involved cost data when it is unclear whether cost-based...ratemaking is required under *Farmers...II*."¹³⁶

Buckeye's interlocutory appeal was "primarily directed to the narrow issue of whether certain cost-of-service data should continue to be protected."¹³⁷ The Commission used the opportunity, however, to establish that if a pipeline lacked significant market power a form of "lightheaded" regulation less stringent than the Opinion No. 154-B cost-based methodology would be permitted. Citing *Farmers II*, the Commission held that it could deviate from strict cost-of-service rate review if non-cost circumstances, such as competition, demonstrated that the resulting rates from such an approach would satisfy the just and reasonable standard.¹³⁸

Analytical Framework and Factors of Analysis. Relying on *Farmers II*, the Commission noted that the competitive forces warranting lightheaded regulation "would have to be clearly identified and must be shown to keep prices at a just and reasonable level to ensure that the Commission can protect shippers from unreasonable rates under the [Interstate Commerce Act]."¹³⁹ The Commission held that the oil pipeline would have the burden of demonstrating

¹³³ See *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,659.

¹³⁴ *Buckeye*, 44 FERC ¶ 61,066 at 61,883.

¹³⁵ *Id.* at 61,882-83.

¹³⁶ *Id.* at 61,883.

¹³⁷ *Id.* at 61,884.

¹³⁸ *Id.* at 61,885 (citing *Farmers II*, 734 F.2d at 1510; *Transwestern Pipeline Company*, Order No. 500, 43 FERC ¶ 61,240, at 61,650 (1988)).

¹³⁹ *Buckeye*, 44 FERC ¶ 61,066 at 61,885.

that it was entitled to regulation less stringent than cost-based ratemaking.¹⁴⁰ To satisfy that burden the pipeline would have to demonstrate it lacked significant market power in its relevant markets.¹⁴¹ The Commission noted that an oil pipeline could demonstrate a lack of market power by showing, for instance, that shippers and buyers have sufficient alternatives to the applicant pipeline.¹⁴²

The Commission concluded by remanding the proceeding to the judge to evaluate the competitive conditions within the relevant markets and determine whether Buckeye had market power in those markets.¹⁴³ Once a determination was made with respect to market power, the findings were to be submitted to the Commission to determine whether the proposed rates should be evaluated under the Opinion No. 154-B cost-based methodology or under a less strict standard.¹⁴⁴

2. Interlocutory Order Clarifies and Elaborates on Market-Based Rate Inquiry

Upon rehearing of the interlocutory order, the Commission clarified and elaborated on several aspects of the required market power analysis. The Commission outlined the particular methodology it would employ and the factors of analysis it would use to assess the pipeline's market power. The Commission's methodology and factors of analysis were largely adopted from those used to assess monopoly power under the antitrust statutes. The basic framework of the analysis articulated remains in place today.

Analytical Framework and Factors of Analysis. The Commission elaborated that its envisioned analysis into an oil pipeline's market power would "to a large extent...mirror the type of inquiry used by courts in evaluating monopoly power."¹⁴⁵

In determining whether such power exists, it is necessary to define the relevant market, which is normally identified in terms of the products affected and geographic market dimensions. Once the relevant market has been determined, monopoly power can be proven by actual exercise of control over prices or exclusion of competition (limitations on this power by regulatory agencies is also relevant), or in the absence of actual exercise of control or exclusion of competition, by evidence of an ability to control prices or exclude competition. Factors considered here include market share...economies of scale, competitor size and performance, entry barriers, pricing practices, market stability, and other considerations. From this it can be seen that, absent a clear case of actual control of prices or exclusion of competition, the determination as to whether monopoly power exists in any given case can involve weighing a myriad of factors.¹⁴⁶

¹⁴⁰ *Id.* at 61,886.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Buckeye*, 44 FERC ¶ 61,066 at 61,886.

¹⁴⁵ *Buckeye*, 45 FERC ¶ 61,046 at 61,162.

¹⁴⁶ *Id.* at 61,162-63.

