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Buckeye Pipe Line Company, L.P.
Order Denying Rehearing and
Clarifying Prior Order
45 FERC ¶ 61,046 (1988)

The Air Transport Association (ATA) filed a request for rehearing or clarification of the Federal Energy Regulatory Commission's (Commission) July 15, 1988 order granting interlocutory appeals. (Buckeye Pipe Line Company, 44 FERC ¶ 61,066 (1988)). In that order, the Commission, inter alia, directed the Presiding Administrative Law Judge (ALJ) to conduct a two-stage hearing. The first stage would concern whether Buckeye Pipe Line Company (Buckeye) lacked significant market power in the relevant markets for which it sought reduced regulatory oversight of its proposed rate increases.

In the rehearing and clarification order (Buckeye Pipe Line Company, L.P., 45 FERC ¶ 61,046 (1988)), the Commission denied ATA's request for rehearing and granted its request for clarification of the type of evidence the ALJ could consider in evaluating Buckeye's market power. (Id. at 61,160).

First, the Commission reiterated its position that Farmers Union Central Exchange, Inc. v. Federal Energy Regulatory Commission, 734 F.2d 1486 at 1510 (D.C. Cir. 1984) and the applicable statutory provisions allowed oil pipelines to incur less stringent regulatory ratemaking standards if there was a lack of market power. (45 FERC ¶ 61,046 at 61,160). Second, the Commission refused to reconsider its decision to bifurcate the Buckeye proceeding. It did not agree with ATA's allegation that phasing the case would unnecessarily delay its final resolution. The Commission noted that Buckeye had not objected to the bifurcation procedure. (Id. at 61,160, 61,161).

The Commission then clarified its position concerning ATA's assertion that evidence necessary to resolve the second stage issues must be developed to answer issues with respect to market power in the first stage. (Id. at 61,161). It stated that by directing the ALJ to initially determine the extent of Buckeye's market power, it did not mean to indicate that cost-based data was irrelevant for justness and reasonableness determinations under the Interstate Commerce Act. On the contrary, the Commission determined that under its Opinion No. 154-B methodology, cost data could be used to justify oil pipeline rate proposals. However, because the Opinion No. 154-B methodology may not always be necessary, i.e. where the pipeline lacks market power, the Commission concluded that it need not address the specifics of point-to-point cost data until it had determined whether the Opinion No. 154-B methodology was required. (Id. at 61,162). The Commission also noted that these findings should not be interpreted to mean that cost-based evidence cannot be considered in an inquiry on market power determinations, nor was the ALJ's scope of inquiry limited by excluding cost-based evidence. (Id. at 61,162) (See also 44 FERC ¶ 61,066 at 61,186 (1988)). The prior order set forth no hard and fast rules concerning the types of evidence that should be submitted on the subject of market power.

The Commission further stated that by offering this clarification, it intended to disabuse interested parties of any notions that the prior order limited the scope of inquiry that could be conducted with respect to the issue of market power in any given case. (45 FERC ¶ 61,046 at 61,162).

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[¶ 61,046]

Buckeye Pipe Line Co., L.P., Docket No. IS87-14-001

Order Denying Rehearing and Clarifying Prior Order

(Issued October 7, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon and Charles A. Trabandt.

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[2] 15 U.S.C. § 3371(a)(2) (1982).

[3] 18 C.F.R. § 284.123(b)(2)(ii) (1988).

[4] *Id.*

[3] 15 U.S.C. § 3412(b) (1982); *see also Mustang Fuel Corp.*, 31 FERC ¶ 61,265, at p. 61,535 (1985).

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Background

On August 12, 1988, the Air Transport Association of America (ATA) filed a request for rehearing or clarification of the Commission's order disposing of interlocutory appeals in this proceeding issued on July 15, 1988.[1] In that order granting Buckeye Pipe Line Co.'s (Buckeye) request for continued protection from disclosure of certain cost data, the Commission directed the administrative law judge (ALJ) to conduct a two-stage hearing and, in the first stage, to determine whether Buckeye lacks significant market power in the relevant markets for which it seeks reduced regulatory oversight of its proposed rate increases. The Commission also concluded that it would determine at a later stage in the proceeding whether the specific point-to-point cost data supplied by Buckeye in response to an earlier order by the ALJ is required for making a determination of the justness and reasonableness of Buckeye's rate proposal under Section 1(5) of the Interstate Commerce Act (ICA).[2]

