Buckeye Pipe Line Company,
Order Granting Interlocutory Appeals
44 FERC ¶ 61,066 (1988)

Buckeye Pipe Line Company (Buckeye) filed for a general rate increase on its oil products pipeline with the Federal Energy Regulatory Commission (Commission). The filing was suspended and an investigation instituted. In the course of the proceeding, the Administrative Law Judge (ALJ) granted, in part, Buckeye's motion to file an interlocutory appeal from an ALJ order requiring production of exhibits for hearing dealing with Buckeye's cost of service. Buckeye contended that the information should be protected from public disclosure. Buckeye also challenged an order of the ALJ that changed Paragraph 9 of the existing Protective Order by limiting appellate rights concerning decisions which removed material from coverage under the Protective Order. (Buckeye Pipe Line Company, 44 FERC ¶ 61,066 at 61,182-83 (1988)).

The Commission used this appeal as an opportunity to set forth its new policy of allowing oil pipelines to bifurcate or phase proceedings as an option to a full cost of service rate case. (Id. at 61,185-61,186).

The Commission noted that Buckeye would not be required to make its cost data public if its rates were shown not to require traditional cost-based regulatory scrutiny. The Commission reasoned that its statutory mandate under the Interstate Commerce Act enabled it to apply a "light-handed" form of regulation if a pipeline was able to show that its competitive circumstances warranted such treatment. (Id. at 61,185, 61,186). Therefore, an oil pipeline that seeks to benefit from reduced regulatory oversight has the burden of demonstrating that it need not be regulated under the methodology of Opinion No. 154-B. The pipeline must show that it lacks significant market power in the relevant markets. (Id. at 61,185, 61,186).

The Commission then directed that the Buckeye proceeding be phased with Phase I directed at the issues of competition and the extent of Buckeye's market power, if any. If lack of market power were determined, then Buckeye's proposed rates would be evaluated under a standard less strict than that imposed by Opinion No. 154-B. The less strict standard would be "light-handed regulation." (Id. at 61,186).

The ALJ's order of April 15, 1988, requiring publication of exhibits, was reversed to the extent it ordered publication of the cost data at issue. (Id. at 61,188).

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thus provides no indication that the controversy underlying our Declaratory Order will be brought back into existence.[15] It would be idle for us to speculate what facts might be established by means of a full-blown trial, should it occur,[16] or what remedies under state law might be imposed. Given that the trial court, aided by the submissions of the litigants, will be fully able to construe Texas contract law as informed by governing federal statutes and regulations, we see no good reasons to issue an advisory opinion on what is now an abstract controversy. *See Yale Broadcasting Co. v. FCC,* 478 F.2d 594, 602 (D.C. Cir.), *cert. denied,* 414 U.S. 914 (1973).

The Emergency Motion of El Paso sought Commission relief specifically because the state court's injunction order imposed certain responsibilities on El Paso. The injunction having been dissolved, no such responsibilities currently exist and the Emergency Motion of El Paso no longer presents the Commission with a live controversy. Consequently, we will dismiss El Paso's Emergency Motion as moot, and vacate our Declaratory Order issued December 23, 1987. Thus, we will not address the merits of the application for rehearing filed by Vitco and by Bright and Kidco, which will be dismissed.

The Commission orders:

(A) The Emergency Motion of El Paso Natural Gas Company for Declaratory Relief and Issuance of Show Cause Order is dismissed.

(B) The Declaratory Order issued December 23, 1987, *El Paso Natural Gas Company,* 41 FERC ¶ 61,352 (1987), is vacated.

(C) The applications for rehearing filed by Vitco on January 13, 1988 and by Bright and Kidco on January 14, 1988 are dismissed.

[¶ 61,066]

Buckeye Pipe Line Company, Docket No. IS87-14-000 et al.

