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Market Based Ratemaking for Oil Pipelines

Order No. 572
FERC Stats & Regs. [Regs. Preambles, 1991-1996] ¶ 31,007 (1994)
affirmed, Association of Oil Pipe Lines v. FERC,
83 F.3d 1424 (D.C. Cir. 1996)

Order No. 572 is a companion to Order No. 561. Order No. 561 established an indexing methodology to set ceilings on oil pipeline rates. However, it also continued the Commission's policy of allowing an oil pipeline to attempt to show that it lacks significant market power in the markets in which it proposes to charge market-based rates. Order No. 572 adopted filing requirements and procedures with respect to an application by an oil pipeline for such a determination.

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Market Based Ratemaking
for Oil Pipelines
Order No. 572
Final Rule
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83 F.3d 1424 (D.C. Cir. 1996)

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[¶ 31,007]

59 FR 59148 (November 16, 1994)

18 CFR Part 348

[Docket No. RM94-1-000; Order No. 572]

Market-Based Ratemaking for Oil Pipelines

(Issued October 28, 1994)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission is amending its regulations to adopt filing requirements and procedures with respect to an application by an oil pipeline for a determination that it lacks significant market power in the markets in which it proposes to charge market-based rates. This rule adopts procedural rules in order to implement the Commission's Order 561 market-based ratemaking policy, which was published in the *Federal Register* on November 4, 1993. In that order, the Commission adopted a simplified and generally applicable ratemaking methodology for oil pipelines, which is an indexing system to establish ceilings on those rates. The Commission also continued its policy of allowing an oil pipeline to attempt to show that it lacks significant market power in the market in which it proposes to charge market-based rates. However, an oil pipeline may not charge market-based rates until the Commission concludes that the oil pipeline lacks significant market power in the relevant markets.

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EFFECTIVE DATE: This final rule is effective January 1, 1995.

FOR FURTHER INFORMATION CONTACT: Jeffrey A. Braunstein, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208-2114.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208-1397. To access CIPS, set your communications software to use 300, 1200, or 2400 bps, full duplex, no parity, 8 data bits and 1 stop bit. CIPS can also be accessed at 9600 bps by dialing (202) 208-1781. The full text of this rule will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in Wordperfect format may also be purchased from the Commission's copy contractor, LaDorn Systems Corporation, also located in Room 3104, 941 North Capitol Street, NE., Washington, DC 20426.

Order No. 572

I. Introduction

The Federal Energy Regulatory Commission (Commission) hereby adopts procedural rules governing an oil pipeline's application for a Commission finding that the oil pipeline lacks significant market power in the relevant markets.

The present rule is a companion to Order No. 561.[1] There, the Commission adopted a simplified and generally applicable ratemaking methodology for oil pipelines to fulfill the requirements of Title VIII of the Energy Policy Act of 1992 (Act of 1992).[2] That methodology is an indexing system to establish ceilings on oil pipeline rates. The Commission also will permit, under defined circumstances, the use of two alternative methodologies. These are the use of a cost-of-service methodology and the use of settlement rates. In addition, in Order No. 561, the Commission continued its policy of allowing an oil pipeline "to attempt to show that it lacks significant market power in the market in which it proposes to charge market-based rates."[3] Under Order No. 561, however, an oil pipeline may not charge market-based rates until the Commission concludes that the oil pipeline lacks significant market power in the relevant markets.[4] The present rule adopts procedural rules in order to implement Order No. 561's market-based ratemaking policy.

II. Public Reporting Requirement

The Commission estimates the public reporting burden for this collection of information under the rule will increase the existing reporting burden associated with FERC-550 by an estimated 510 hours annually—an average of 255 hours per response based on an estimated 2 responses. The information filed by the oil pipelines will be collected by the Commission under FERC-550 "Oil Pipeline Rates: Tariff Filings." FERC-550 is a designation covering oil pipeline tariff filings made to the Commission. The estimates include the time for reviewing instructions, researching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The current annual reporting burden is 5,350 hours based on an estimated 535 responses from approximately 140 respondents.

Interested persons may send comments regarding these burden estimates or any other aspect of this information collection, including suggestions for reducing this burden, to the Federal Energy Regulatory Commission, 941 North Capitol

[1] Revisions to Oil Pipeline Regulations pursuant to Energy Policy Act, Order No. 561, 58 FR 58785 (November 4, 1993), *FERC Statutes and Regulations* ¶ 30,985 (1993), *order on reh'g and clarification*, Order No. 561-A, 59 FR 40243 (August 8, 1994), *FERC Statutes and Regulations* ¶ 31,000 (1994).

[2] 42 U.S.C. 7172 note (West Supp. 1993).

[3] *18 CFR 342.4(b) to be effective January 1, 1985.*

[4] *Id.*

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Street, N.E., Washington, D.C. 20426 [Attention: Michael Miller, Information Services Division, (202) 208-1415]; and to the Office of Information and Regulatory Affairs of OMB (Attention: Desk Officer for Federal Energy Regulatory Commission).

III. BACKGROUND

On October 22, 1993, the Commission issued a Notice of Inquiry (NOI) about market-based rates for oil pipelines.[5] In the NOI, the Commission first inquired whether it should continue to permit oil pipelines to seek market-based rates on a showing that they do not have significant market power in the relevant markets. The Commission also inquired about how it should make a market power determination and, in that connection, raised a number of substantive and procedural issues.

On July 28, 1994, the Commission issued a Notice of Proposed Rulemaking (NOPR) in response to the NOI and the comments to the NOI.[6] In the NOPR, the Commission concluded that oil pipelines may continue to seek market-based rates upon a showing that they do not have significant market power in the relevant markets. In addition, the Commission concluded that no consensus existed on the substantive standards to be used in determining whether an oil pipeline lacks significant market power in the relevant markets and that, therefore, the appropriate course of action is to develop oil pipeline precedents on a case-by-case basis. Accordingly, the Commission did not propose in the NOPR any substantive rules about market power determinations. However, the Commission did propose in the NOPR appropriate procedural rules to govern applications by oil pipelines for a market-power determination that could lead to market-based rates. The Commission has received comments on the NOPR from eleven commenters.[7] In brief, after analyzing those comments as discussed below, the Commission is adopting the procedural rules proposed in the NOPR with minor modifications and some clarifications.

IV. The Continuation of Market-Based Rates

As in the NOPR, the Commission concludes that oil pipelines may continue to seek market-based rates on a showing that they do not possess significant market power in the relevant markets. Most of the commenters support or do not oppose the continuation of market-based rates. Only Sinclair and the Farmers oppose the continuation of market-based rates. Sinclair maintains that there is no need for a market-based methodology in light of the indexation approach adopted by the Commission in Order No. 561, coupled with the cost-of-service alternative. The Farmers argue that market-based ratemaking is not needed in that the Order No. 561 ratemaking options provide pipelines with ample flexibility in obtaining just and reasonable rates and that market-based ratemaking will create an unnecessary potential for abuse of market power.

The Commission believes that it is appropriate for oil pipelines to continue to be able to seek market-based rates because this approach comports with the spirit of the Act of 1992 by retaining a light-handed regulatory method to complement the indexing approach adopted as the generally applicable ratemaking methodology for oil pipelines. In addition, as the Commission has previously stated, a market-based approach is clearly within the Commission's authority under the ICA.[8] Further, the Commission believes that the market-based approach will be of

[5] Market-Based Ratemaking for Oil Pipelines, Notice of Inquiry, 58 FR 58814 (November 4, 1993), *FERC Statutes and Regulations* ¶ 35,527 (October 22, 1993).

[6] Market-Based Ratemaking for Oil Pipelines, Notice of Proposed Rulemaking, 59 FR 39985 (August 5, 1994), *FERC Statutes and Regulations* Proposed Regulations ¶ 32,508 (July 28, 1994).