The Commission thus gave Buckeye an opportunity to show that strict ratemaking scrutiny under Opinion No. 154-B methodology[3] is not warranted by demonstrating, for instance, that shippers have alternate ways to ship products, buyers have alternate supply sources, or other constraining factors exist to restrain prices.[4] To help the Commission determine whether such market-oriented ratemaking is appropriate here, the Commission directed the ALJ, in the first stage, to evaluate evidence submitted by the parties with respect to competitive conditions within the relevant markets to determine whether effective competition exists in those markets. The Commission determined that after such a finding was made, it would be better able to determine the need for the involved cost-based data than it could at the interim stage of the interlocutory appeals.

ATA's Rehearing Request

On rehearing, ATA argues that the Commission's order may fail to satisfy the requirements of the ICA as interpreted by the Court of Appeals in *Farmers Union Central Exchange v. Federal Energy Regulatory Commission*, 734 F.2d 1486 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984) *(Farmers Union II)*, and will cause a substantial and unnecessary delay in the final resolution of the proceeding. Further, ATA asserts that all of the evidence related to issues reserved for resolution by the Commission in the second stage would have to be developed in order for the Commission to resolve the issues in the first stage. In this regard, ATA requests that the Commission clarify its order to allow the parties to rely on cost-based evidence to develop a record with respect to Buckeye's market power.[5] ATA also requests the Commission to allow the ALJ to conduct a non-staged, comprehensive hearing prior to any further Commission review, and direct the ALJ not to preclude consideration of cost-based evidence that is already on record in assessing market power.

ATA does not specify how the Commission's order fails to satisfy either the ICA or *Farmer's Union II*. However, with respect to its procedural arguments concerning unnecessary delay and development of the evidentiary record, ATA makes several points. ATA suggests that because Buckeye serves numerous markets, the issues with respect to its market power will be extremely complex and not easily resolved. Thus, ATA projects an initial decision will not issue before late in 1989 if the current schedule setting a hearing to begin on April 4, 1989, remains effective, and the Commission would not issue further direction as to how to evaluate the rate proposal until late in 1990. By this time, ATA argues the evidence developed in 1987 and 1988 would be stale and further testimony would be necessary. ATA argues that this can be avoided by allowing a hearing to commence on all issues, including Buckeye's market power, to commence in April of 1989. Furthermore, ATA argues that because all testimony and exhibits necessary to decide the justness and reasonableness of Buckeye's rate proposal under the Opinion No. 154-B methodology already has been filed, there is no need to conduct the hearing in stages. In this regard, ATA asserts that the existing cost-based evidence can be relevant to an assessment of market power and that Buckeye's pricing behavior may be indicative of its market power.

Preliminary Matter

On August 29, 1988, Buckeye filed a reply to ATA's rehearing request. On September 1,

[1] 44 FERC ¶ 61,066 (1988).

[2] 49 U.S.C. § 1(5).

[3] *Williams Pipe Line Co.*, 31 FERC ¶ 61,377 (1985), modified and clarified in *Williams Pipe Line Co.*, 33 FERC ¶ 61,327 (1985).

[4] 44 FERC ¶ 61,066, at p. 61,186 (1988).

[5] On July 22, 1988, the ALJ initially assigned to this proceeding issued an "Order Setting Procedural Schedule and Denying Use of Cost-Based Data" to implement the Commission's directive with respect to determining Buckeye's market power. In that order the ALJ interpreted the Commission's July 15, 1988 order as prohibiting the receipt of cost-based evidence with respect to the issue of Buckeye's market power. The ALJ requested reassignment from this proceeding on July 27, 1988. The Chief Judge designated a new presiding ALJ on July 29, 1988.

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1988, ATA filed a motion to strike this pleading as a prohibited answer under the Commission's Rules of Practice and Procedure,[6] or, in the alternative, permit a limited reply. In its pleading, Buckeye agrees with ATA's position with respect to cost-based evidence but disagrees with its position concerning the bifurcated hearing approach. ATA in its reply asserts that Buckeye's current position on the two-stage hearing approach differs from that taken at the prehearing conference.

