

and what other factors will have to be weighed to enable a finding as to the existence or absence of significant market power. For measuring market concentration, the Commission concluded that a proper screening device is an HHI.³⁰ The Commission also concluded that the use of delivery data, e.g., deliveries into each BEA, is the best method for calculating HHIs in Buckeye.

In *Buckeye* (Opinion No. 380), market power was defined as the ability to profitably raise the price above the competitive level for a significant time period. Significant market power was defined as the ability to control market price by sustaining at least a 15% real price increase, without losing sales, for a period of two years. The Commission further concluded that the relevant price for the purposes of making a determination of whether Buckeye can profitably increase its transportation prices above the competitive level is the delivered product price. Because shippers or customers in the destination market often have the option of switching away from purchasing transportation into the market, and, instead, purchasing the delivered product itself, suppliers of

transportation must compete with suppliers of the delivered product.

There were 22 markets examined in Opinion No. 380. The Commission found that in 15 Buckeye lacked significant market power; in two Buckeye had no tariffs on file thus no finding was warranted; in one the record was insufficient and so continued regulation was necessary; and, in four, Buckeye was found to have market power.

2. The Buckeye Experiment

In Opinions No. 380 and 380-A, the Commission also authorized a three year experimental program proposed by Buckeye.³¹ During this experiment, rates in each competitive market were subject to two limitations: (1) Individual rate increases could not exceed a "cap" of 15% real increase over any two-year period, and (2) individual rate increases would be allowed to become effective without suspension or investigation only if they did not exceed a "trigger" of the change in the Gross Domestic Product (GDP) deflator plus 2%. Rate decreases were presumably valid but could not result in rates below marginal costs.

In the markets the Commission did not find to be competitive, no rate could be increased by more than the volume-weighted average rate increase in the competitive markets. Conversely, every rate in the "non-competitive markets" had to reflect the volume-weighted average of rate decreases in the competitive markets.³²

No protests of rate changes or complaints against existing rates were filed during the three year experiment. In addition, no protests were filed in opposition to Buckeye's filing to extend the experiment indefinitely.³³ Buckeye noted that this lack of opposition to its market-based program was "in sharp contrast to the years of complex and expensive rate litigation that preceded adoption of * * *" this program.³⁴

No rates were changed by more than the GDP+2% trigger during the three year period. In the competitive markets, rate increases were generally well below the trigger, and in the non-competitive markets, rate increases were below the allowed volume-weighted average increase in the competitive markets. The allowable and average actual rate changes are shown in the table below.

BUCKEYE RATE CHANGES

Year (April 1 to March 31)	Cap (GDP+15%) (percent)	Trigger (GDP+2%) (percent)	Competitive markets average rate change (percent)	Non-competitive markets average rate change (percent)
90-91	19.16	6.16	3.86	3.58
91-92	22.32	5.16	3.14	2.74
92-93	20.69	4.53	1.45	0.97

Since all changes in rates are based on an index *not* reflecting the pipeline's costs, there is no danger of the raising of rates in non-competitive markets through shifting costs attributable to competitive markets.³⁵ This attribute is not exclusive to the Buckeye program; approaches which base rate changes on something other than the pipeline's costs would eliminate this concern about cost shifting.

Finally, under the market-based program Buckeye was able to engage in

some successful marketing in very competitive situations. For example, in Indianapolis, where Buckeye held less than three percent of the market in 1990, Buckeye raised its share to 17 percent in 1993. "These increased volumes resulted from Buckeye's deep price discounts (as deep as 40%) in 1991 and later a volume incentive tariff to attract new refinery business from a recently restarted independent refinery * * *"³⁶ As a result of Buckeye's actions, the total size of the Indianapolis

market increased and its concentration decreased.

D. The Electric Cases

Since 1986, the Commission has approved many applications from public utilities to sell electricity in wholesale transactions at negotiated market-based rates. In a recent order addressing a request for market-based rates from an electricity marketer affiliated with a traditional public

³⁰The Commission used an HHI of .18 as an initial screen in Transcontinental Gas Pipe Line Corp. (*Transco*), 55 FERC ¶ 61,446 at 62,393 (1991).

³¹53 FERC 61,473 and 54 FERC 61,117.

³²On March 24, 1994, the Commission accepted a tariff that extended this experiment for an indefinite period (66 FERC ¶ 61,348). However, the Order stated that Buckeye was subject to the requirements of Order No. 561, the simplified and generally applicable ratemaking methodology for oil pipelines, when they take effect on January 1, 1995. On December 6, 1994, the Commission permitted Buckeye to continue its experimental program as an exception to the Commission's oil pricing policies,

subject to future reevaluation. Buckeye Pipe Line Co., L.P., 69 FERC ¶ 61,302 (1994).

³³66 FERC 61,348.

³⁴October 26, 1994 Buckeye Pipeline filing in Docket No. OR94-6-000, *et al.*

³⁵While there was concern that Buckeye might be able to "manipulate" the program by raising prices in the competitive markets solely to raise prices in the non-competitive markets, the Commission found this to be a very unlikely event under the approved program. It nevertheless committed to monitoring for this occurrence during the experiment (53 FERC 61,473). Since the growth rate

of revenues was higher in the competitive markets than in the non-competitive markets (constant annual growth rates of 6.54% versus 2.78% (66 FERC 61,348)), this demonstrates that this potential problem did not occur during the experiment.

³⁶February 22, 1994 "Statement of James A. Spicer on behalf of Buckeye Pipe Line Company, L.P."

In contrast to oil pipelines, natural gas pipelines are permitted to selectively discount. Thus, gas pipelines would be able to structure such a deal under the Commission's traditional cost-based rate regulation.