[7] Comments were filed by: ARCO Pipe Line Company and Four Corners Pipe Line Company (ARCO), the Association of Oil Pipe Lines (AOPL), Marathon Pipeline Company (Marathon), Buckeye Pipe Line Company, L.P. (Buckeye), Kaneb Pipe Line Operating Partnership, L.P. (Kaneb), Glenn E. Davis (Davis), Total Petroleum, Inc. (Total), Alberta Department of Energy (Alberta), Petrochemical Energy Group (Petrochemical), Natural Council of Farmer Cooperatives (Farmers), and Sinclair Oil Corporation, Crysen Refining, Inc., Frontier Refining Company, and Lion Oil Company (Sinclair).

[8] Order No. 561, *FERC Statutes and Regulations* ¶ 30,985 at p. 30,958; *Cf. Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993).

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use in circumstances where the oil pipeline needs the flexibility to compete provided by market-based rates, rather than other approaches. Under the market-based approach, the oil pipeline will be able to engage in competitive pricing in order to react to changes in market conditions, such as increased demand for its service. This can result in pricing that is both efficient and just and reasonable. As the court stated in *Tejas Power Corp v. FERC*:

> In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment.[9]

Traditional regulatory ratemaking is based on historic accounting cost. But rates based on historic cost do not function well to signal individuals how to efficiently respond to changes in market conditions.[10] Historic cost-based rates, even if indexed for past inflation, do not perform this function well, which generally requires one price to change relative to another. Therefore, where appropriate, it is reasonable to permit a market pricing option.

The Commission is confident that the information provided to it by the procedural requirements adopted in this rule will permit the Commission to make informed decisions about market power and prevent the possibility of abuses of market power. In that vein, both Sinclair and the Farmers in general support the rules proposed in the NOPR. Those rules will enable the Commission to comply with *Farmers Union* by not permitting market-based rates until there is an affirmative showing that the oil pipeline lacks significant market power in the relevant markets.[11] Such a showing will assure the Commission that the oil pipeline's prices are just and reasonable.[12]

V. Legal Basis

The oil pipelines raise several legal objections to the proposed regulations. In brief, they maintain that the Commission has acted outside of its authority under the Interstate Commerce Act (ICA)[13] and has contravened the mandate of Section 1802 of the Act of 1992 by not adopting streamlined procedures for market-based filings.

In Order No. 561, the Commission adopted section 342.4(b) of the regulations, which provides that: "Until the carrier establishes that it lacks market power, these rates will be subject to the applicable ceiling level under § 342.3." This rule builds on that requirement by requiring an oil pipeline to file an application for a market power determination rather than a rate filing under the ICA. Only after the Commission concludes that the oil pipeline lacks significant market power in the markets in which it proposes to charge market-based rates may it file market-based rates.

The AOPL, Kaneb, and Marathon argue that the Commission has overstepped its authority under the ICA by precluding an oil pipeline from charging market-based rates until the Commission has determined that the oil pipeline lacks significant market power in the relevant markets. The AOPL and Kaneb maintain that the Commission will be improperly suspending market-based rates indefinitely when Section 15(7) of the ICA permits suspensions for a period no longer than seven months. They both contend that the Commission's procedure is unnecessary in light of the ICA's refund mechanism, which protects the public interest. The AOPL further maintains that the Commission is acting inconsistently with its approach to market-based determinations for gas storage rates while Kaneb contends that the Commission has

[9] 908 F.2d 998, 1004 (D.C. Cir. 1990).

[10] The classic statement on the informational role of prices is F. Hayek, "The Use of Knowledge in Society," American Economic Review, XXXV(4) 519-30 (September, 1945). On the natural gas shortage and its relation to historic cost of service ratemaking see Stephen Breyer and Paul McAvoy, Energy Regulation by the Federal Power Commission, Brookings 56-88 (1974).

[11] *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

[12] *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993), *citing Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) and *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

[13] 49 U.S.C. app. 1 (1988).

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not justified disparate treatment between market-based rate filings and cost-of-service based rate filings, which will be allowed to become effective, subject to refund. Marathon maintains that the Commission will violate Section 6(3) of the ICA by opening an investigation before either a rate can be filed or go into effect.[14]

The Commission rejects the above arguments as collateral attacks on Order No. 561. ARCO recognized that the present rule merely implements that regulation when it stated that "the Commission has indicated in Order No. 561-A that it intends to proceed on the basis that it has this power" to prevent an oil pipeline from putting into effect a market-based rate until the Commission concludes that the oil pipeline lacks significant market power in the relevant markets.[15] Nonetheless, the Commission sees no merit in the above arguments.

The indexing method sets the maximum lawful rate subject to exceptions which must be proven. For purposes of analyzing the legal issues presented, the Commission must assume that market-based rates would be higher than indexed rates because an oil pipeline is free to file for rates under the index without justification. Hence, an oil pipeline must show that it is entitled to an exception to charge more than the index would permit. In this context, the application is in essence a request for waiver of the maximum rate. Such a moratorium on filings for market-based rates (except under the application process) comports with the Commission's power to restrict filings of proposed rates higher than those determined by the Commission to be just and reasonable.[16]

It is true that this treatment of market-based rates differs from the Commission's approach to filings by oil pipelines for cost-based rates. However, the difference is justified. It is appropriate to take the present action with respect to market-based rates for oil pipelines in order to ensure that presumed market forces will not be the basis of effective rates for the transportation of oil when an oil pipeline's application (*i.e.*, its waiver request) is under consideration.[17] The Commission cannot permit market-based rates without an affirmative showing that the oil pipeline lacks significant market power in the relevant markets.[18]

Because the Commission is taking the approach that an oil pipeline must file an application for market-based rates, Marathon's reliance on Section 6(3) of the ICA is misplaced. Simply put, there is no rate investigation. Rather, the investigation is into whether the oil pipeline possesses significant market power in the relevant markets.

The AOPL also maintains that the Commission is not authorized by the ICA

[14] Section 6(3) of the ICA provides:

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: Provided further, That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classification not changed if, in its judgement, not inconsistent with the public interest.

[15] Comments at p. 9.

[16] *Cf.*, Permian Basin Area Rate Cases, 390 U.S 747, 780 (1968). ("The Commission may under §§5 and 16 [of the Natural Gas Act] restrict filings under §4(d) of proposed rates higher than those determined by the Commission to be just and reasonable.".

[17] *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

[18] *Id.* With respect to the AOPL's contention about gas storage rates, the Commission notes that those cases were considered mostly in certificate proceedings. While Koch Gateway Pipeline Company's proceeding was a rate filing, it involved the continuation of an experimental program that had been previously approved as part of a settlement. 66 FERC ¶61,385 (1994). In addition, oil pipeline market cases have been lengthy and have gone beyond the statutory suspension period.

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to adopt market-power filing requirements. It argues that, under Section 6(3) of the ICA, an oil pipeline seeking to change its rates need only file a notice of proposed change with the Commission, and that the Commission's authority under that action is limited to rules and regulations for the "simplification" of schedules.[19] The AOPL adds that the ICA does not require the submission of material in justification of a proposed rate change unless and until that rate change is set for hearing. It asserts that the oil pipeline's statutory burden of proof under Section 15(7) of the ICA does not attach until the matter is set for hearing.[20] The AOPL last maintains that the Commission's characterization of the market power application as a nonrate filing does not cure the statutory shortcoming because if it is not a rate filing there is no statutory basis for the application. It further maintains that, in any event, the characterization is wrong as shown by the caption of this proceeding and the collection of information form (FERC 550 "Oil Pipeline Rates - Tariff Filings").

