160 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Buckeye Linden Pipe Line Company LLC   Docket No. OR16-21-000

ORDER ON APPLICATION FOR MARKET-BASED RATE AUTHORITY

(Issued August 24, 2017)

1. On August 1, 2016, Buckeye Linden Pipe Line Company LLC (Buckeye Linden) filed an application (Application) for authorization to charge market-based rates for the transportation of all pipelineable refined petroleum products within the New York area Origin and Destination markets, which the Application defines as BEA No. 118.[1] Buckeye Linden states the authority to charge market-based rates in BEA No. 118 will allow Buckeye Linden the flexibility to respond quickly to market conditions and more effectively compete in the Origin and Destination markets. Buckeye Linden argues it does not possess market power in the Origin or Destination markets, and states both are workably competitive. The Application was unopposed.[2]

2. The Commission grants Buckeye Linden's Application for market-based rate authority for both the Origin and Destination markets, as discussed below.

[1] 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. *Market Based Ratemaking for Oil Pipelines*, Order No. 572, FERC Stats. & Regs. ¶ 31,007, 31,184 n.31 (1994), *aff'd sub nom. Assoc. of Oil Pipelines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

[2] World Fuel Services Inc., filed a motion to intervene, in order to become a party to the proceeding. The Commission grants World Fuel Services, Inc.'s motion.

I. Description of Filing

3. Buckeye Linden is a subsidiary of Buckeye Partners (BPL).[3] BPL is an oil pipeline company engaged in the transportation of refined petroleum products in interstate commerce subject to the regulatory jurisdiction of the Commission. Buckeye Linden states that its facilities are located entirely within BEA No. 118, and that it transports refined petroleum products within BEA No. 118 between Linden, New Jersey (Linden), Port Reading, New Jersey (Port Reading), Sewaren, New Jersey (Sewaren), and Perth Amboy, New Jersey (Perth Amboy). According to the Application, the Buckeye Linden pipeline system consists of: (1) 95,000 barrels per day of pipeline capacity on a 6-mile, 12-inch diameter pipeline (Line 604) leased from BPL, and (2) 95,000 barrels per day of pipeline capacity on a 6-mile, 16-inch diameter pipeline (Line 605) leased from Buckeye Perth Amboy Terminal LLC. Buckeye Linden states that together, Line 604 and Line 605 effectuate a loop on which Buckeye Linden serves the destinations of Linden, Sewaren, and Perth Amboy from origin points at Linden, Port Reading, Sewaren, and Perth Amboy.[4]

4. Buckeye Linden requests market-based rate authority for the transportation of all pipelineable refined petroleum products within the New York area Origin and Destination markets (BEA No. 118).[5] Buckeye Linden states that it is seeking market-based rate authority in order to have greater flexibility in setting rates than that currently available to it under the Commission's indexing and cost-of-service ratemaking regulations.[6] Buckeye Linden argues that operating under the Commission's indexing procedures and cost-of-service alternatives constrains Buckeye Linden's ability to respond quickly to market forces and to compete effectively in the Origin and Destination markets.[7]

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[3] Affiliates include: Buckeye Pipe Line Company LP, Buckeye Pipe Line Transportation LLC, Laurel Pipe Line Company, LP, Buckeye Perth Amboy Terminal LLC, Buckeye Port Reading Terminal, LLC, Buckeye Terminals, LLC, Buckeye Raritan Bay Terminal LLC, and Buckeye Bayonne Terminal LLC. *See* Application at 2, n.6.

[4] *Id.* at 3.

[5] *Id*. at 1.

[6] *Id*. at 4.

[7] *Id*.