While Buckeye's pleading technically constitutes a prohibited answer, and ATA's limited reply also exceeds the scope of pleadings allowed by our rules, we will consider both pleadings. Good cause exists for permitting consideration of these pleadings They help explicate issues that are important to this proceeding and that may have an impact on the course of the Commission's regulatory oversight of other oil pipeline rate proceedings. Further, ATA will not be prejudiced because it has responded. ATA's motion to strike will be denied.

Discussion

Although denominated a "Petition for Rehearing and Clarification," ATA's pleading primarily takes greater issue with the ALJ's determination in his July 22 procedural order that the Commission's July 15 order prohibits consideration of cost-based evidence with respect to the issue of Buckeye's market power (*see* footnote 4, *supra*). As to the July 15 order, ATA objects to the potential for delay that may be caused by bifurcating the hearing. ATA's only substantive challenge to the Commission's July 15 order is its rather attenuated assertion (petition, at p. 2) that the order may not satisfy the requirements of the ICA as interpreted by *Farmers Union II*. For the reasons discussed below, the Commission will deny ATA's rehearing request but will grant its request to clarify the intent of our July 15, 1988 order with respect to the types of evidence the ALJ can consider in evaluating Buckeye's market power.

The ICA and Farmers Union II. As noted, ATA does not specifically delineate how the Commission's prior order may fail to satisfy the requirements of the ICA as interpreted by *Farmer's Union II*. It presents no new arguments that would cause the Commission to reconsider its determination that under the applicable statutory provisions and case law, oil pipelines can incur less stringent regulatory oversight of ratemaking proceedings than that required by Opinion No. 154-B if they can demonstrate a lack of significant market power in the market or markets where such lightened regulatory treatment is sought.

The Commission's reasons for making this determination were thoroughly discussed[7] in the July 15 order and need not be repeated here. It will suffice to reiterate that in *Farmers Union II*, the court indicated that light-handed regulation can be justified by a showing that in current circumstances, the goals and purposes of the statute can be achieved by substantially less regulatory oversight.[8] From this, the Commission concluded that less burdensome rate justification could be applied to oil pipelines under the ICA if, in a given case, the record showed the existence of sufficient competition. The Commission, citing *Transwestern Pipeline Company*, 43 FERC ¶ 61,240 (1988),[9] also noted that competition or lack of market power may warrant a departure from the traditional rate review process where the substitute ratemaking methodology ensures that resulting rate levels are justified by such non-cost factors.[10] Accordingly, the Commission directed that Buckeye demonstrate that strict ratemaking scrutiny is not warranted in this proceeding by showing that it lacks significant market power in the market or markets in which it desires light-handed regulation. Because ATA presented no substantive arguments that would lead the Commission to conclude that its approach is inconsistent with either the ICA or *Farmers Union II*, its request for rehearing will be denied.

Procedural Considerations. Beyond the above argument for rehearing, ATA requests that the Commission reconsider its decision to bifurcate this proceeding because it asserts that requiring an initial determination with respect to market power would unnecessarily delay final resolution of this proceeding because the evidence necessary to resolve that issue also is necessary to resolve the issue of justness and reasonableness in the second stage. ATA argues that the parties should be able to develop the record on both issues in a comprehensive proceeding prior to the ALJ's determination of and Commission review of market power issues.

ATA's conjectural arguments with respect to procedural concerns do not warrant rehearing.

[6] 18 C.F.R. § 385.213 (1988).

[7] 44 FERC ¶ 61,066, at pp. 61,184-186 (1988).

[8] 734 F.2d 1486, 1510.

[9] In that proceeding addressing Transwestern's Gas Supply Inventory Charge under Order No. 500, *FERC Statutes and Regulations* ¶ 30,761 (1987), the Commission stated it had considerable flexibility in selecting the methodology it will use to determine a just and reasonable rate (citing *Farmers Union II* and *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968)).

[10] 44 FERC ¶ 61,066, at p. 61,185 (1988).