As discussed in the order in *Cost-of-Service Filing and Reporting Requirements for Oil Pipelines*, issued contemporaneously with this rule, the Commission has the authority to adopt filing requirements beyond the mere form of notices and schedules. The Commission may require information upon which to determine how to act on a filing. In any event, as discussed above, the Commission views the application required here as in essence a waiver request, which will enable the Commission to make the required affirmative finding that the oil pipeline lacks significant market power in the relevant markets before it permits market-based rates as an exception to the indexing approach. Nothing in the ICA prevents the Commission from setting forth the requirements of a waiver request, including placing the burden of proof on the person seeking the waiver. Even if the application is a rate change under Section 15(7), the Commission is not compelled to hold a hearing, but if it does hold a hearing, the hearing may be resolved on the written record. The required application simply starts the hearing process and the statutory burden of proof would affix.[21] With respect to the AOPL's arguments about the caption to this proceeding, it merely reflects the end result of the process—market-based rates. Further, the form for the collection of information merely recognizes the end-result—oil pipeline rates and, in any event, is purely ministerial.

The AOPL maintains that the Commission's market power application process is inconsistent with the Act of 1992 streamlining mandate because it violates the Act of 1992's requirements that the Commission "develop streamlined procedures 'to avoid unnecessary regulatory costs and delays'," that "proceedings address issues raised by parties with real economic interests, and that Staff initiated proceedings be limited to 'specific circumstances.'"[22] It thus "submits that the scope of any market power investigation should be limited to (1) rates subject to a valid protest by an entity with a demonstrated economic interest in the pipeline's rate, or (2) markets that do not meet Commission-established screens."[23] It asserts that the Commission's failure to adopt substantive guidelines does not comply with the Act of 1992's streamlining mandate.

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[19] Comments at p. 18.

[20] Section 15(7) provides in pertinent part:

At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

[21] The AOPL maintains that the scope of discovery is limited under the Commission's rules of practice and procedure (18 CFR 385.402(a)) to issues set for hearing. It submits that the Commission will put the "procedural cart before the horse by requiring production of discovery - related information before the scope of contested issues has been established." Comments at p. 40. As stated in the text, the Commission has the authority to adopt filing requirements and to set forth the requirements for a waiver as the first stage of the investigation.

[22] Comments at p. 25. ARCO, Marathon, and Davis similarly argue that the Commission has fallen short of the Act of 1992's streamlining mandate.

[23] *Id.*

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The Commission has fully complied with the mandate of the Act of 1992. The Commission has adopted the indexing methodology, which is "a simplified and generally applicable ratemaking methodology for oil pipelines in accordance with section 1(5) of Part I of the [ICA]."[24] And, the Commission has adopted streamlined procedures with respect to rates established under that methodology. The market-based ratemaking approach is not generally applicable. Therefore, it must be optional and oil pipeline specific. Indeed, the Commission doubts that it could have adopted market-based ratemaking as the simplified and generally applicable ratemaking methodology in light of the court's holding in *Farmers Union* that the Commission cannot presume the existence of competition or that a competitive price will be within a just and reasonable range.[25] In any event, the Commission believes that the present regulations, in the spirit of the Act of 1992, indeed streamline procedures as to market-based rates by filling a regulatory void with respect to procedures and by minimizing burdens by obtaining data at the outset. This should avoid unnecessary regulatory costs and delays and result in informed decisions with respect to all markets in which an oil pipeline seeks to charge market-based rates rather than the generally applicable indexing methodology or, if appropriate, cost-based rates. In addition, the Commission's requirements for standing are applicable.[26] Last, there is nothing in the Act of 1992 even suggesting that the Commission must adopt substantive guidelines for market-based rates, which, as discussed below, are not warranted at this time.

A. Disclosure of Confidential Shipper Information

The AOPL maintains that the NOPR's filing procedures will place oil pipelines in the untenable position of violating their statutory duty not to disclose confidential shipper information in order to comply with the rule. The AOPL asserts that the Commission cannot by rule repeal the statutory protection of confidentiality provided to shipper information by Section 15(13) of the ICA. The AOPL asks the Commission "to clarify that nothing in the NOPR is intended to require the production of shipper information otherwise protected by ICA Section 15 (13)."[27]

Section 15(13) of the ICA makes it unlawful for an oil pipeline to disclose "any information concerning the nature, kind, quality, destination, consignee, or routing of any property tendered to" the oil pipeline for transportation, "which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor." However, Section 15(13) provides certain exceptions to allow "the giving of such information in response to any legal process under the authority of any State or Federal court, or to any officer or any agent of the Government of the United States . . . in the exercise of its powers . . ."

The Commission is concerned about the possibility that an oil pipeline might violate Section 15(13) and subject itself to a misdemeanor charge under Section 15(14) of the ICA by disclosing statutorily protected shipper information. However, the Commission sees no reason to eliminate the information collection in the proposed rule on that ground. Under the new procedural rules adopted as Section 348.2,[28] the oil pipeline must file its application for a market power determination with the Commission and provide a copy of its letter of transmittal, without a copy of the application, to each shipper and subscriber on or before the day the material is submitted to the Commission. Thereafter, the shipper or subscriber must make a written request for a copy of the oil pipeline's complete application, which must be provided by the oil pipeline.

The Commission will adopt the following additional approach with respect to protected shipper information. First, under the exception provided by Section 15(13), the Commission in this order authorizes an oil pipeline to disclose information and materials necessary for it to

[24] Section 1801(a) of the Act of 1992.

[25] *Farmers Unions Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

[26] See section 348.2(g) referring to section 343.2(b).

[27] Comments at p. 23.

[28] See *infra*.

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file its application, which disclosure in the absence of this order might be deemed to violate Section 15(13). Next, as with all submissions to the Commission that include privileged information, the oil pipeline should file its application for a market power determination with a request for privileged treatment under Section 388.112 of the Commission's regulations. As required by that section, the oil pipeline must indicate the information for which it is seeking privileged treatment, including identification of the material subject to Section 15(13) of the ICA. However, for administrative convenience, the Commission is requiring the oil pipeline to file the original application and three copies in an unredacted form rather than only the original as required by section 388.112(b)(ii) of the Commission's regulations. The oil pipeline must file the remaining eleven copies required by section 348.2(a) of this rule and by Section 388.112(b) without the information for which privileged treatment is sought as required by section 388.112(b)(iii).

In addition, the Commission will require the pipeline to submit a proposed form of protective agreement with its request for privileged treatment and with its letter of transmittal to its shippers and subscribers. Any shipper or subscriber seeking a complete copy of the oil pipeline's application must provide the oil pipeline with an executed copy of the protective agreement at the time it requests a copy of the oil pipeline's application. The Commission will act expeditiously to resolve any controversies about protective agreements. This approach is similar to that used in litigated cases to prevent the disclosure of sensitive information[29] and akin to that suggested by the AOPL in its comments to the NOI. This approach will be sufficient to prevent the use of the information to the detriment or prejudice of a shipper and will not result in the improper disclosure of business transactions to a competitor.[30] Hence, there will be no violation of Section 15(13).

VI. Substantive Guidelines and Screens and Alternative Procedures

The Commission will not adopt substantive standards, including screens and rebuttable presumptions at this time. Instead, the Commission will continue to develop oil pipeline precedents on a case-by-case basis through the application procedure adopted by this rule.

The AOPL, Marathon, and ARCO maintain that the Commission should adopt market power guidelines in this rule. The AOPL contends that the absence of those guidelines threatens to impose undue burdens on all participants in a market-based rate proceeding. They further assert that the NOPR's reliance on a lack of consensus was misplaced because the Administrative Procedure Act (APA) does not require consensus as a prelude to adoption of a final rule and that, in any event, there was substantial support for streamlining market power determinations. It believes that without such substantive guidelines a market power presentation will be too elaborate and unfocussed because the oil pipeline will fear selecting an analytical model that unknown to it is disfavored by the Commission. It thinks the industry is facing a "regulatory vacuum."

The AOPL, Marathon, and ARCO suggest the Commission adopt certain guidelines and threshold screens in connection with establishing rebuttable presumptions as a means of streamlining market power determinations. They maintain that the oil pipelines should be able to use BEAs[31] as their geographic markets without justification as proposed by the NOPR. They further submit that the relevant product market should be delivered pipelineable petroleum products (AOPL) or delivered pipelineable barrels of both refined and unrefined products (Marathon). They also maintain that the Commission should establish market power screens to establish rebuttable presump-

[29] See, e.g., Phillips Pipe Line Co., Order to Produce Shipper Information and Enter Protective Order, Docket No. IS94-1-000 (January 19, 1994).