Order Granting Interlocutory Appeals

(Issued July 15, 1988)

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

On May 17, 1988, the Administrative Law Judge (ALJ) in this proceeding granted, in part, Buckeye Pipe Line Company's (Buckeye) motion for leave to file an interlocutory appeal from the ALJ's April 15, 1988, "Order Requiring Publication of Exhibits for Hearing, and Setting Prehearing Conference on Reforming Protective Order" (Publication Order) [43 FERC ¶ 63,023]. The Commission issued a Notice of Intent to Act on this interlocutory appeal on June 1, 1988. The ALJ also denied other requests by Buckeye and the Association of Oil Pipelines for leave to file interlocutory appeals with respect to the Publication Order and the ALJ's April 22, 1988 "Order Reforming Protective Order" (Reformation Order). On May 31, 1988, pursuant to Rule 715 of the Commission's Rules of Practice[1] Buckeye's interlocutory appeal of the Reformation Order was referred to the full Commission by the Chairman.

In the Publication Order, Buckeye was ordered to disclose, on July 26, 1988, the scheduled date for commencement of the evidentiary hearing, exhibits to testimony which set out individual costs of service for each of Buckeye's individual rates. The Publication Order was issued in response to staff's objection to Buckeye's claimed protection under a protective order previously entered in this proceeding. The ALJ ruled that Buckeye failed to establish that the cost-of-service data in question was of the type not usually released to the public, warranting protection under the Freedom of Information Act (FOIA) test set forth in *Gulf & Western Industries v. U.S. (Gulf & Western),* 615 F.2d 527, 530 (D.C. Cir. 1980).[2] In the Reformation Order, the ALJ limited appellate

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[15] We undertake no analysis here of the merits of our decision to issue our December 23, 1987 Declaratory Order because the current status of the litigation requires none.

[16] We think it fair to note that settlement of take-or-pay litigation has recently occupied, to constructive effect, the energies of many parties to such litigation. Settlement of this particular lawsuit remains a possibility. Indeed, John L. Clanton, *et al.*, one of the two plaintiff producer groups, settled its differences with El Paso and filed, on January 14, 1988 a motion to withdraw their intervention in this docket.

[1] 18 C.F.R. § 305.715 (1987).

[2] Gulf & Western involved an appeal from a District Court's order granting defendant's motion for summary judgment in a FOIA action. Plaintiff sought disclosure of documents in an Armed Services Board of Contract Appeals proceeding. The Court of Appeals, in interpreting 5 U.S.C. § 552(b)(4) of the

rights during the course of the proceeding from his decisions related to removing material from protected status.

In the Publication Order, the ALJ determined that: (1) Commission precedent did not support the granting of protective status to cost-of-service schedules of publicly regulated utilities; (2) oil pipelines are required to be publicly regulated under the Interstate Commerce Act (ICA), *Farmers Union Central Exchange, Inc. v. FERC (Farmers Union II),* 734 F.2d 1486 (1984) and *Gulf Central Pipeline Company (Gulf Central),* 42 FERC ¶ 61,062 (1988); and (3) other oil pipelines will be required to disclose their cost-of-service data in the future. He held that by maintaining the protected status of the data all hearings devoted to cost-of-service questions would be held *in camera*, and the public would be excluded from participating in the regulatory proceedings. However, the ALJ agreed with Buckeye that the Commission should review the Publication Order because he also found that Buckeye demonstrated the likelihood of competitive injury from release of the materials, and the Commission might disagree with his conclusions regarding oil pipeline disclosure of cost-of-service data in this and future proceedings. In the Reformation Order, the ALJ determined that modification of Paragraph 9 of the Protective Order[3] would enhance his ability to control the proceeding and was consistent with the Commission's position that discovery matters should, and must be, resolved by ALJs without Commission intervention except in extraordinary cases. Reformation Order at 2, citing *Mojave Pipe Line Company (Mojave),* 38 FERC ¶ 61,249 (1987).

Buckeye's Motions

In its motion for leave to file interlocutory appeals, Buckeye maintains that it filed the individual rate-by-rate cost data pursuant to a stipulated protective order signed by the ALJ, solely to avoid summary rejection of its rate filing and to comply with the ALJ's December 22, 1987 "Order Denying Summary Disposition, Granting Intervention and Scheduling Filing of Direct Testimony." Buckeye states that although the Commission disfavors *in camera* proceedings, it should not be forced to suffer the serious competitive injury the ALJ found likely to occur from disclosure of the involved cost data when it is unclear whether cost-based, rate-by-rate ratemaking is required under *Farmers Union II.* Buckeye requests that the individual rate cost-of-service cost data remain confidential throughout the proceeding.