5. Buckeye Linden states that its market-based rate application consists of two separate assessments, one examining market power in the Origin market, and a separate analysis of market power in the Destination market.[8] The evidence submitted by Buckeye Linden in the Application addresses: (i) the definitions of the relevant product and geographic markets; (ii) the competitive alternatives to Buckeye Linden that exist in each market; (iii) statistical analyses demonstrating Buckeye Linden's inability to exercise market power in each relevant market; (iv) potential sources of competition in each market; and (v) other factors that establish Buckeye Linden's lack of market power in each relevant market.[9]

6. Buckeye Linden states that the relevant product market is properly defined as the supply (in the case of the Destination market) or absorption (in the case of the Origin market) of all refined petroleum products that Buckeye Linden transports or could transport, which includes diesel fuel and home heating oil, jet fuel and gasoline.[10] Concerning the relevant geographic market, Buckeye Linden states that all of its facilities, and all of its origins and destinations, are located within BEA No. 118.[11] Buckeye Linden further states that BEA No. 118 also encompasses all competitive alternatives at both the origin and destination of Buckeye Linden's transportation movements.[12] Accordingly, argues Buckeye Linden, BEA No. 118 should be utilized as both the Origin market and Destination market for purposes of its Application.[13]

7. Buckeye Linden argues that there are numerous competitive alternatives to Buckeye Linden in both the Origin and Destination markets that would restrain any attempt by Buckeye Linden to raise and maintain rates above a competitive level.[14] These competitive alternatives, states Buckeye Linden, include local consumption, local production (refineries), other pipelines, firms that provide waterborne service, and

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[8] *Id*. at 6.

[9] *Id*. at 10.

[10] *Id*. at 11.

[11] *Id*. at 13.

[12] *Id*.

[13] *Id*.

[14] *Id*. at 16.

trucks.[15] Analyzing the markets, including these competitive alternatives it identified, Buckeye Linden calculated its market shares and market concentrations as within the range previously accepted by the Commission when granting market-based rate authority.[16]

II. Discussion

8. In Order No. 572,[17] as codified in Part 348 of the Commission's Regulations,[18] the Commission established 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. As set forth in Order No. 572, the Commission requires oil pipelines to define the relevant markets for which they are seeking a market power determination. In this context, "market power" is defined as "the ability to profitably maintain prices above competitive levels for a significant period of time."[19] The Commission does not require an oil pipeline to file pursuant to any particular geographic market definition, but considers that the appropriate geographic markets should be determined in each proceeding based on its facts.[20]

9. Further, the Commission requires oil pipelines to identify the competitive transportation alternatives for its shippers, including potential competition and other competition constraining its rates. The alternatives may include other pipelines, rail, barges, trucks, refiners, and local consumption. A competitive alternative must be available to receive product diverted from the applicant in response to a price increase, and must be of the same quality as the transportation service offered by the applicant.

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[15] *Id*. at 17.

[16] *Id*. at 22-25.

[17] Order No. 572, FERC Stats. & Regs. ¶ 31,007; *Enterprise Product Partners L.P. and Enbridge Inc.,* 146 FERC ¶ 61,115 (2014) (*Seaway I*); *Enterprise Products Partners L.P. and Enbridge Inc.,* 152 FERC ¶ 61,203 (2015).

[18] 18 C.F.R. pt. 348 (2017).

[19] *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098 at 1100 (D.C. Cir. 2012) (*Mobil*).

[20] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,188.

10. Finally, the oil pipeline must compute the market concentration for the relevant market(s) and other market power measures.[21] The Commission uses this information as a measure of whether the oil pipeline lacks significant market power in the relevant markets.

A. <u>Relevant Markets</u>

i. <u>Product Market</u>

11. Buckeye Linden states that the relevant product market consists of the supply (in the case of the Destination market) or absorption (in the case of the Origin market) of all refined petroleum products that Buckeye Linden transports or could transport, which includes diesel fuel and home heating oil, jet fuel and gasoline.[22] Buckeye Linden identifies the services that it competes with as including transportation by other pipelines, waterborne transportation, truck-based transportation and local consumption, including refineries.[23]

12. An oil pipeline seeking to charge market-based rates must identify the product market or markets for which it seeks to establish that it lacks significant market power.[24] The relevant product market does not consist of the commodity itself. Under the Interstate Commerce Act (ICA), the Commission regulates the transportation of oil by pipelines, not the commodity being transported.[25] Thus, it is the transportation of a particular product or products that is an appropriate product definition. The relevant product market for oil pipelines therefore includes transportation services the applicant provides and for which the applicant seeks to charge market-based rates, as well as any service that could discipline the exercise of market power over those services.[26] As to the second point, services that could discipline the exercise of market power are those that exhibit a suitable cross-elasticity of demand with the offered service; in other words,

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[21] *Id.* at 31,187.