[30] Id.

[31] The term BEA refers to United States Department of Commerce, Bureau of Economic Analysis Economic Areas. BEAs are geographic regions surrounding major cities that are intended to represent areas of actual economic activity.

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tions in connection with market power determinations. Marathon suggests an HHI[32] of 2500. ARCO suggests screens of a market share based on actual deliveries or capacity of less than 45 percent into, for example, a BEA or a market share of 55 percent combined with an HHI of 2500 or less based on capacity data. The AOPL refers to those screens as suggested by *Williams*[33] and *Buckeye*[34] and refers to a third threshold of a ten percent market share for potential waterbased traffic.

On the other hand, Alberta, Total, the Farmers, and Sinclair support the Commission's decision not to set substantive standards and to develop precedents on a case-by-case basis. They agree with the NOPR that no consensus exists among affected groups about substantive standards and maintain that the Commission should not consider establishing substantive standards until it has gained more experience from a number of applications for market rates. Total and the Farmers submit that the Commission properly rejected the use of HHIs as screens to avoid arbitrary results. Sinclair approves of the Commission's decision not to establish generic standards about geographic markets and to place the burden on the oil pipeline to show the relevance of any BEA.

The Commission recognizes that the APA does not require a consensus to adopt rules. However, here, where the Commission has the very limited experience of two oil pipeline proceedings with respect to market power determinations, this lack of consensus among the parties most affected suggests to the Commission that it should proceed cautiously on a case-by-case basis to ensure that markets are not presumed to be competitive.[35] Hence, the Commission at this time is not adopting substantive guidelines and screens.[36]

The Commission sees no regulatory vacuum as asserted by the AOPL. The Commission's procedural regulations set forth clearly what matters are pertinent in determining significant market power—*e.g.*, geographic and product markets, HHIs and market share. The Commission does not view the lack of screens as unfair or unduly burdensome. As with any proponent, the oil pipeline must make its most persuasive case for its position.

With respect to specific screen issues, the Commission is not ready to adopt BEAs as the defined or presumed geographic market in the absence of more experience in determining relevant geographic markets. Similarly, the Commission is not ready to adopt a specific definition of product market. Nor can the Commission at this time adopt presumptions about market power determinations. The Commission prefers to gain more experience with specific cases to develop HHI (market concentration) and market power criteria for oil pipelines.[37] These issues should all be pursued cautiously on a case-by-case basis to ensure that markets are not assumed to be competitive. Of course, as more experience is gained, precedent can serve as well as presumptions to provide guidance.

The AOPL contends that the proposed application process is unfair because an oil pipeline must shoulder its burden of proof prior to knowing whether the competitiveness of a market has been challenged. Both the AOPL and ARCO suggest alternative procedures based on the use of screens. Total, the Farmers, Petrochemical, and Sinclair approve of the Commission's procedural rules requiring the oil pipeline to file a case-in-chief at the outset. Total maintains that this will lessen the burden on parties to a market power case. It suggests that the burden could be further minimized and the analytical quality of the data en-

[32] The HHI stands for the Herfindahl-Hirschman Index, which calculates market concentration by summing the squares of individual market shares of all the firms in the market. For example, if each of four firms has a 25 percent share of the market, the HHI for the market would be .2500 ((.25 x .25)4) or 2500 in nontechnical terms.

[33] *Williams Pipe Line Co.*, 68 FERC ¶ 61,136 (1994).

[34] *Buckeye Pipe Line Co.*, 53 FERC ¶ 61,473 (1990), *order on reh'g*, 55 FERC ¶ 61,084 (1991).

[35] *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

[36] The comments to the NOI, among other things, indicated a lack of consensus about the use of BEAs and the appropriate level for an HHI screen.

[37] Geographic and product markets and HHIs and market power are also discussed *infra*.

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hanced if the Commission would direct staff to aggregate oil pipeline data by origin and destination markets.[38]

As indicated above, the Commission is not adopting any market power screens. Hence, it rejects the AOPL'S and ARCO's proposed alternative procedures. In any event, the Commission sees no unfairness in adopting the proposed case-in-chief approach in lieu of the "*Buckeye*" approach.[39] The Commission is requiring no more than an oil pipeline bear its burden of proof in a fashion that ensures that there is no reliance on presumed market forces.[40] Last, the Commission, as part of this rule, sees no reason to direct staff to aggregate oil pipeline data.

ARCO suggests that if an oil pipeline's indexed-based rates are challenged as substantially exceeding its increase in costs, the oil pipeline should be allowed to advance a market-based justification of those rates in a *Buckeye* bifurcated procedure. The Commission rejects ARCO's suggestion because it is appropriate to keep cost challenges to indexed rates separate from market-based rate cases. For example, under ARCO's proposal, if the oil pipeline failed in its market-based defense, it would still be able to defend on cost grounds. The Commission believes it better for the oil pipeline to defend solely on cost grounds under Order No. 561. An oil pipeline may file an application for market-based rates at any time.

Buckeye asks about noncompetitive markets after others are found to be competitive. It asks the Commission to clarify that it will "permit substantially competitive pipelines to propose alternative ratemaking programs or approaches that do not apply the index to their less competitive markets."[41] It also is concerned about the difficulty of an allocation of costs between competitive and noncompetitive markets under a cost-of-service analysis if raised by the shipper or oil pipeline.

The Commission sees no need to discuss Buckeye's requests and concerns here. Any oil pipeline seeking a waiver from the index for another approach for noncompetitive markets may file such a waiver request with its application for market-based rates.

VII. Monitoring and Constraints

As in the NOPR, the Commission proposes no generic constraints on the level of market-based prices or on their duration. In addition, the Commission proposes no mechanism to monitor market-based rates.

Sinclair maintains that the Commission, to discharge its responsibilities under the ICA, must impose price caps and term limits on market-based rates. The Farmers submit that any market-based rates should be experimental and for a trial period such as the three-year period allowed in *Buckeye*. They argue that this will allow the Commission and shippers to judge whether competition is actually effective in a particular market. In addition, they maintain that the final rule should require applicants for market-pricing authority to propose specific safeguards against the risk that competition will not effectively constrain rate increases.

Alberta maintains that the Commission should require an oil pipeline to file comprehensive information about the markets in which it is charging market rates so that the Commission can examine whether the pipeline has been able to exercise significant market power. It also suggests that the Commission monitor an oil pipeline's earnings because comparison of its earnings prior to using market rates to its earnings thereafter may indicate that it has exerted monopoly power. Alberta further suggests the Commission re-

[38] In the example, Total states that: "delivery-based market shares of pipelines can be aggregated to calculate delivery-based HHIs. The availability of such studies to shippers would minimize their burden of constructing an answer to a pipeline's direct case." Comments at pp. 2, 3.

[39] In general, an oil pipeline tariff filing was not suspended or investigated unless it was protested. Under the "*Buckeye*" approach, if its rates were protested, the oil pipeline could elect at the hearing to prove it lacked significant market power, filing its case-in-chief after discovery. *See Buckeye Pipe Line Co.*, 44 FERC ¶ 61,066 (1988).

[40] *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

[41] Comments at p. 8. Buckeye refers to its own program but states that it does not suggest that it be addressed here.

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consider adopting a rate trigger mechanism as a safeguard against monopoly rents and to provide a tolerance level around rates to ensure they do not stray from a zone of reasonableness.

The Commission concludes that there is no need to adopt generic rules about constraints on the level or duration of market-based prices. This is a matter to be considered in individual cases in light of the circumstances there. The Commission does not consider the market-based rate approach for oil pipelines generically as experimental or in need of a trial or in need of generic safeguards, such as rate triggers. All such issues can be discussed in the context of an individual case.