Buckeye argues that the Publication Order prejudges the outcome of fundamental issues of oil pipeline rate regulation and threatens competitive harm. It argues that oil pipelines should not be subject to the same regulatory requirements as gas pipelines. Buckeye argues that while the ALJ recognized that individual rate cost-of-service data has never been disclosed by Buckeye or the industry in general, he erroneously concluded that *Farmers Union II* forecloses the possibility of confidential treatment of cost data and requires that departures from cost-based pricing must be open to public scrutiny. Further, Buckeye notes the ALJ's determination that but for the fact that other oil pipelines would be compelled to disclose similar data, the cost data at issue would retain its protected status. Publication Order at 5.

In addition, Buckeye argues that the ALJ erroneously ignored the proper balance struck regarding confidential information in *Mojave,* 38 FERC ¶ 61,249, at p. 61,842 (1987), where the Commission stated:

> A claim that information is confidential business information may form the basis for an order denying or limiting discovery under Rule 410(c). Generally, if the documents will give the parties seeking discovery unfair business advantage, the information should be treated confidentially.

Buckeye states that Commission policy has not been to raise the need for public hearings over the need to protect parties to a proceeding. Further, Buckeye argues that protecting the involved cost-of-service data would not lead to a wholly *in camera* rate proceeding. In this regard, it notes that: only two of its nine witnesses submitted sealed and confidential data; none of Buckeye's extensive company-wide cost-of-service data was submitted on a confidential basis; and only one exhibit of the Inter-

(Footnote Continued)

Act held that the sought information, including information concerning a competitor's profit rate, actual loss data, general and administrative expense rates and other information was properly withheld under FOIA since it was financial or commercial, was obtained from a person outside government, and was privileged or confidential. 5 U.S.C. § 552(b)(4) provides that FOIA does not apply to matters that are among other things trade secrets and commercial or financial information obtained from a person and privileged or confidential. In determining what constitutes privileged or confidential information, the court, said such information is not the type usually released to the public and is of the type, that if made public, would cause substantial harm to the competitive position of the person from whom it was obtained.

[3] Paragraph 9 of the Protective Order provides for continued protection of confidential materials pending appeal to the Commission.

venors' cost-of-service data was submitted on a confidential basis. Moreover, Buckeye states that as to rate design, only limited portions of the testimony remain confidential—solely cost data relating to individual movements and competitive information relating to specific markets, origins and destinations. Thus, it argues that regardless of the outcome of this appeal, most of the proceeding will be open to the public.

Finally, Buckeye argues that the ALJ's conclusion that *Farmers Union II* mandates a rigid adherence to cost-based regulation on a rate-by-rate basis, is unsupported by the language of *Farmers Union II.* Moreover, Buckeye argues that the Commission has inherent flexibility in fulfilling its responsibilities under the "just and reasonable" rate standard of the Interstate Commerce Act (ICA).[4] Buckeye notes that the ALJ indicated a similar reading of Farmers Union II in his December 22, 1987 order that required the filing of rate schedules showing individual costs. Buckeye states that it did not file an interlocutory appeal because it felt a remedy could be pursued upon issuance of a final order.

In the Reformation Order, the ALJ, as noted above, modified Paragraph 9 of the Protective Order which provided for continued protection of confidential materials pending appeal to the Commission. The ALJ found that Paragraph 9 would require that materials remain protected until issuance of a final Commission order, even if the Commission did not ultimately reverse the ALJ, and would unduly restrict the authority of the ALJ to order disclosure of documents during the course of the evidentiary hearing, by requiring either *in camera* hearings or a suspension of hearings until Commission action occurred. As to both outcomes, the ALJ concluded that "the objecting party could determine the nature of the proceeding and whether it will even continue." Reformation Order at 2-3. Based on these findings, the Reformation Order revised Paragraph 9 to state that " . . . nothing in this paragraph shall operate to prevent the Presiding Judge's rulings at hearing on the protected status of materials from becoming immediately effective, and they will not be subject to the time limits otherwise imposed under those paragraphs." Reformation Order at 4.