[22] Application at 11.

[23] *Id*. at B-3.

[24] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,189.

[25] 49 U.S.C. app. § 1(1)(b) (1988) (cited in Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,189).

[26] 18 C.F.R. § 348.1(c)(5) & (8) (2017); *see also Potomac Elec. Power Co. v. U.S.*, 584 F.2d 1058 (D.C. Cir. 1978).

those that consumers would buy as a substitute for the offered service in response to an increase in the offered service's price.[27] The Commission does not require a specific product market definition; the pipeline must identify the product market or markets for which it seeks to establish that it lacks significant market power. The analysis is a fact-specific, case-specific analysis.

13. The Commission also has consistently explained that it is the shippers that determine the mix of refined petroleum products transported by a pipeline, and thus it is appropriate to include in the product definition the transportation and/or disposition all of the refined petroleum products that the pipeline applicant could transport.[28]

Commission Determination

14. Buckeye Linden's product market definition is consistent with Commission precedent. The Application defines the product market as those services that Buckeye Linden provides, as well as those services that could discipline an anti-competitive price increase by Buckeye Linden. Further, Buckeye Linden's analysis treats all refined petroleum products as a single product market, consistent with Commission precedent.[29]

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[27] *Mobil*, 676 F.3d at 1102.

[28] *Buckeye Pipe Line Co.,* 53 FERC ¶ 61,473, at 62,664 (1990) (*Buckeye*).

[29] *See Buckeye*, 53 FERC ¶ 61,473 at 62,664; *Williams Pipe Line Co.,* Opinion No. 391, 68 FERC ¶ 61,136, at 61,659 (1994) (Opinion No. 391); *Kaneb Pipe Line Operating Partnership, L.P.*, 83 FERC ¶ 61,183, at 61,760 (1998); *Longhorn Partners Pipeline, L.P.*, 83 FERC ¶ 61,345, at 62,378 (1998); *SFPP, L.P.,* 84 FERC ¶ 61,338, at 62,494 (1998); *Explorer Pipeline Co.,* 87 FERC ¶ 61,374, at 62,385 (1999) (*Explorer)*; *TE Products Pipeline Co.*, 92 FERC ¶ 61,121, at 61,463 (2000); *Colonial Pipeline Co.*, 92 FERC ¶ 61,144, at 61,529 (2000); *Wolverine Pipe Line Co.*, 92 FERC ¶ 61,277, at 61,921 (2000); *TE Products Pipeline Co.*, 95 FERC ¶ 61,108, at 61,314 (2001); *see also Colonial Pipeline Co.,* 75 FERC ¶ 61,047, at 61,180 (1996); *Marathon Ashland Pipe Line LLC*, 96 FERC ¶ 61,263, at 62,015 (2001); *West Shore Pipe Line Co.*, 100 FERC ¶ 61,001, at P 4 (2002) (*West Shore*); *Magellan Pipeline Co.*, 128 FERC ¶ 61,278, at P 4 (2009); *Magellan Pipeline Co.*, 132 FERC ¶ 61,016, at P 4 (2010).

ii. Geographic Market

15. The Commission requires an oil pipeline seeking to charge market-based rates to describe the geographic markets, both origin and destination, in which it is attempting to demonstrate a lack of market power.[30] A geographic origin market is a geographic area that includes all of the alternatives available to a shipper to transport or otherwise dispose of its particular product.[31] A geographic destination market is a geographic area within which buyers are able to purchase a pipeline's product.[32] Buckeye Linden seeks market-based rate authority for pipeline movements that originate in and are delivered to BEA No. 118, which is comprised of counties in New York, New Jersey, Connecticut and Pennsylvania.[33] Buckeye Linden therefore requests market-based rate authority for the same geographic Origin market and geographic Destination market (BEA No. 118).