The Commission will be able to adequately monitor market-based rates through price changes because the oil pipeline must file its rates. In addition, the Commission can monitor the oil pipeline's aggregate earnings through its Form No. 6 filing.

VIII. The Rule

The Commission is amending subchapter P of its regulations, Regulations Under the Interstate Commerce Act, by adding a new Part 348 to those regulations. Section 348.1(a) requires an oil pipeline to file a statement of position and supporting statements with its application. Section 348.1(b) provides that an oil pipeline's statement of position must include an executive summary of its statement of position and a statement of material facts. The latter must include citation to the supporting statements, exhibits, affidavits, and prepared testimony. In its statement of position, the oil pipeline would be expected to present its arguments in favor of its position that it lacks significant market power in the relevant markets. The Commission received no comments about the specifics of Sections 348.1(a) and (b).[42]

Section 348.1(a) requires that an oil pipeline seeking a market power determination include with its application the information required by section 348.1(c). Under section 348.1(c) the oil pipeline must include certain designated information. The information required is mostly factual and is relevant to measuring the oil pipeline's ability to exercise market power in the relevant markets. That measurement will enable the Commission to determine whether the oil pipeline can exercise significant market power by profitably maintaining its prices significantly above competitive levels for a significant period.

The Commission is requiring the oil pipelines to essentially file the same information as the Commission has analyzed in the past in oil pipeline proceedings with respect to market power determinations. In brief, the Commission is first requiring the oil pipeline to define the relevant markets to be analyzed. It must identify the geographic areas and the products to be analyzed to establish the relevant markets for which to determine market power. For example, the inquiry might be, does the oil pipeline possess significant market power over the transportation of crude oil into the Houston area? Further, the Commission is requiring the oil pipeline to identify the competitive transportation alternatives for its shippers, including potential competition, and other competition constraining its rates. Finally, the oil pipeline must compute the market concentration for the relevant markets (the HHI) and other market power measures based on the information provided about competition. The Commission will be able to analyze the oil pipeline's information and its measures of market concentration and power to determine if the oil pipeline lacks significant market power in the relevant markets.

If a record about a market has been established in an oil pipeline proceeding, another oil pipeline may make use of all or part of that record in satisfying its burden to present information to the extent the other record contains relevant public information which is not out-of-date.[43] The Commission turns to the specific supporting statements.

A. *Statement A—Geographic Market*

In Statement A, the Commission is requiring that the oil pipeline describe the geographic markets in which it seeks to make a showing that it lacks significant market power. The oil pipeline must ex-

[42] The argument that it is unfair to require the oil pipeline applicant to file a case-in-chief at the outset was discussed above.

[43] *FERC Statutes and Regulations* ¶ 32,508 at p. 32,889.

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plain why its method for selecting the geographic markets is appropriate. The Commission also is requiring the oil pipeline to include both relevant origin and destination markets in its evidentiary presentation. This will provide interested parties with complete information about competition at the supply and delivery ends of the pipeline system. The Commission is not requiring the oil pipeline to file a market analysis of each point-to-point corridor. The Commission concludes that, in light of the significant point-to-point traffic in the oil pipeline industry, this would be too onerous a requirement at the filing stage, that a point-to-point corridor analysis may exclude competitive alternatives to the relevant service and, in some instances, it could provide an inaccurate picture of market concentration. However, a protestant may, as part of its response to the oil pipeline's application, seek to prove that in the particular circumstances a point-to-point corridor approach should be used to determine the appropriate geographic market.

The Commission is not requiring an oil pipeline to file pursuant to any particular geographic market definition. But the Commission expects that oil pipelines will propose to use BEAs as their geographic markets. In that event, the burden will be on the oil pipeline to explain why its use of BEAs or any other definition of the geographic market is appropriate. If a pipeline uses BEAs, it must show that each BEA represents an appropriate geographic market. Of course, the oil pipeline may choose to define its relevant geographic markets at a sub-BEA level, such as by a given radius around its terminals. As with BEAs, the oil pipeline must explain why this geographic market definition is appropriate.

The AOPL, ARCO, and Marathon maintain that the Commission should establish BEAs "as the generally applicable means for determining relevant geographic markets" or "[a]lternatively the 'explanation' that use of BEAs to define relevant geographic markets complies with Commission precedent should satisfy a pipeline's obligation to explain its chosen approach."[44] The AOPL refers to *Buckeye* and *Williams* as such precedents employing BEAs to define relevant geographic markets.

Alberta, Total, and the Farmers support the Commission's geographic market proposal. Alberta maintains that the geographic size of markets will depend on many factors. Total submits that there are many instances where BEAs are larger than a relevant geographic market area, such as where a pipeline needs two terminals to serve distinct population centers. It further states that it does not object to the Commission's proposal to allow pipelines to submit data on a BEA basis, provided that shippers have the right to contend that the BEA is too large. In addition, Total states that it supports the Commission's conclusion that shippers should be entitled to present information demonstrating that it may be appropriate to utilize a point-to-point transportation corridor market as the relevant geographic market. The Farmers maintain that it is far more realistic to define relevant geographic markets on a fact basis than on the basis of arbitrary BEAs.

The Commission rejects the oil pipelines' requests with respect to BEAs. As stated above, the Commission believes that the appropriate geographic markets should be determined in each proceeding based on its facts. The burden is on the proponent of any particular definition.

The AOPL also argues against the proposal to include origin markets. It states that the Commission provided no rationale in the NOPR and that in *Buckeye* and *Williams* the Commission rejected arguments that it consider origin markets and focused only on destination markets. It adds that this complexity is not needed when there is little reason to be concerned about monopsony power in origin markets, that an analysis of each end of point-to-point service would significantly increase the burden on oil pipelines, and that the definition of origin market is a matter of some uncertainty owing to interconnections. The AOPL asserts that a competitive analysis of origin markets should be required only when proposed by an oil pipeline or if a shipper raises an issue of market power in origin markets.

On the other hand, Alberta and the Farmers support the Commission's proposal to include origin markets. Alberta maintains that an oil pipeline need only possess market power in either an origin

[44] AOPL's comments at p. 41.

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or destination market to exert market power in a transportation corridor. The Farmers state that while the NOPR properly allows protestants to seek corridor market definitions, there is no justification for requiring protestants to bear the burden of proof and that if a protestant raises the issue of corridor market power, the burden of proof should remain with the applicant as part of its overall burden of establishing the relevant geographic market.

The Commission concludes that it is appropriate to include origin markets in the geographic market information. At this time, the Commission is still concerned about the possibility of monopsony power. The Commission agrees with the Farmers that the ultimate burden of proof is on the oil pipeline to establish the relevant geographic market. However, a proponent of corridor geographic markets must come forward with an adequate presentation to warrant rebuttal by the oil pipeline.

B. *Statement B—Product Markets*

In Statement B, the Commission is requiring the oil pipeline to identify the product market or markets for which it seeks to establish that it lacks significant market power. The oil pipeline must explain why the particular product definition is appropriate.

Under the ICA, the Commission regulates the transportation of oil by pipeline.[45] In a market power analysis, the Commission must determine the oil pipeline's ability to exercise market power over this transportation service. However, a market power analysis in general cannot be made solely in the context of transportation rates. Where competitive alternatives constrain the applicant's ability to raise transport prices, the effect of such constraints is ultimately reflected in the price of the commodity transported. Hence, the delivered commodity price (relevant product price plus transportation charges) generally will be the relevant price to be analyzed for making a comparison of the alternatives to a pipeline's services. However, in some instances such as for origin markets or crude oil pipelines, it may be appropriate to make a case based only on transportation rates. A pipeline may elect to file such a case and a protestant may argue that such a case is appropriate. In either event, the burden of establishing the relevant product market remains on the oil pipeline.

The Commission is not requiring a specific way to define the product markets. The relevant product market first would be distinguished between the transportation of crude oil and the transportation of refined products. Crude oil transportation could further be divided to include transportation of natural gas liquids while products transportation could be delineated by type, such as motor gasoline, distillates, or jet fuel. The oil pipeline should, in the first instance, select its product market and the burden is on the oil pipeline to justify its choice.