The Commission posited that its list of factors to determine market power “is illustrative of the types of evidence that the parties may submit in attempting to address the issue of market power.”¹⁴⁷ The Commission also noted the factors considered by the DOJ in its report on Oil Pipeline Deregulation may be relevant to the analysis. These included “the number and size of pipeline carriers or alternate suppliers in the relevant market (such data was used to calculate a Herfindahl-Hirschman index), the cost of truck transportation between geographic markets, the presence of excess capacity on a regulated pipeline in question, and the potential for certain competitors to increase sales.”¹⁴⁸

On rehearing, the Commission clarified that it envisioned a monopoly power type inquiry would be conducted. The basic framework, which remains in place today, called for the pipeline’s product and geographic markets to be defined and then the market power in those defined markets to be analyzed through the assessment of certain factors. The Commission also listed numerous factors it would find persuasive in making that assessment. Ultimately, the inquiry the Commission required was a determination on whether the pipeline actually controls prices or excludes competition in a market area, or has the ability to control prices or exclude competition in a market area.

3. Opinion No. 360 Establishes the Market Based Rate Inquiry

In Opinion No. 360, the Commission put its case-by-case approach to practical use. This resulted in the Commission’s first rulings on how to determine the proper product and geographic markets, and how the factors to assess market power in those defined markets would be calculated and weighed.

On February 12, 1990, the judge issued the initial decision finding that Buckeye lacked significant market power in all twenty-two of the markets in which it provided transportation services.¹⁴⁹ On exceptions, the Commission affirmed the conclusion that Buckeye lacked significant market power in fifteen markets. But, the Commission found four markets in which Buckeye had significant market power, reversed because of inadequate evidence as to the New York market, and held two others were inappropriate for consideration because Buckeye had no tariff on file to serve those markets.¹⁵⁰

Analytical Framework and Factors of Analysis. In evaluating the evidence presented at the hearing and the judge’s findings on Buckeye’s market power, the Commission first defined the applicant pipeline’s product and geographic markets.¹⁵¹ The Commission held that “before market power may be assessed, the relevant product and geographic markets must be defined.”¹⁵²

¹⁴⁷ *Id.* at 61,163 n.20.

¹⁴⁸ *Id.* at 61,163 n.21.

¹⁴⁹ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,658-59.

¹⁵⁰ *Id.* at 62,659, 62,674.

¹⁵¹ *Id.* at 62,663.

¹⁵² *Id.*

The Commission then used as an initial screen the HHI calculations of market concentration in the pipeline's relevant markets calculated by Trial Staff.¹⁵³ Markets with extremely low HHI numbers were subjected to less scrutiny.¹⁵⁴ For all other markets, the Commission weighed a myriad of factors, including "the potential entry of competitors into the market, available transportation alternatives, market share, availability of excess capacity," and the presence of large buyers able to use their own market power to exert downward pressure on transportation rates.¹⁵⁵ The Commission then concluded whether, on balance, those factors established that Buckeye had significant market power in any particular market that required continued close regulatory oversight of its rates.¹⁵⁶

The Commission has retained this overall methodological framework, which defines the product and geographic markets and then assesses certain factors of market power in those defined markets. The use of market concentration numbers alone as an initial screen, however, is not used in the current Commission analysis. Instead, the Commission analyzes every market, but uses both the market share and market concentration statistics as the primary factors it will cite to in its analysis.

Product Market. The judge found that the relevant product market was the transportation of all refined pipeline petroleum products.¹⁵⁷ An intervenor, the Air Transport Association, contended that the relevant product market should be differentiated into jet fuel, gasoline, and fuel oil markets because they are separate products that cannot be substituted for one another as to end use.¹⁵⁸

The Commission held that the appropriate inquiry to determine the product market is whether products are substitutes for one another and whether their prices move together.¹⁵⁹ If they are substitutes, those products are properly within the same product market.¹⁶⁰ The Commission found that the ease of substitution between petroleum products both in their transportation and production, even if not in end use, showed that the relevant product market was the transportation of all refined petroleum products, not the transportation of specific differentiated products.¹⁶¹

The Commission noted that the "substitution of the transportation of one petroleum product for the transportation of another petroleum product is nearly universal among pipelines."¹⁶² Further, as to production, refiners of petroleum products can switch their production mix in response to an increase in the price of one as compared to the other, which causes their prices to move together.¹⁶³ For example, an increase in the price of jet fuel as compared to gasoline will cause a switch to produce more jet fuel, decreasing the supply of

¹⁵³ *Id.*

¹⁵⁴ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,663.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 62,663-64.