16. Buckeye Linden argues that the use of BEA No. 118 as both the geographic Origin and Destination market is appropriate in this case because: (1) it is a recognized area of economic activity which encompasses the market in which competition for Buckeye Linden's transportation service occurs; (2) the market captures both direct and indirect alternatives to Buckeye Linden, allowing for an appropriately dynamic analysis; (3) the Commission accepted the use of BEAs as the appropriate definition of a pipeline's geographic market in the fully-litigated Opinion No. 391 and *Buckeye* market-based rate proceedings; (4) the Commission stated in Order No. 572 that it expects oil pipelines to use BEAs as the starting point for their analyses of the appropriate geographic markets; and (5) BEAs were used by the Department of Justice (DOJ) in its study that examined whether the oil pipeline industry faced sufficient competition to warrant complete deregulation.[34] Thus, argues Buckeye Linden, the use of BEA No. 118 is appropriate because it includes the competing alternatives to which Buckeye Linden's shippers could reasonably turn in order to avoid a price increase.[35]

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[30] *Seaway I*, 146 FERC ¶ 61,115 at P 35.

[31] *West Shore*, 100 FERC ¶ 61,001 at P 6, n.8.

[32] *Id*. P 5, n.7.

[33] Application at A-2.

[34] *Id*. at A-3.

[35] *Id*.

Commission Determination

17. Generally, the Commission has accepted a BEA designation as a good basis for defining a geographic market. Specifically, in *West Shore*, the Commission approved the applicant pipeline's proposed use of a BEA as both its Origin and Destination market.[36] Buckeye Linden has demonstrated that the use of BEA No. 118 is appropriate for defining both the relevant Origin and the relevant Destination market.

B. Competitive Alternatives

18. The Commission requires oil pipeline applicants seeking a market power determination to describe available transportation alternatives in competition with the pipeline in the relevant markets, and other competition restraining the pipeline's rates in those markets.[37] Alternatives may include other pipelines, rail, barges, trucks, refiners and local consumption. The Commission does not exclude any alternative form of competition. However, the burden is on the applicant pipeline to justify an alternative's inclusion in the market power analysis.[38] The fact that an alternative is located within a certain proximity to the pipeline does not alone establish that an alternative is a good alternative. For an alternative to be competitive, it must possess the ability to discipline, or prevent, a potential increase in price above the competitive level.[39]

19. Buckeye Linden states that it faces significant competition in both the Origin and Destination market.[40] Buckeye Linden argues that within the Origin market it faces competition from local consumption, pipelines, dock facilities, and trucks for the disposition of refined petroleum products.[41] Buckeye Linden estimates local consumption in the Origin market at 836.3 MBPD.[42] Buckeye Linden also identifies 24 unaffiliated pipelines and 148 dock facilities owned by 70 separate firms that operate within the Origin market that provide an alternative to those shippers that elect not to

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[36] *West Shore*, 100 FERC ¶ 61,001.

[37] Order No. 572, FERC Stats. & Regs. ¶ 31,007 at 31,191.

[38] *Id*.

[39] *Seaway I*, 146 FERC ¶ 61,115 at P 45.

[40] Application at 16.

[41] *Id*. at 17.

[42] *Id.* at A-10.

sell into the Origin market.[43] Thus, according to Buckeye Linden, firms that desire to transport refined petroleum products from or within the Origin market have numerous competitive alternatives.[44]

20. Concerning the Destination market, Buckeye Linden states that it competes with one refinery, 29 unaffiliated pipelines, 148 dock facilities, and trucks.[45] Buckeye Linden also notes that in addition to the Bayway refinery, there are four additional refineries within a 75-mile radius of BEA No. 118, all of which have access to BEA No. 118 either via truck racks or connecting pipelines.[46] According to Buckeye Linden, waterborne receipts of refined petroleum products in 2014 totaled more than 65 percent of local consumption needs in BEA No. 118.[47]

Commission Determination

21. The Commission finds there are many competitive alternatives to Buckeye Linden in BEA No. 118, as represented in the Application.