In its motion for interlocutory appeal with respect to the Reformation Order, Buckeye argues that reformed Paragraph 9 of the Protective Order effectively removes any right of appeal during the hearing regarding rulings on confidential data. Buckeye argues that it relied in good faith upon the protections in the protective order in submitting what it describes as "commercially sensitive information" and that the Reformation Order precludes it from effectively appealing any ALJ decision at hearing requiring the disclosure of such information. Finally, Buckeye contends that the ALJ's concerns about controlling the course of the proceedings and his primary responsibility for settling discovery disputes do not warrant limiting Buckeye's appellate rights with respect to disclosure rulings that could cause it competitive injury.

Discussion

A. Publication Order

Buckeye's motion regarding the Publication Order is primarily directed to the narrow issue of whether certain cost-of-service data should continue to be protected. Buckeye submitted the involved cost data under a stipulated protective order, accepted by the ALJ, to comply with the ALJ's December 1987 order requiring such data to avoid summary dismissal of its rate filing. Because the ALJ found the competitive harm Buckeye would suffer from the data's release subordinate to the need for public ratemaking proceedings for oil pipelines, it is necessary to discuss the balance of factors that should guide this decision. In this regard, the motion also raises the underlying issue of whether such cost data is relevant in this proceeding.

Relevance of Cost Data. Buckeye concedes that submittal and public disclosure of rate-specific cost data is routine for the electric and natural gas industries regulated by the Commission. *See* Publication Order at 4. However, it argues that neither case law nor Commission regulations require oil pipelines to submit such data and that competitive differences between the oil pipeline industry and other Commission-regulated industries warrant exempting oil pipelines from such rate-specific cost data filing requirements. While Buckeye is correct in noting that oil pipelines are not subject to extensive ratemaking filing requirements applicable to other industries regulated by the Commission, it does not necessarily follow that cost data such as that supplied by Buckeye is irrelevant to justness and reasonableness determinations under Section 1(5) of the ICA.

The Commission has adopted generic principles for the testing of the reasonableness of oil pipeline rates in Opinion Nos. 154-B[5] and 154-C[6] in response to the Court's remand in

[4] 49 U.S.C. § 1(5).

[5] *Williams Pipe Line Co.*, 31 FERC ¶ 61,377 (1985).

[6] *Williams Pipe Line Co.*, 33 FERC ¶ 61,327 (1985).

Farmers Union II of the earlier Opinion No. 154.[7] In *Farmers Union II* the court found that the Commission should be cognizant of the past Interstate Commerce Commission (ICC) cost allocation practices,[8] and noted that relevant ICC precedents show that past oil pipeline proceedings have included attempts to set rates computed on a detailed allocation of costs to the proper section of the pipeline system. In Opinion No. 154-B, the Commission concluded, among other things, that the cost allocation issue is best suited for case-specific treatment.[9] Thus, under *Farmers Union II,* past ICC precedent, and Opinion No. 154-B, cost data is relevant in oil pipeline rate proceedings to ensure that the just and reasonable costs of providing service will be recovered from the shippers that use that service. Further, the Commission has ordered production of cost data in a prior oil pipeline proceeding.

In *Southern Pacific Pipe Lines Inc.,* 35 FERC ¶ 61,242 (1986), the Commission addressed a settlement in an oil pipeline rate proceeding that staff opposed on the grounds that no evidence (cost data) had been introduced with respect to whether the rates were just and reasonable under the Opinion No. 154-B methodology. After citing Farmers Union II for the proposition that rates must be cost based, the Commission stated:

> [T]he settlement should not be certified to us without record support demonstrating a close correlation between SPPL's cost-of-service computed in accordance with the Opinion No. 154-B methodology, as modified by Opinion No. 154-C, and SPPL's revenue stream under the proposed settlement rates. 35 FERC at p. 61,562.