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ATA has not convinced the Commission that requiring the development of a record on and an initial determination of Buckeye's market power in relevant markets would result in such an inordinate delay that the Commission should reassess its prior determination to order a two-stage proceeding. This is particularly true in the event Buckeye is found to have significant market power in relevant markets since all the evidence necessary to make a just and reasonable rate determination under the stricter Opinion No. 154-B standards is already on record. Further, while the issues with respect to Buckeye's market power in relevant markets may not be easy to resolve, the amount of time necessary to determine these issues is a matter of case management within the ALJ's control. To the extent the parties can use existing record evidence to develop the record with respect to market power, the ALJ can set an expedited evidentiary schedule that all parties can adhere to and a determination with respect to that issue can be made within a reasonable period of time. Finally, by using a bifurcated proceeding to resolve the issues here, the Commission hopes to remove uncertainty with respect to oil pipeline ratemaking proceedings and clearly articulate standards that should be used in determining the justness and reasonableness of oil pipeline rate proposals. The Commission expects that this process will ultimately expedite the course of this and future proceedings by providing clear guidance as to the Commission's thinking with respect to oil pipeline rate proceedings.

Finally, the Commission notes that the concerns arising from the possibility of delay in reaching a determination of the justness and reasonableness of Buckeye's rates that may arise from a bifurcated proceeding are subordinate to the Commission's need to determine Buckeye's market power in order to decide whether a strict or light-handed methodology for ratemaking determinations is warranted. In this regard, it should be emphasized that any adverse consequences resulting from delays attributable to such an approach should impact Buckeye equally, if not more, than ATA because the rates are in effect subject to refund.[11] Buckeye has not objected to the two-stage hearing. Accordingly, because ATA presents no sound procedural reasons for the Commission to reassess its determination to conduct the hearing in stages, its request for rehearing on this issue will be denied.

Clarification. In conjunction with its procedural arguments, particularly its assertion that evidence necessary to resolve second stage issues in this proceeding must be developed to answer issues with respect to market power, ATA has objected to the ALJ's determination to deny Buckeye's and ATA's request that they be allowed to submit cost-based data, and possibly their entire pre-filed testimony, with respect to the market power issue. Although this objection is directed at a procedural ruling and technically would be raised more appropriately through an interlocutory appeal, the Commission will discuss it because it raises a point about the prior order that requires clarification. In light of the clarification below, the Commission finds that the ALJ initially presiding in this proceeding erroneously accepted Commission staff's position that the Commission did not wish cost-based data to be submitted in the first stage of the hearing and that the currently assigned ALJ need not so limit the scope of the evidentiary presentation.

ATA states that the current record in this case involves a full analysis of Buckeye's costs and revenues both on an aggregate basis and on a movement-by-movement basis. It asserts that this evidence is essential to the issue of Buckeye's market power to be resolved in stage one. It argues that under generally recognized principles of antitrust law, cost-based evidence can be highly relevant to an assessment of market power and that from an economist's point of view, the pricing behavior of a firm may be indicative of its market power. Thus, ATA asserts that the rate of return that an oil pipeline generates through rates charged in its markets is highly relevant to the pipeline's market power. Accordingly, it argues that cost-based evidence must be developed in order to provide the Commission with a full record upon which to determine the extent of Buckeye's market power. As noted, Buckeye concurs with ATA's position that nothing in the Commission's July 15 order requires prohibition of consideration of cost-based evidence. However, neither does Buckeye believe such evidence is necessarily required. It argues that parties should be free to submit whatever evidence they deem necessary to make their case.

It must be remembered that the prior order arose in the context of an interlocutory appeal by Buckeye seeking the continued protection of specific point-to-point cost data it submitted under a protective order to avoid possible dismissal of its rate proposal by the ALJ. In discussing the balance of factors relevant to disclosure, the Commission addressed the underlying relevance of this data because the ALJ had determined that its disclosure could result in competitive harm to Buckeye. By directing the ALJ to initially determine the extent of Buckeye's market power, the Com-

[11] 38 FERC ¶ 62,256 (1987).

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mission did not mean to indicate that cost-based data was irrelevant to justness and reasonableness determinations under the ICA. To the contrary, the Commission determined that under the Opinion No. 154-B methodology, the production of cost data generally, and possibly the specific point-to-point cost data supplied by Buckeye, may be required to justify oil pipeline rate proposals.[12] However, because the Commission determined that application of the strict Opinion No. 154-B methodology may not always be warranted for oil pipeline rate proposals, particularly where sufficient competition in relevant markets exists, the Commission concluded, at that interim point, that it need not address the relevance of specific point-to-point cost data, until it had made a determination as to whether the Opinion No. 154-B methodology was required to evaluate Buckeye's proposed rate increases.[13] Thus, because Buckeye successfully argued that competitive circumstances may warrant a lighter regulatory approach to its rate making proposal, the Commission ordered the continued protection of the involved cost data because ultimately it might not be needed in making a justness and reasonableness determination if Buckeye could prove the existence of sufficient competition in relevant markets. Accordingly, the Commission directed the ALJ to determine whether Buckeye lacks significant power in the relevant markets.