C. Market Metrics

22. In evaluating a market-based rate application, the Commission historically has used three statistics to assess the applicant's market power: (1) the Herfindahl-Hirschman Index (HHI); (2) delivery-based and capacity-based market share, which evaluates the applicant's share of the Origin or Destination market based on actual deliveries or actual capacity; and (3) the market's excess capacity ratio, which is the ratio of local consumption and receipt transportation capacity to local refinery production in the Origin market, and the ratio of local production and delivery transportation capacity to the local consumption in the Destination market.[48] HHI measures market concentration, and the likelihood of a pipeline exerting market power in concert with all

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[43] *Id*.

[44] *Id*. at 19.

[45] *Id*.

[46] *Id*.

[47] *Id*. at 20-21.

[48] *Id.* at 6-7.

other sources of supply.[49] Market share identifies a firm's size in relation to other firms in the market. Excess capacity identifies the availability of supply beyond demand. If sufficient excess capacity exists, particularly where delivery-based market shares are below a threshold level, then the market should be competitive. It would be much more difficult for a firm to maintain a supra-competitive price if its competitors have excess capacity that could be used to capture additional market share than it would be if all its competitors were operating at capacity.[50]

23. In its Oil Pipeline Deregulation Study,[51] the DOJ recommended an HHI threshold of 2,500 for permitting an oil pipeline to be totally deregulated.[52] An HHI is derived by squaring the market shares of all the firms competing in a particular geographic market and adding them together. The HHI can range from just above zero, where there are a very large number of small competitors in the market, to 10,000, where the market is served by a single monopolist. A high HHI indicates significant concentration, meaning that the pipeline is more likely to be able to exercise market power, either unilaterally or through collusion with rival firms in the market.[53]

24. HHI can be calculated by two methods. Using the DOJ Method, a firm's market share is estimated by dividing total consumption within the market by the number of market participants, such that an equal market share is initially allocated to each competitor.[54] If a firm does not have the capacity necessary to accommodate the market share it is allocated, that firm is assumed to be able to supply only an amount equal to its capacity, and the firm's remaining market share is then allocated equally across the other competitors with remaining capacity. Once all consumption has been allocated in this

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[49] *See* Horizontal Merger Guidelines, Section 1.1, U.S. Department of Justice and the Federal Trade Commission (April 2, 1992, Revised April 8, 1997), https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf.

[50] *Id*. at G-8.

[51] *See* "Oil Pipeline Deregulation," Report of the U.S. Department of Justice, May 1986, http://www.ferc.gov/industries/oil/indus-act/handbooks/volume-I/doj-report.pdf.

[52] *Id.* at 30.

[53] *See* Application at G-1.

[54] *Id.* at G-12.

manner, the result is each company's calculated capacity share, which is then squared and aggregated to derive an "adjusted" HHI.[55]

25. Under the capacity-based method, or FERC Staff Method,[56] each firm is allocated a share of the market, based upon the lesser of its capacity or the total market consumption, and the resulting number is then divided by the sum of these effective capacity measures. The result is then squared and aggregated to derive the HHI.[57] This method causes pipelines or refineries with larger capacities to be allocated a larger share of the market.