The AOPL argues that the Commission is unjustifiably retreating from the standard of *Buckeye* and *Williams*—"delivered pipelineable petroleum products." It maintains that this standard should be the generally applicable method for identifying relevant product markets, with participants free to argue for exceptions as appropriate.

Total maintains that the Commission has correctly recognized that crude and product markets can and should be divided further into differentiated products. It argues that, in order to minimize the need for discovery, the Commission should require that the delivery data be submitted by crude and product type and that capacity relied upon in HHI calculations should be segregated by crude types and product types. It further submits that oil pipelines should be further required to identify all alternatives of the same crude type or products which are being transported by the pipeline seeking a market-power demonstration.

The Commission reiterates that it is up to the oil pipeline to identify the product market or markets for which it seeks to establish that it lacks significant market power. As stated above, the Commission is not establishing at this time any presumptions as suggested by the AOPL. Nor will the Commission require the oil pipeline to submit information by crude and product type as proposed by Total. This would be too onerous at the outset. However, in identifying competition, as

[45] *49 U.S.C. 1(1)(b).*

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suggested by Total, the type identification should match that of the oil pipeline's commodity type used to determine the product market.

The AOPL also contends that the Commission's discussion of transportation in the product context is "problematic." It argues that if it "is intended to address relevant price for the purpose of comparing competitive alternatives to all pipeline transportation, it simply is misplaced and should be shifted to a discussion of how to define market power," but if the Commission intends to require relevant product markets to be defined to include transportation, or the transportation of particular products, the discussion would represent a significant break with *Buckeye* and *Williams* which recognized that relevant product market could include non-transportation alternatives, such as refiners.[46] It asks the Commission at a minimum to clarify that "no such narrowing of the definition of 'relevant product markets' was intended."[47]

The Commission is not narrowing the definition of relevant product market by defining it in terms of the transportation of the commodity. That definition of relevant product market simply recognizes that the Commission regulates the transportation rate. As the AOPL maintains, non-transportation factors, such as competition from refiners, are an element in an analysis of an oil pipeline's market power with respect to the pertinent product.

Sinclair is concerned about the NOPR's statement that "the delivered commodity price (relevant product price plus transportation charges) generally will be the relevant price."[48] It assumes, and seeks clarification, that the term "product" applies to both petroleum products and crude oil. It further urges that the Commission "state that the use of any delivered price concept in a market power analysis is directed to the market power which a pipeline exercises with respect to shippers - not with respect to the price ultimate consumers pay for refined petroleum products." It maintains that the Commission should do this because shippers, and not end users, are the protected class under the ICA.[49] Sinclair further urges the Commission to reflect on the particular situations in which the delivered price concept is useful in market power analysis, such as in developing the geographic contours of the market. It further contends that it must be recognized that it is a pipeline's ability to increase its transportation rates, and not the delivered price, that must be the ultimate focus of the analysis. It specifically refers to crude oil origin markets, where the netback price is pertinent, and to captive refiners in the origin market of a product pipeline, which refiner could be adversely affected by a rate increase by an inability to raise prices in the retail market. Sinclair suggests that protestants should always be given the opportunity to conduct discovery and present evidence with respect to a pipeline's ability to unilaterally raise its transportation rates and that there should not be any narrow bounds on the relationship between the commodity price and a pipeline's market power.

Sinclair is right that the product referred to in the NOPR was both petroleum products and crude oil. Sinclair is also correct that the Commission's analysis reflects market power *vis-a-vis* shippers and not consumers. This is because, whether or not the ICA is intended to protect consumers, it is the rate paid by shippers that must be just and reasonable.[50] Sinclair's other arguments should be presented in a particular case when the Commission must consider the appropriate determination of the geographic and product market. The Commission will consider requests for discovery when it determines what future proceedings are appropriate after protests are filed.

C. *Statement C—Pipeline Facilities and Services*

In Statement C, the Commission is requiring the oil pipeline to describe its own facilities and services in the relevant markets identified in Statements A and B. Statement C must include all pertinent data about the pipeline's facilities and services in those markets. For example, without limitation, the oil pipeline would

[46] Comments at p. 44.

[47] *Id.*

[48] *FERC Statutes and Regulations* Proposed Regulations ¶ 32,508 at p. 32,890.

[49] Citing *Williams Pipeline Co.*, 21 FERC ¶ 61,260 at p. 61,584 (1982).

[50] Farmers *Union Central Exchange, Inc.* v. *FERC*, 734 F.2d 1486, 1507 (D.C. Cir. 1984).

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have to include data on the capacity of its facilities, on its throughput, on its receipts in its origin markets, on its deliveries in its destination markets and to its major consuming markets, and the mileage between its terminals and its major consuming markets. Data should be supplied for each commodity carried, such as jet fuel, gasoline, etc.

The AOPL maintains that, aside from its origin market objection, the proposed Statement C would require extremely sensitive shipper receipt and delivery information, which, in many instances, would constitute disclosure of confidential shipper information in violation of Section 15(13) of the ICA. It adds that disclosure of data for each commodity carried would compound the problem. It makes two requests. First, Statement C should be streamlined to require only information likely to influence the ultimate market power determination and, second, some mechanism must be developed to safeguard the confidentiality of the information filed.

Alberta and Total support the Commission's proposal to collect detailed data. Total adds that the Commission should direct its staff to aggregate delivery data submitted by all pipelines serving each BEA and calculate delivery-based HHIs because the availability of such studies would reduce the need and difficulty of obtaining such data in discovery. It further states that the delivery data also will be useful to determine the extent of excess capacity and to determine the likelihood that terminals would be constructed in response to a rate increase because it is necessary to know the extent of available uncommitted upstream capacity and supplies to serve a new terminal.

The Commission rejects the AOPL's request that Statement C require only data likely to influence the ultimate market power determination because it would enable the oil pipeline to make that determination at the outset. The AOPL's concern about safeguarding the confidentiality of sensitive information is being addressed through a change in procedures as discussed above. In this rule, the Commission will not direct staff to collect aggregate delivery data and calculate delivery-based HHIs. However, if the Commission receives sufficient data to make collection warranted, it may reconsider this in the future.

D. *Statement D—Competitive Alternatives*

In Statement D, the Commission is requiring the oil pipeline to describe available transportation alternatives in competition with the oil pipeline in the relevant markets and other competition constraining the oil pipeline's rates in those markets. To the extent available, Statement D must include all pertinent data about transportation alternatives and other constraining competition. For example, the oil pipeline would have to include data similar to that provided for its own facilities and services in Statement C, including cost and mileage data in specific reference to the oil pipeline's terminals and major consuming markets. The following transport and other competition might be included in a market power calculation: other pipelines, including private pipelines and those passing through the geographic market but without terminals, pipelines passing near the geographic market, barges, trucks, and refineries within the geographic market. The Commission is not excluding any alternative form of transport or other competition, including, for example, local consumption in origin markets. However, the burden is on the oil pipeline to justify its inclusion of transportation alternatives and other competition in its market power analysis.

The AOPL maintains that the Statement D - type information lies largely beyond a pipeline's reach. It declares it highly unlikely that a competing pipeline will provide information such as throughput, origin market receipts, destination market deliveries, and deliveries to major consuming markets, particularly by commodity. It states that to do so would be illegal. It also argues that Statement D potentially requires the production of much ultimately useless information. It requests the Commission to require "only information or estimates concerning matters ultimately affecting the Commission's determination of market power" and to require only "publicly available information or [the oil pipe-

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line's] best estimate of competitive alternatives."[51]

The Commission denies the AOPL's first request. As stated above, permitting the oil pipeline to submit information or estimates that only affect the Commission's determination of market power will enable it to make that determination at the outset. With respect to the second request, the Commission has modified the proposal in the NOPR to require the oil pipeline to include pertinent data only to the extent available. Hence, as requested by the AOPL, the oil pipeline need only file information that is publicly available or its best estimates of competitive alternatives, unless the oil pipeline possesses additional information. Of course, it is in the oil pipeline's interest to make its best case to satisfy its burden of proof.