Even though the production of cost data generally is not inconsistent with current oil pipeline ratemaking methodology and is relevant to making a determination as to the justness and reasonableness of the proposed rates, the Commission is unable to determine whether the specific point-to-point cost data supplied by Buckeye is required under the Opinion No. 154-B methodology because of the nature of Buckeye's operations or the configuration of its system. Furthermore, until that issue is resolved as to individual pipelines, it is not unreasonable to require production of such cost-of-service data to justify oil pipeline rate proposals under the ICA. As Buckeye concedes, such data is routinely submitted by other industries regulated by this Commission, and Buckeye has not demonstrated a compelling reason to treat it differently for purposes of justifying its rate proposal under the ICA. However, the Commission could apply less burdensome rate justification standards to oil pipelines. Neither *Farmers Union II* nor recent Commission pronouncements with respect to natural gas pipelines require a heavy-handed regulatory approach for oil pipelines if the record shows that sufficient competition exists.

In *Farmers Union II,* the court stated:

> Moving from heavy to lighthanded regulation within the boundaries set by an unchanged statute can, of course, be justified by a showing that under current circumstances the goals and purposes of the statute will be accomplished through substantially less regulatory oversight. We recognize that this court has sanctioned dramatic reductions in regulatory oversight under, for example, the FCC and ICC licensing provisions, both of which require that the licensee operate in accordance with the "public interest."[10]

Further, in *Transwestern Pipeline Company,* 43 FERC ¶ 61,240 (1988), the Commission addressed Transwestern's Gas Supply Inventory Charge under Order No. 500,[11] and stated that the Commission has considerable flexibility in selecting the methodology it will use to determine a just and reasonable rate (citing *Farmers Union II, supra,* and *Permian Basin Area Rate Cases,* 390 U.S. 747, 790 (1968)). The Commission indicated that clearly identified non-cost factors such as competition or lack of market power may warrant a departure from the traditional rate review process where the substitute ratemaking methodology ensures that resulting rate levels are justified by such non-cost factors.

Thus, the Commission clearly could, if competitive circumstances warrant, require only generalized cost data for oil pipeline ratemaking if it can be demonstrated that the resulting rates from such an approach would satisfy the just and reasonable standard. *Farmers Union II,* at 1510. Clearly identified non-cost factors such as competition or lack of market power may warrant departure from strict rate review. *Transwestern, supra,* at p. 61,650. The competitive forces warranting such light-handed regulation would have to be clearly identified and must be shown to keep prices at a just and reasonable level to ensure that the Commission can protect shippers from unreasonable rates under the ICA. Thus, an oil pipeline that seeks to benefit from reduced regulatory oversight

[7] *Williams Pipe Line Co.,* 21 FERC ¶ 61,260, *reh'g denied,* 22 FERC ¶ 61,086 (1983).

[8] 734 F.2d 1486, 1529 (1984).

[9] 31 FERC at p. 61,838 n.2.

[10] 734 F.2d 1486, 1510 (citations omitted).

[11] *FERC Statutes and Regulations* ¶ 30,761 (1987).

would have the burden of demonstrating that it need not be regulated under the methodology laid out in Opinion No. 154-B. Such a showing would involve demonstrating that it lacks significant market power in the relevant markets. In making such a showing, an oil pipeline would need to show, for instance, that its shippers have alternate ways to ship their product, that buyers have alternate means of obtaining supplies, or the existence of other constraining factors which would restrain its prices to ensure that they are just and reasonable. From such a showing, the Commission could conclude that market-oriented ratemaking would meet the objectives of the ICA and find a substantial evidentiary predicate on which to determine that competition in relevant markets will operate as a meaningful constraint on the involved pipeline. *Id.*

Accordingly, to give Buckeye an opportunity to demonstrate that strict ratemaking scrutiny is not warranted in this proceeding, we will direct the ALJ to conduct the proceeding in stages. In the first stage, the ALJ should evaluate evidence submitted by the parties with respect to competitive conditions within the relevant markets to determine whether Buckeye has market power in relevant markets and whether it is subject to effective competition in those markets. Buckeye should submit evidence in this proceeding that demonstrates its lack of significant market power in those markets in which it desires light handed regulation. Once the ALJ makes a determination with respect to Buckeye's market position, we will direct him to forward his findings to the Commission so that we can determine whether Buckeye's proposed rates should be evaluated under the Opinion No. 154-B methodology or under a less strict standard. After receiving such a record, the Commission will be better able to determine the need for the involved cost-based data than it can at this interim point and will be able to provide further direction as to how the ALJ should evaluate the justness and reasonableness of Buckeye's rate proposal under the ICA in the second stage of this proceeding.