26. In Opinion No. 391, the Commission expressed limited concerns regarding an applicant's potential ability to exercise market power in situations where the applicant has a market share as high as 70 percent in a market with HHIs in the 1,800 to 2,500 range.[58] Additionally, the presence of significant excess capacity in both the Origin and Destination markets indicates the applicant does not have the ability to exercise market power, since any attempt by the applicant to raise and maintain prices above the competitive level will result in use of the existing transportation alternatives with available capacity.[59]

27. Buckeye Linden submits that the market power statistics for its Origin market and Destination market readily demonstrate that Buckeye Linden does not have market power. Buckeye Linden argues that both the widely-recognized HHI threshold of 2,500, used by the DOJ for the complete deregulation of oil pipelines, and the more restrictive HHI of 1,800, which the Commission's Staff has utilized as the lower end of the HHI

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[55] *Id.*

[56] *See* Opinion No. 391, 68 FERC ¶ 61,136 at 61,665.

[57] *See* Application at G-13.

[58] *See* Opinion No. 391, 68 FERC ¶ 61,136 at 61,671.

[59] *Enterprise TE Prods. Pipeline Co., LLC,* 141 FERC ¶ 63,020, at P 55 (2012) ("The [small but significant and non-transitory increase in price] test is founded on the premise that if the pipeline is operating in a competitive market, shippers could switch to the good competitive alternatives if the pipeline were to raise its prices above a competitive level. Conversely, if the pipeline had market power, shippers would have limited ability to switch to alternatives in the event of a price increase."); *see also Explorer*, 87 FERC ¶ 61,374 at 62,393 ("the low HHIs and high excess capacity ratios evidence a lack of significant market power by Explorer.").

range at which an applicant could potentially exercise limited market power (if coupled with high market share), dwarf the HHIs for Buckeye Linden's Origin market and Destination market, with an HHI of zero for the Origin market and 660 for the Destination market.

28. Under the market power analysis presented by Buckeye Linden, the estimated consumption in the Origin market is 836.3 MBPD.[60] Buckeye Linden represents there is one refinery within the Origin markets, Bayway Refinery, with a capacity to supply 216.8 MBPD of refined petroleum products to meet the demand. Buckeye Linden argues for any Origin market where local consumption exceeds local refinery production, the potential for a pipeline to exercise market power does not exist, and the HHI is zero, because a pipeline's attempt to exercise market power over a refinery in such a market would be defeated by the refinery's ability to sell its refined petroleum products in the local market.[61]

29. Concerning the Destination market, Buckeye Linden calculated its HHI at 660.[62] According to Buckeye Linden, estimated consumption in the Destination market is 836.3 MBPD.[63] The Bayway refinery produces 216.8 MPBD. Additionally, there are 38 pipelines owned by eleven firms with the ability to supply 5,237.6 MBPD of refined petroleum products. Finally, Buckeye Linden states that total waterborne capacity in the Destination market is 550.3 MBPD.[64]

30. Addressing market share, Buckeye Linden states that its combined capacity-based market share with its affiliates is less than 9 percent in both the Origin market and Destination market, well below the market share ratios the Commission has indicated could allow an applicant to exercise market power, even when paired with HHIs substantially higher than those presented in the Application. In prior market-based rate proceedings, the Commission has found that an HHI below 1,800 suggests that a market is 'not captive' to a particular supplier.[65]

31. Buckeye Linden argues the presence of significant excess capacity in both the Origin market and Destination market illustrates the inability of Buckeye Linden to

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[60] Application at 26.

[61] *Id*. at A-10.

[62] *Id*. at 27.

[63] *Id*. at G-17.

[64] *Id*.

[65] *See Williams Pipe Line Co.*, 71 FERC ¶ 61,291, at 62,128 (1995).

exercise market power. Buckeye Linden states that in the Origin market, the excess capacity ratio is more than 30 times local production, and in the Destination market, the capacity ratio is 4.0 times local consumption. As Buckeye Linden explains, in past oil pipeline market-based rate proceedings, the Commission has noted that the existence of significant excess capacity in a market further indicates that the applicant does not have the ability to exercise market power, since any attempt by the applicant to raise and maintain prices above the competitive level will simply result in use of the existing transportation alternatives with available capacity.

Commission Determination

32. The Commission finds that Buckeye Linden's market metric calculations support granting its application for market-based rate authority.

The Commission orders:

Buckeye Linden's market-based rate Application is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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