E. *Statement E—Potential Competition*

In Statement E, the Commission is requiring the oil pipeline to describe potential competition in the relevant markets. To the extent available, Statement E must include data about the potential competitors such as a potential entrant's costs and their distance in miles from the oil pipeline's terminal and major consuming markets.

The AOPL asserts that the most reliable information is possessed by shippers and not pipelines. It states that it has no objection so long as the pipeline's best estimates of potential competition drawn from publicly available information are acceptable.

The Commission has modified the proposal in the NOPR to require the oil pipeline to include data only to the extent available. Hence, as proposed by the AOPL, an oil pipeline need only submit its best estimates of potential competition drawn from publicly available information, unless the oil pipeline possesses additional information. Of course, it is in the oil pipeline's interest to make its best case to satisfy its burden of proof.

F. *Statement F—Maps*

In Statement F, the Commission is requiring maps showing the oil pipeline's principal transportation facilities and the points at which service is rendered under its tariff, the direction of flow of each line, the location of each of the oil pipeline's terminals, the location of each of its major consuming markets (cities, airports, and the like, as appropriate), and the location of alternatives to the oil pipeline, including their distance in miles from oil pipeline's terminals and major consuming markets. The statement must include a general system map and maps by geographic markets and the information required by this statement may be on separate pages. No commenter opposed Statement F.

G. *Statement G—Market Power Measures*

In Statement G, the Commission is requiring the oil pipeline to set forth the calculation of the HHI[52] and its market share with respect to the relevant markets and the calculation of other market power measures relied on by the oil pipeline, along with complete particulars about those calculations. The Commission believes that it is useful to obtain a showing of market concentration using the HHI. The HHI must include the oil pipeline and the competitive alternatives set forth in Statements D and E. The burden is on the oil pipeline to justify the individual market shares used in calculating the HHIs. In addition, the Commission is not proposing any particular HHI level, such as 1800 or 2500, as a screen or presumption, rebuttable or otherwise. All factors must be considered in determining whether an oil pipeline lacks significant market power.

The Commission also is requiring the oil pipeline to submit a market share calculation based on its receipts in its origin markets and its deliveries in its destination markets, if the HHIs are not based on those factors. For example, if the destination HHIs are based on capacity determined market shares, the oil pipeline would have to submit a calculation showing its share of the market based on deliveries in the respective destination markets. The Commission is not proposing any screen or presumption, rebuttable or otherwise, about particular market share levels. All factors must be considered in determining whether an oil pipeline lacks significant market power.

The oil pipeline may also include other indicators of the lack of significant market power—for example, it could present

[51] Comments at p. 46.

[52] *Id.*

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evidence about water transportation as an indication that the oil pipeline lacks significant market power.

The AOPL objects to the inclusion of origin market information in HHI and market share calculations and to the production of underlying HHI and market share calculations as part of an initial submission, particularly where a market's HHI or pipeline market share is so low as to preclude a challenge to the market's competitiveness. The AOPL also maintains that market share data for HHIs should reflect market capacity and not market deliveries. It argues that the use of delivery data distorts the analysis of market behavior because it is at best a "snapshot" of the market as it existed prior to any purported try to exercise market power rather than a gauge of the potential of the market to respond to such an exercise. It maintains that this prospective response can be evaluated best by considering the market's capacity to respond. It also argues that delivery data are not readily available and of questionable accuracy unlike capacity data which tend to be a matter of public information and more readily available.

Total supports the collection of delivery data in order to calculate market shares. It further maintains that the delivery information should be aggregated in order to calculate delivery-based HHIs to provide the Commission with a picture of how the market is actually behaving inasmuch as this understanding is essential to analyzing the rule of potential competition.

As discussed above, the Commission considers it appropriate to include origin markets in a determination of market power because it is not ready to exclude the possibility of oil pipeline monopsony power. The Commission is permitting oil pipelines to submit HHIs based on capacity rather than on deliveries. They need submit delivery based data only for market share as another factor to consider in making the determination whether or not an oil pipeline possesses significant market power. At this time, the Commission is not going to aggregate data, but may do so at a later time.

H. *Statement H—Other Factors*

In Statement H, the oil pipeline would describe any other factors that bear on the issue of whether it lacks significant market power in the relevant markets. The oil pipeline must explain why those other factors are pertinent. Possible other factors are: Exchanges, Excess Capacity, Competition with vertically integrated companies, buyer power, and profitability. The Commission is not excluding any factor and is not limiting the factors to those listed in the NOI. For example, an oil pipeline might want to show that it has been losing markets over a period of years or that the relevant market is expanding. The burden is on the oil pipeline to show the relevance of any factor to showing its lack of significant market power. No commenter opposed Statement H.

I. *Statement I—Proposed Testimony*

In Statement I, the Commission is requiring the oil pipeline to present proposed testimony in support of its application. This will serve as its case-in-chief if the Commission sets the application for hearing. The proposed witness must subscribe to the testimony and swear that all statements of facts in the proposed testimony are true and correct to the best of his or her knowledge, information, and belief.

The AOPL opposes Statement I because it does not believe it should present a case-in-chief prior to the filing of a protest as discussed above. In addition, it argues that the filing of a case-in-chief at this stage raises significant due process concerns because it cannot conduct discovery, as it can now, of other shippers prior to submitting its case. It points out that all participants except the oil pipeline will be able to conduct discovery before first filing prepared testimony. It asks, at a minimum, that an oil pipeline should receive a 15-day period after its initial filing to submit proposed testimony.

There is no entitlement to discovery before an applicant files a case-in-chief. In addition, the Commission has not ruled that a participant is entitled to discovery from the oil pipeline or any one else before it files a protest and its responsive case.[53] Last, the AOPL has provided no

[53] *See infra.*

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justification for a 15-day delay in filing its proposed testimony.

The Commission expects the oil pipeline to file a complete application which should contain sufficient information upon which the Commission could grant the application after expiration of the protest period. However, in the event the Commission finds it necessary to establish a hearing, that process would be greatly expedited because the applicant's testimony is part of the record already. Thus, this requirement is intended to expedite the hearing process. The Commission's experience with gas pipelines, for example, has been that the proposed testimony often provides essential justification for the applicant's proposal which is not provided elsewhere in the filing. It has been the Commission's experience that the process of proposing sworn testimony often causes an applicant to organize its arguments and facts in a manner that is easier to understand. This also aids the protestants in their framing of the issues to pursue.

IX. Procedural Requirements

In new section 348.2 the Commission is adopting several procedural requirements in connection with applications for a market power determination. First, an oil pipeline must file an original and 14 copies of its complete application with the Commission but would only have to provide its letter of transmittal to its shippers and subscribers. As discussed above, some of the supporting information may be prohibited from disclosure under Section 15(13) of the ICA. Hence, the oil pipeline must submit with its application any request for privileged treatment of documents and information under section 388.112 of the Commission's regulations and a proposed form of protective agreement. In the event the oil pipeline requests privileged treatment under section 388.112, it must file the original and three copies of its application with the information for which privileged treatment is sought and 11 copies of the application without that information. The letter of transmittal must describe the application for a market power determination and identify each rate that would be market-based, if the oil pipeline shows that it lacks significant market power in the relevant market. The pipeline must include a copy of its proposed form of protective agreement with its letter of transmittal.

Under the regulations, a person must make a written request to the pipeline for a copy of the complete application within 20 days after the filing of the application with the Commission. The requesting person must include an executed copy of the protective agreement. Any person objecting to a proposed form of protective agreement must file a motion under Section 385.212 of the Commission's regulations.[54] The oil pipeline must provide a person with a copy of its complete application within seven days after receipt of the written request and an executed copy of the protective agreement. A protestant must file its protest to the application within 60 days after the filing of the application. At that time, the protestant must set forth in detail its grounds for opposing the oil pipeline's application, including responding to its statement of position and information, and, if the protestant desires, presenting information of its own pursuant to Statements A-I.

