

167 FERC ¶ 61,042
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

April 18, 2019

In Reply Refer To:
Buckeye Pipe Line Company, L.P.
Docket No. IS18-228-002

Ms. Amy L. Hoff
Caldwell Boudreaux Lefler PLLC
1800 West Loop South, Suite 1680
Houston, TX 77027

Attention: Amy L. Hoff

Dear Ms. Hoff:

1. Buckeye Pipe Line Company, L.P. (Buckeye), Lucknow-Highspire Terminals, LLC (LHT), Sheetz, Inc. (Sheetz), C.H.R. Corp. (d/b/a Rutter's) (Rutters), and PBF Holding Company, LLC (PBF)¹ (collectively, the Parties) filed a joint Offer of Settlement (Settlement). The Settlement resolves all issues in the consolidated proceeding in Docket Nos. IS18-228, IS18-229 and IS18-230 (Affected Dockets). No adverse comments to the Settlement have been filed. On February 19, 2019, the Chief Administrative Law Judge certified the Settlement to the Commission as uncontested.²

2. Buckeye is an oil pipeline company engaged in the transportation of refined petroleum products in interstate commerce. As relevant here, Buckeye provides transportation services: (i) on its Midwest Products System (MPS) from various origins in Indiana, Michigan, Ohio, and Pennsylvania to destinations in the Pittsburgh, Pennsylvania market; and (ii) on its Eastern Products System (EPS) from various origins

¹ For purposes of this order, LHT, Sheetz, Rutters, and PBF are referred to as Intervenors.

² *Buckeye Pipe Line Co., L.P.*, 166 FERC ¶ 63,017 (2019).

in New Jersey and Pennsylvania to destinations in the Pittsburgh, Pennsylvania and Harrisburg, Pennsylvania markets.³

3. Opinion No. 558 revoked Buckeye's market-based rate authority for its Pittsburgh and Harrisburg, Pennsylvania markets and directed Buckeye to file revised rates for destination points in those markets.⁴ On March 16, 2018, Buckeye filed revised rates in the Affected Dockets. On April 2, 2018, Intervenors protested the tariff filing. On April 30, 2018, the Commission issued an order accepting and suspending the tariff and establishing hearing and settlement judge proceedings.⁵ The Parties engaged in settlement negotiations before Administrative Law Judge Lawrence Brenner on May 24, July 16-17, August 20-21, and September 5-6, 2018.⁶ The Parties state that the Settlement represents the culmination of more than six months of settlement negotiations and urge swift approval of the Settlement as an efficient means of resolving their pending disputes in the Affected Dockets. The terms of the Settlement and comments filed on the Settlement are briefly summarized below.

4. Section I identifies the Parties. Section II provides background on the proceeding.

5. Section III(A) defines the effective date of the Settlement and Settlement period. Section III(B) explains that the Affected Dockets will be resolved by the Settlement. Section III(C) states that Intervenors' Protest will be resolved by the Settlement, and incorporates a Joint Conditional Notice of Withdrawal of Protest (Conditional Notice) as Attachment A that will automatically become effective on the Effective date of the Settlement.

6. Section III(D) provides as follows. Buckeye will withdraw its Petition for Review that is currently pending before the U.S. Court of Appeals for the District of Columbia Circuit in Case No. 18-1253. Buckeye's May 30, 2018 Request for Clarification or Rehearing in Docket No. IS18-228 will become moot when this docket is terminated as a result of the withdrawal of Intervenors' Protest. Buckeye will tender Settlement payments to each of the Intervenors.⁷ Buckeye will also reduce rates for interstate

³ Settlement at 2.

⁴ *Guttman Energy, Inc. v. Buckeye Pipe Line Co., L.P.*, Opinion No. 558, 161 FERC ¶ 61,180 (2017).

⁵ *Buckeye Pipe Line Co., L.P.*, 163 FERC ¶ 61,066 (2018) (Hearing Order).

⁶ Settlement at 3.

⁷ The individual Settlement payment amounts to each of the Intervenors are set

transportation from Chelsea Junction, Pennsylvania to Mechanicsburg, Highspire, Sinking Springs, Eldorado, Coraopolis, Neville Island, and Pittsburgh, Pennsylvania (Chelsea Junction Origin Settlement Rates).⁸ Such reduced rates will be increased by two percent annually, effective July 1 of each year of the Settlement period commencing on July 1, 2019.⁹ Buckeye will establish a volume incentive rate for interstate transportation from Linden, New Jersey to Eldorado, Pennsylvania.¹⁰ In addition, Buckeye's EPS/MPS Settlement Rates¹¹ will be adjusted annually during the Settlement period in accordance with the FERC index, commencing with the July 1, 2018 FERC index.