¹⁵⁹ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,664.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

gasoline, causing the price of gasoline to also increase.¹⁶⁴ Therefore, the Commission concluded that all petroleum products were substitutes for each other in transportation and production, even if not in use, and defined the product market as the transportation of all refined pipelineable petroleum products. The Commission's analysis in this case for determining the product market and proper substitutes applies today.

Geographic Market and Alternative Sources of Transportation. In addition to defining the products the pipeline transports, it is also necessary to define the geographic area in which the pipeline transports those products in order to measure market power. The judge in *Buckeye* determined that the relevant BEAs, including all supplies of transportation from all origins to those areas, would serve as the geographic market.¹⁶⁵ "BEAs are geographic regions surrounding major cities that are intended to represent areas of actual economic activity."¹⁶⁶

The Air Transport Association contended that the relevant geographic markets should be the individual airports to which Buckeye transported jet fuel.¹⁶⁷ The Commission outlined the purpose of defining the geographic market, and adopted the process for making that determination that was utilized by Trial Staff. The Commission held that the primary purpose in defining the geographic market "is to identify an area in which the price of the relevant product is largely determined by the buyers and sellers within the area."¹⁶⁸ That is, the goal is to identify the area around the pipeline's terminal where viable competition exists and include alternative suppliers within that area in the market power analysis. The Commission found that a hypothetical price increase in the relevant product (the threshold price increase) "is used to estimate the ability of buyers to avoid the price increase by purchasing the same product from sellers in other areas."¹⁶⁹ The process for defining the geographic area, as testified by Trial Staff witness Dr. Ogur and approved by the Commission, was as follows:

In his analysis Dr. Ogur assumed a threshold price increase in [a proposed] geographic area. He then looked for evidence that buyers could travel to sellers in other areas and for evidence that sellers in other areas could ship into the area in question. If buyers can avoid a price increase in either manner, then the geographic market must be expanded to include the other area of competing sellers. The process is repeated until a geographic market is defined within which the price increase can be profitably imposed on buyers.¹⁷⁰

The threshold price increase Dr. Ogur used was an increase of 0.5 cents/gallon (which amounted to a 40 percent price increase over Buckeye's average transportation rate).¹⁷¹ Dr. Ogur concluded, and the Commission agreed, that a BEA was a reasonable approximation of the relevant geographic market for the delivered product and was the smallest geographic area that

¹⁶⁴ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,664.

¹⁶⁵ *Id.* at 62,661.

¹⁶⁶ *Id.* at 62,661 n.13.

¹⁶⁷ *Id.* at 62,665.

¹⁶⁸ *Id.*

¹⁶⁹ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,665.

¹⁷⁰ *Id.*

¹⁷¹ *Buckeye Pipe Line Co., L.P.*, 50 FERC ¶ 63,011, at 65,049 (1990) (Initial Decision); *see also Enterprise TE Products*, 141 FERC ¶ 63,020 at P 195.

seemed reasonable.¹⁷² The Commission found that it was not reasonable to have an area smaller than a BEA because viable competition to the pipeline existed within the BEAs. Specifically, buyers could avoid a hypothetical threshold price increase of 0.5 cents/gallon through the presence of competitive trucking shipments that existed within the BEAs.¹⁷³

Therefore, the Commission in *Buckeye* provided that the underlying goal in defining the geographic market is to identify viable competitive alternatives to a pipeline. The process of identifying those viable alternatives through a cost comparison utilizing a hypothetical price increase has undergone some change. The amount of the threshold price increase has been a matter of significant contention. Further, as detailed throughout this introduction, the Commission has limited the circumstances when a detailed price test is required.

Ability to Increase Price as Threshold for Market Power. After addressing the relevant geographic market, the Commission in *Buckeye* turned to the appropriate methodology for measuring market power within the defined product and geographic market. The judge held, and the parties agreed, that “market power is the ability to raise price above the competitive level for a significant time period.”¹⁷⁴ The judge further defined significant market power “as the ability to control market price by sustaining at least a 15-percent real price increase, without losing sales, for a period of at least two years.”¹⁷⁵ The parties generally agreed that this standard was acceptable as a minimum requirement for finding significant market power.¹⁷⁶ The Commission held this definition of market power was “adequate in this proceeding.”¹⁷⁷

The Commission further held that the relevant price to be considered in determining whether *Buckeye* could profitably increase its transportation prices above the competitive level was the “delivered product price,” which includes “all transportation costs and the product price from the source.”¹⁷⁸