The Commission's prior discussion of the relevance of cost data as it relates to regulatory oversight of the justness and reasonableness of oil pipeline ratemaking should not be interpreted to mean that cost-based evidence cannot be considered in an inquiry with respect to market power determinations, or that the Commission in any way intended to limit the scope of the ALJ's inquiry by excluding consideration of cost-based evidence.[14] The prior order set forth no hard and fast rules concerning the types of evidence that should be submitted with respect to market power other than placing the burden on Buckeye to prove that it lacks significant market power in those markets in which it desires light-handed regulation.[15] To make such a showing the Commission suggested that a pipeline demonstrate, for instance, that shippers have alternate shipping options for their product, that buyers have alternate supply sources, or the existence of other constraining factors on prices ensuring their just and reasonable levels.[16] Thus, the Commission declined to set forth a rigid standard for determining when effective competition exists.

Buckeye correctly points out that in adopting this approach, the Commission left to the business discretion of the parties, the adversarial judgment of their representatives, and the discretion of the ALJ the determination as to what type of evidence should be submitted in meeting the burdens of proving or rebutting the lack of significant market power in any given case. By offering this clarification the Commission intends to disabuse interested parties of any notions that the prior order limited the scope of inquiry that could be conducted with respect to the issue of market power. The Commission continues to believe that it is administratively undesirable, if not practically impossible, to set forth a procrustean evidentiary bed that must be met by an oil pipeline to establish the lack of significant market power. The number of, and operational differences in, oil pipelines, not to mention the operational complexity and varied configuration of individual pipelines, mandate that market power determinations be made on a case-by-case basis.

However, to the extent ATA and Buckeye request that the ALJ be directed to allow the parties to use cost-based evidence, if they so chose, it is apparent that some further comment regarding the Commission's view of the nature of such inquiries would be helpful. The Commission envisions that any inquiry into an oil pipeline's market power, to a large extent, would mirror the type of inquiry used by courts in evaluating monopoly power.[17] 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.[18] 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,

[12] 44 FERC ¶ 61,066, at p. 61,185 (1988).

[13] *Id.* at p. 61,186.

[14] The Commission notes, however, that in most antitrust cases, costs are relevant only in computing an overall rate of return. We find it difficult to see how the allocation of embedded accounting costs—especially common costs—to point-to-point movements on a pipeline are relevant to determining whether a pipeline has market power in setting a price for that movement.

[15] 44 FERC ¶ 61,066, at p. 61,186 (1988).

[16] *Id.*

[17] Monopoly power has been defined as the "power to control market prices or exclude competition." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

[18] ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984) at p. 110.

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by evidence of an ability to control prices or exclude competition.[19] Factors considered here include market share, maintenance of market share despite product or service inferiority, cost advantages attributable to technology, price leadership, economies of scale, competitor size and performance, entry barriers, pricing practices, market stability, and other considerations.[20] 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.[21]

As we have indicated, whether or not evidence is presented with respect to any of these factors is primarily determined as a function of advocacy and the needs of the presiding fact finder. In this context, Buckeye should feel free to present whatever evidence it deems necessary to meet its burden of showing a lack of significant market power in relevant markets. This evidence can, if Buckeye so desires, incorporate that already filed. ATA and other parties have the same latitude in submitting rebuttal evidence. In this regard, the Commission does not encourage the filing of cumulative evidence, rather it intends that Buckeye and other parties should be permitted the opportunity to use evidence already filed to the extent necessary to address the market power issue. Finally, to the extent Buckeye or other parties intend to use cost-based data as evidence, the directives of our prior order with respect to protected status continue in effect.

The Commission orders:

(A) ATA's request for rehearing of the June 15, 1988 order is denied.

(B) ATA's request for clarification is granted.

(C) The ALJ is ordered to allow submission of cost based evidence with respect to the issue of Buckeye's market power and to accept other evidence consistent with this order.

(D) ATA's motion to strike Buckeye's reply is denied, and ATA is permitted to file a limited reply.

(E) The Commission's directives in its June 15, 1988 order regarding the protected status of cost-data continue in effect.