7. Section III(E) describes a rate moratorium and duty to support the Settlement terms. Section III(F), as amended,¹² provides that the standard of review is as follows: "Once approved, the standard of review for any modifications to the Settlement Agreement, whether by the Commission acting *sua sponte* or by the settling Parties acting unanimously, shall be the ordinary just and reasonable standard. The standard of review for any modification of the Settlement Agreement at the request of one or more but less than all of the Parties or any non-parties to the Settlement Agreement shall be the most stringent standard permissible under law."

forth in confidential Attachments C through F, filed under seal.

⁸ The reduced rates are set forth in Section III.D(5).

⁹ The application of the annual increase to the Settlement rates is set forth in Table 1 of the Settlement in Section III.D(6).

¹⁰ The initial incentive rate will be \$1.2140 and will be available to any shipper who ships an average of 7,500 barrels per day from Linden to Eldorado in any calendar year. The incentive rate will be adjusted annually during the Settlement period in accordance with the FERC index, commencing with the July 1, 2019 FERC index. Settlement at Section III.D(7).

¹¹ The Settlement defines the EPS/MPS Settlement Rates as all of Buckeye's rates for interstate transportation of refined petroleum products that were adjusted by Buckeye's March 16, 2018 tariff filing, other than the Chelsea Junction Origin Settlement Rates. The EPS/MPS Settlement Rates are set forth in Table B-1 in Attachment B to the Settlement.

¹² An amendment to the Settlement was filed with the Commission on January 10, 2019.

8. Section III(F) further provides that the Settlement has been achieved on a “black box” basis, without the endorsement and/or acceptance of how or whether any cost-of-service principles or Commission policies should be applied. However, the Parties agree that at the end of the Settlement period, the Settlement rates as adjusted shall be deemed to establish the applicable ceiling levels for such rates.

9. Section IV sets forth various reservations and stipulations.

10. On January 7, 2019, Trial Staff filed comments. Trial Staff does not oppose acceptance of the Settlement by the Commission. However, Trial Staff notes that at litigation it would not support a number of the Settlement rates because: (1) they are unchanged from the proposed retroactively indexed market-based rates that the Commission previously found to be inconsistent with Commission policy;¹³ or (2) are unchanged from Buckeye’s proposed cost-based rates, where the income tax allowance has not been removed consistent with the Commission’s Revised Policy Statement on Treatment of Income Taxes.¹⁴ Nonetheless, Trial Staff states that the rates are part of a whole settlement package containing various forms of consideration. Trial Staff does not oppose approval of the Settlement with the understanding that the Parties agreed on the rates on a “black box” basis as part of a larger Settlement package that included other provisions such as an avoidance of future litigation, settlement payments, and a reduction in the rates from the origin of Chelsea Junction, Pennsylvania. On January 16, 2019, Buckeye filed reply comments responding to Trial Staff’s comments and requesting that the Commission approve the Settlement without modification or condition.

11. On February 19, 2019, the Chief Administrative Law Judge certified the Settlement to the Commission as uncontested and recommended that the Commission approve the Settlement. The Chief Administrative Law Judge explained that Trial Staff’s “alleged deviations from Commission precedent are mitigated by the fact that the Settlement Agreement, according to its express terms, ‘has been achieved on a ‘black box’ basis without the endorsement and/or acceptance of how or whether any cost-of-service principles or Commission policies should be applied.’”¹⁵

12. The Settlement appears to be fair and reasonable and in the public interest and is therefore approved, and the Conditional Notice is granted.

¹³ Trial Staff Initial Comments on Settlement at 11-13 (citing Hearing Order, 163 FERC ¶ 61,066 at P 18).

¹⁴ *Id.* at 13-15 (citing *Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227, *reh’g denied*, 164 FERC ¶ 61,030 (2018)).

¹⁵ *Buckeye Pipe Line Co., L.P.*, 166 FERC ¶ 63,017 at P 42.

13. Because the Settlement appears to provide that the standard of review for changes to the Settlement at the request of any non-Parties to the Settlement is “the most stringent standard permissible under applicable law,” we clarify the framework that would apply if the Commission were required to determine the standard of review in a later challenge to the Settlement by a third party. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,¹⁶ however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

14. The Commission’s approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings. This order terminates Docket Nos. IS18-228-000, IS18-228-001, IS18-228-002, IS18-229-000, and IS18-230-000.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁶ *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013).