Because shippers or customers in the destination market often have the option of switching away from purchasing transportation into the market, and, instead, purchasing the delivered product itself, suppliers of transportation must compete with suppliers of the delivered product... Therefore, any market power that might be exercised by transportation suppliers can be limited by delivered product suppliers who provide both product and transportation.¹⁷⁹

Buckeye had never increased its rates by more than 15 percent over a two year period however.¹⁸⁰ And no party attempted to show that *Buckeye* had (or did not have) the ability to do so in its defined product and geographic markets. The 15 percent increase in price used in *Buckeye* as the definition of a price increase that equates to market power has been used by the

¹⁷² *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,665.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 62,666.

¹⁷⁵ *Id.* A “real” price increase is one adjusted for inflation.

¹⁷⁶ *Id.*

¹⁷⁷ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,665.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 62,666.

Commission as a permissible range to use when comparing a hypothetical threshold increase in the competitive price to possible alternative sources of transportation.¹⁸¹

Market Power Statistics (Market Concentration and HHI). In *Buckeye*, the Commission addressed the factors it would use in its analysis and their parameters. In analyzing market power, the judge identified market concentration as one of the factors to be considered.¹⁸² The judge acknowledged the HHI¹⁸³ as a preliminary threshold measure of market concentration, but stated that the number and type of true economic alternatives were his paramount consideration.¹⁸⁴ Trial Staff and the Air Transport Association urged the Commission to more strongly consider market concentration and the HHI in determining Buckeye's market power.¹⁸⁵

The Commission first explained that “[m]arket concentration is a function of the number of firms in a market and their respective market shares, and HHIs are an appropriate and widely used measure of market concentration.”¹⁸⁶ The Commission determined that the proper method to calculate HHIs in this case was the method used by Trial Staff, which was based on delivery data, “e.g., deliveries into each BEA...”¹⁸⁷ At this time, the Commission declined the invitation to give the factor more weight or base the market power analysis primarily on market concentration however.¹⁸⁸ The Commission reiterated that the HHI is a useful factor in determining market power, however, because it provides useful information about the degree of concentration in a market and where on the competitive spectrum that market likely lies.¹⁸⁹

The Commission also noted that a high HHI raised concerns of cooperative, non-competitive behavior. In highly concentrated markets, the Commission observed that the pricing behavior of firms would directly impact the positions of their competitors, and firms would weigh the likely responses of their rivals before changing prices.¹⁹⁰

Therefore, the Commission determined that the analysis it would employ in evaluating Buckeye's market power would examine relevant BEAs as the geographic market, the transportation of refined pipeline petroleum products as the product market, and it would not elevate one particular factor over the others in the analysis, but instead analyze all factors under a balanced approach.

Analysis of Particular Markets. Most of the markets in *Buckeye* were uncontested and not discussed.¹⁹¹ In applying its analysis to the contested markets, the factors the Commission relied on included market concentration, market share, competition from alternative

¹⁸¹ See *Mobil*, 133 FERC ¶ 61,192 at P 24.

¹⁸² *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,665.

¹⁸³ The HHI is calculated by summing the squares of the individual market shares of all the market participants. See, e.g., *Williams*, Opinion No. 391, 68 FERC ¶ 61,136 at 61,661.

¹⁸⁴ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,666-67.

¹⁸⁵ *Id.* at 62,667.

¹⁸⁶ *Id.* at 62,667 n.45.

¹⁸⁷ *Id.* at 62,667.

¹⁸⁸ *Id.* at 62,667 n.45.

¹⁸⁹ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,667.

¹⁹⁰ *Id.* at 62,668-69.

¹⁹¹ *Id.* at 62,669.

transportation like barges or trucks, large buyers that might have leverage to exert downward pressure on prices, and excess transportation capacity within the market.¹⁹²

For example, in the Pittsburgh BEA, Buckeye faced competition from barges, a large buyer in USAir that purchased sixty-five percent of the product transported to the Pittsburgh airport, a significant amount of excess capacity above total deliveries, and potential competitive entry from trucking firms.¹⁹³ The Commission concluded:

[Trial Staff]...calculated an HHI of 2102 for Pittsburgh. This HHI suggests a degree of market concentration that, when considered with Buckeye's 43.7 percent market share, makes the decision with respect to this market a close call. However, after considering the nature and quality of the transportation alternatives relied on by the ALJ and the amount of excess capacity in the market, we conclude that Buckeye does not have significant market power in the Pittsburgh BEA.¹⁹⁴

Of note in the Columbus BEA, the Commission held that the competition Buckeye faced from a privately owned pipeline that served only its owners was relevant to the market power analysis.¹⁹⁵ In that market, even though the HHI was calculated to be 3051, the Commission found a lack of market power from Buckeye's market share of 28.5 percent; the existence of excess capacity; competition from trucking, barging, and the proprietary pipeline; and the presence of a large buyer.¹⁹⁶

The Commission found that Buckeye had market power in four of its markets. In those markets, generally the market share and HHI numbers were extremely high, and there was a lack of competition in fact or through potential entrants.¹⁹⁷ For instance, in the Cleveland BEA, the HHI was calculated to be in the range of 2400 to 5976, with a market share by Buckeye of 75.7 percent.¹⁹⁸ In the Rochester BEA, the HHI was calculated at 5378 with a 71.3 percent market share by Buckeye, and there were no potential entrants that could enter the market at a reasonable cost.¹⁹⁹

Viewed from a purely market share and market concentration perspective, the Commission found Buckeye had market power in a market when the HHI was above 2500 and

¹⁹² *Id.* at 62,669-70. The Commission measured "excess capacity" by comparing total transportation capacity to total deliveries into the market. *Id.* at 62,670.

¹⁹³ *Id.* at 62,669.

¹⁹⁴ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,669. For context regarding the HHI, under the DOJ Merger Guidelines, if an HHI is less than 1000, the market is viewed as competitive. *Id.* at 62,667 n.46. If the HHI exceeds 1800, the guidelines find that significant market power may be exercised, and the DOJ will examine entry conditions and other factors to determine whether a proposed merger is likely to increase market power. *Id.* Trial Staff in the *Buckeye* case recommended the use of an 1800 threshold, consistent with the approach suggested in the DOJ Merger Guidelines and the approach taken by the Commission in natural gas pipeline cases. *Id.*

¹⁹⁵ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,670-71.

¹⁹⁶ *Id.* at 62,671.

¹⁹⁷ *Id.* at 62,671-73.

¹⁹⁸ *Id.* at 62,671.

¹⁹⁹ *Id.* at 62,672.

market share was in excess of 50 percent.²⁰⁰ Likewise, from only a market share and market concentration perspective, the Commission generally found Buckeye did not have market power in markets where the HHI was below 2500 and market share was less than 45 percent.²⁰¹ However, as noted, the Commission found a lack of market power in the Columbus BEA where the HHI was 3051 because other mitigating factors were present.²⁰² Therefore, from a market power statistic perspective, HHIs above 2500 accompanied by market shares close to 50 percent were found to be indicative of market power. Those numbers along with the absence of other mitigating factors, such as a lack of excess capacity or lack of large buyers, led the Commission to a finding of market power.

Form of Lighthanded Regulation. After making its determination on Buckeye's market power in its various markets, the Commission adopted Buckeye's proposal for lighthanded regulation. In markets where Buckeye lacked market power, the Commission allowed Buckeye to charge rates it could negotiate in the market, but provided price caps and monitoring requirements.²⁰³ This is the only proceeding to date where the Commission has conditioned its allowance of market-based rates with price caps or monitoring requirements. The Commission remanded the proceeding to the judge to determine the just and reasonable baseline rate in markets where Buckeye had significant market power.²⁰⁴

²⁰⁰ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,671-73. The particular statistics the Commission relied on to find significant market power in the BEA markets were:

- Cleveland (HHI unclear, but calculated from 2400 to 5976; market share 75.7 percent);
- Rochester (HHI 5378; market share 71.3 percent);
- Syracuse-Utica (HHI 4783; market share 68.4 percent);
- Binghamton-Elmira (HHI 3401; market share 50.2 percent).

²⁰¹ *Id.* at 62,669-71. The particular statistics the Commission relied on to find a lack of significant market power in the BEA markets were:

- Pittsburgh (HHI 2102; market share 43.7 percent);
- Indianapolis (HHI unclear, but calculated from 1400 to 4678; market share 2 percent);
- Detroit (HHI unclear, but calculated from 1600 to 2252; market share 38.5 percent);
- Columbus (HHI 3051; market share 28.5 percent).