The Commission, after examination of the oil pipeline's application and any protests, will issue an order in which it will rule summarily on the application or, if appropriate, establish additional procedures and the scope of the investigation. Additional procedures may or may not involve a hearing before an administrative law judge.

The Commission is requiring the oil pipelines to file their applications with the Commission on an electronic medium in addition to the paper filing. The formats for the electronic filing and the paper copy will be obtainable at the Federal Energy Regulatory Commission, Public Reference and Files Maintenance Branch, 941 North Capitol Street, N.E., Washington, D.C. 20426. The Commission intends to establish the formats in cooperation with the oil pipeline industry.

The Commission believes that it is sufficient to adopt procedures only for the submission of applications and responses

[54] The Commission will act expeditiously to resolve any controversies about protective agreements.

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thereto. Hence, the Commission is not adopting any regulations with respect to protests or complaints against existing marketbased rates under Sections 15(7) and 13(1) of the ICA. However, the Commission expects a protestant or complainant to allege and to present evidence that the pipeline has developed significant market power. In particular, the Commission would expect a protestant or complainant to describe any circumstances that have changed since the Commission made the determination that the oil pipeline lacks significant market power and could charge market-based rates.

Petrochemical requests that the Commission publicly notice any oil pipeline rate filing in the *Federal Register* as further assurance that any notice of a proposed rate change is widely disseminated. It further asks the Commission to clarify that "pursuant to proposed regulation § 348.2(b), the copy of the letter of transmittal that is to be provided to shippers and subscribers on or before the day the application is filed, must be *received* by the shipper or subscriber prior to the date of the application. In other words, the deadline is an in-hand receipt date, not a posted for mailing date."[55] It contends that this is necessary to avoid erosion of the 15-day window for requesting a copy of the entire application.

It has not been the Commission's practice to publicly notice oil pipeline tariff filings in the *Federal Register* because the oil pipeline must serve all affected persons. However, the Commission has modified the proposal in the NOPR to require written requests 20 days after the application was filed rather than 15 days. This should satisfy Petrochemical's concern about the deadline running from the date of application rather than receipt by the shipper.

Alberta, Petrochemical, and Sinclair maintain that protestants need more time than 60 days after the filing of the application as proposed in the NOPR. Alberta and Petrochemical suggests that the deadline for filing protests be extended to 90 days.

The Commission believes that protestants will be able to respond within 60 days of the filing of the application. However, if this period is insufficient in a particular case, then additional time can be requested from the Commission under Section 385.2008 of the Commission's regulations. The Commission will act liberally in connection with requests for an extension of time.

Petrochemical requests clarification that a complete copy of the application provided to protestants will include the materials submitted in electronic format. It argues that the "ability to obtain cost and other data in electronic form would save vast amounts of money that would otherwise be spent in the redundant task of taking a hard copy generated from computers and then reentering the data into computer format so that studies and analyses can be performed on the data."[56] The Commission clarifies, as requested by Petrochemical, that the complete copy of the application must include the materials submitted in electronic format.

Davis submits that if "electronic medium" is defined as computer modem-based electronic equipment, the electronic filing requirement may be a hardship on small independent pipeline companies. Davis suggests the requirement be permissive. Davis also maintains that proposed sections 348.2(b) and (c) are redundant to current procedure and place an additional burden on oil pipelines.

The Commission is not modifying its requirement that applications must be submitted on an electronic medium. However, an oil pipeline may submit a waiver request. Last, with respect to Davis' redundancy argument, the Commission sees no harm in repetition as the new regulations merely reiterate in part current procedure for convenience.

The Farmers maintain that the protestants have a right to a hearing where a case involves substantial issues of fact, law, or ratemaking policy. They argue that because the time for preparing a rebuttal is so short, shippers need the opportunity for normal prehearing and hearing procedures to present a meaningful response to an oil pipeline's case-in-chief and to obtain clarification or explanation of the applicant's evidence. Alberta also suggests that "all proceedings must receive full hearing before an Administrative Law Judge (ALJ) to ensure that all evidence is thoroughly tested and

[55] Comments at p. 5.

[56] Comments at p. 6.

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the Commission has a complete evidentiary record on which to base its decision."[57]

The Commission believes that the procedures for proceeding on an application for a market power determination should be tailored to the specifics of the case. Hence, the Commission will make no generic decisions here. The protestants should make their request for a hearing before an ALJ when they file their protests. The oil pipeline applicants may make their request after the protests are filed. The Commission is not establishing provisions for limited discovery. The oil pipeline and the protestants should file their case-in-chiefs and responsive pleadings without discovery. The Commission believes that the oil pipeline and the protestants should have sufficient information available from public sources or their own experience to submit their cases. Of course, the Commission encourages the informal exchange of information to expedite and facilitate the application process. The protestants may request discovery when their protests are filed. The oil pipeline applicants may request discovery after the protests are filed. Both requests must provide a full explanation for the need for discovery, a hearing, or both.

X. Environmental Analysis

The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[58] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[59] The action taken here is procedural in nature and therefore falls within the categorical exclusions provided in the Commission's regulations.[60] Therefore, neither an environmental impact statement nor an environment assessment is necessary and will not be prepared in this rulemaking.

XI. Reporting Flexibility Certification

The Regulatory Flexibility Act (RFA)[61] generally requires the Commission to describe the impact that a rule would have on small entities or to certify that the rule will not have a significant economic impact on a substantial number of small entities. An analysis is not required if a rule will not have such an impact.[62] Most oil pipelines to whom the rule will apply do not fall within the definition of small entity.[63] Consequently, pursuant to section 605(b) of the RFA, the Commission certifies that the regulations will not have a significant impact on a substantial number of small entities.

XII. Information Collection Requirements

The Office of Management and Budget's (OMB) regulations[64] require that OMB approve certain information and recordkeeping requirements imposed by an agency. The information collection requirements in this rule are contained in FERC-550 "Oil Pipeline Rates" Tariff Filings" (1902-0089).

The Commission's Office of Pipeline Regulation uses the data collected in these information requirements to investigate the rates charged by oil pipeline companies subject to its jurisdiction, to determine the reasonableness of rates, and when appropriate prescribe just and reasonable rates. In addition, the information to be required by the rule would allow the Commission to determine if an oil pipeline lacks significant power in the relevant markets when it proposes to charge market-based rates.

Because the adoption of the procedural rules will create an expected increase in the public reporting burden under FERC-550, the Commission is submitting a copy of the rule to OMB for its review

[57] Comments at p. 4.

[58] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), *FERC Statutes and Regulations, Regulations Preambles 1986-1990* ¶ 30,783 (1987).

[59] 18 CFR § 380.4.

[60] See 18 CFR § 380.4(a)(2)(ii).

[61] 5 U.S.C. § § 601-612.

[62] 5 U.S.C. § 605(b).

[63] Section 601(c) of the RFA defines a "small entity" as a small business, a small not-for-profit enterprise, or a small governmental jurisdiction. A "small business" is defined by referent to section 3 of the Small Business Act as an enterprise which is "independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. § 632(a).

[64] 5 CFR § 1320.14.

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and approval. Interested persons may obtain information on these reporting requirements by contacting the Federal Energy Regulatory Commission, 941 North Capitol Street, N.E., Washington, D.C. 20426 [Attention: Michael Miller, Information Services Division, (202) 208-1415]. Comments on the requirements of this rule can be sent to the Office of Information and Regulatory Affairs of OMB (Attention: Desk Officer for Federal Energy Regulatory Commission).

XIII. Effective Date

The final rule will be effective January 1, 1995.

List of Subjects in 18 CFR Part 348

Pipelines, Reporting and recordkeeping requirements.

By the Commission.

Lois D. Cashell,

Secretary.