²⁰² *Id.* at 62,670-71.

²⁰³ In markets where Buckeye did not have market power, it was subject to a 15 percent real price increase cap over every two year period (which was the same threshold adopted as the definition of market power). *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,675, 62,680-81. It was also required to provide justification for certain increases below the cap in those markets. *Id.* In markets where Buckeye did have significant market power it was required to decrease its rates when there was "any average decrease in rates" in markets where it did not have significant market power. *Id.* at 62,682-83. And if Buckeye's rates in markets where it did not have significant market power increased on average by some percentage, it would be permitted to increase rates in markets where it did have significant market power by that average percentage increase. *Id.* The Commission also required Buckeye to submit annual reports detailing price and revenue changes to monitor Buckeye's market power, and the lighthanded regulation was accepted for a limited three-year time frame. *Id.* at 62,684-85. Subsequently, the Commission discontinued Buckeye's experimental market-based rate program, but for those markets that were found competitive in Opinion No. 360, Buckeye was permitted to maintain market-based rates in those markets without requalifying. *Buckeye Pipe Line Co., L.P.*, 142 FERC ¶ 61,140, at P 13 (2013). Buckeye has since applied for market-based rates in the New York City market, which the Commission set for hearing. *Buckeye Pipeline Co., L.P.*, 142 FERC ¶ 61,162 (2013).

²⁰⁴ *Buckeye*, Opinion No. 360, 53 FERC ¶ 61,473 at 62,685.

4. Opinion No. 360-A Adheres to Case-by-Case, Multi-Factored Analysis

In requesting rehearing of Opinion No. 360, the Association of Oil Pipe Lines urged the Commission to determine that some of its findings in *Buckeye* would apply in a broad fashion to future requests by oil pipelines for market-based rate treatment.²⁰⁵ For instance, the Association of Oil Pipe Lines requested that the Commission establish a rebuttable presumption that the product and geographic market definitions adopted in *Buckeye* would be utilized in future market power determinations.²⁰⁶ The Commission held that it would continue the case-by-case approach, at least until it gained more experience with oil pipeline market-based rate determinations.²⁰⁷ The Commission has continued to adhere to its methodology for defining the product market in any event, however, and has adopted a rebuttable presumption in favor of the use of BEAs as the geographic market.

The Association of Oil Pipe Lines also requested that the Commission make a broad recognition that competition could serve as the principal restraint on prices in the oil pipeline industry.²⁰⁸ It contended there was overwhelming evidence of competition in the oil pipeline industry as a whole which would support a rebuttable presumption that competition could serve as the principal regulation of oil pipeline rates.²⁰⁹ The Commission noted that this would require a party requesting a traditional cost based approach to bear the burden of proof, rather than the pipeline bearing the burden of demonstrating that some lighthanded regulatory approach should be used.²¹⁰ The Commission declined the request, recognizing that *Farmers II* rejected the reliance on presumed market forces to serve as the principal regulatory constraint on oil pipeline rates.²¹¹

Market Concentration and HHI. The Commission clarified in Opinion No. 360-A at the Association of Oil Pipe Lines' request that in future oil pipeline market analyses, "data other than delivery data (such as pipeline capacity) may be used as a basis for calculating HHIs," and that pipelines "are free to propose using delivery data or any other appropriate data for the purposes of calculating HHIs."²¹² In subsequent proceedings, the Commission would allow capacity based data and would require its use to calculate market concentration if delivery based data was used to calculate market share.²¹³ In addition, the practice would develop among the participants in these proceedings to provide multiple capacity and delivery based calculations for market share and market concentration.

²⁰⁵ *Buckeye*, Opinion No. 360-A, 55 FERC ¶ 61,084 at 61,260.

²⁰⁶ *Id.*

²⁰⁷ *Id.* The Commission also declined a similar request to adopt threshold HHI numbers which would serve as an irrebuttable presumption of a lack of market power. *Id.* at 61,261.

²⁰⁸ *Id.*

²⁰⁹ *Buckeye*, Opinion No. 360-A, 55 FERC ¶ 61,084 at 61,261.

²¹⁰ *Id.*

²¹¹ *Id.* at 61,260-61 (citing *Farmers II*, 734 F.2d at 1530).

²¹² *Id.*

²¹³ Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,192.