We now turn to the issue whether, in light of our determination to bifurcate this proceeding, the data should continue to be treated as confidential under the protective order at least until the Commission resolves the relevance issue.

Competitive harm versus public disclosure. The ALJ determined that FOIA statutory provisions at 5 U.S.C. § 552 generally require that Commission proceedings be public and that all information filed with the Commission must be available for public inspection. He found that 5 U.S.C. § 552(b)(4) contains the only relevant exception to this requirement. That section allows privileged and confidential trade secrets or commercial and financial information to be exempt from public disclosure. *See* footnote 2, *supra.* While the Commission's Rules of Practice and Procedure[12] contain procedures for waiver of FOIA's mandatory disclosure requirements, they do not detail standards to be considered in determining whether information submitted under a protective order can be released. The ALJ considered this question under the conjunctive test set forth in *Gulf & Western, supra*, and determined that under 5 U.S.C. § 552(b)(4), Buckeye had sustained its burden of proving the likelihood of competitive harm from release of the protected cost data. He concluded that affidavits and memoranda submitted by Buckeye persuasively demonstrated that public disclosure of its costs of service would place it at a severe disadvantage to competing oil pipelines and unregulated competitors such as barges, private truck fleets, private pipelines and refineries which are not required to publish either cost or price information.[13] See Publication Order at 3. That determination is not disputed and a determination that harm actually would occur is not required. However, it is clear that disclosure of the involved cost data would provide Buckeye's competitors with information that Buckeye submitted under the cloak of protection. Thus, the focus should be on whether any overriding public interest requires removal of the protective cloak shielding the cost data.

The Commission has issued protective orders in natural gas pipeline proceedings[14] and has detailed guidelines granting and lifting protective orders that are equally instructive here. *See, e.g., Transcontinental Gas Pipe Line Corporation (Transco),* 40 FERC ¶ 61,023 (1987). In *Transco,* the Commission stated that it generally does not promote closed administrative proceedings, but recognized that in a few situations sensitive business records require confidential treatment. Protective orders which have been issued in Commission proceedings often provide that evidence, briefs, or other submissions which utilize protected materials must be sealed, and that examination of witnesses on the protected materials must be *in camera.* The Commission also noted that, in some instances, umbrella protective orders are

[12] 18 C.F.R. § 385.903 (1987).

[13] Nevertheless, the ALJ ordered disclosure of the cost data to meet the public disclosure requirements of FOIA based upon his interpretation of *Farmers Union II* and *Gulf Central* that all oil pipelines would be required to publicly submit such data in the future.

[14] *E.g., Southern Natural Gas Co.,* 36 FERC ¶ 63,023 (1986); *Texas Eastern Transmission Corp.,* 22 FERC ¶ 61,228 (1983).

entered to facilitate discovery, in which case, not all of the discovered information should properly be withheld from public scrutiny. In this regard the Commission stated that documents produced under a protective order that do not qualify as confidential or commercially sensitive should no longer be subject to the protective order. However, limited access could continue to be appropriate in some cases where information is extremely sensitive.

On the other hand, the Commission has also emphasized that once material has been treated confidentially, the treatment should govern throughout the proceeding unless there is good reason not to do so. *Transcontinental Gas Pipe Line Corporation*, 38 FERC ¶ 61,245, at p. 61,833 (1987). Once such information has been submitted, the ALJ generally should exercise caution to avoid unnecessary disclosure of confidential information, particularly in disputes between competitors. *Mojave, supra*, at p. 61,842 (1987).

In determining the public interest under the conjunctive test of *Gulf & Western*, the ALJ concluded that Buckeye failed to establish that the protected data is of the type that is not usually released to the public or should not be released to the public.[15] The ALJ determined that oil pipelines should be subject to the same regulatory treatment as natural gas pipelines, but failed to consider whether the cost data submitted by an oil pipeline, even though it is of the type usually released to the public in gas pipeline proceedings, is entitled to protection.

Here, although the party seeking disclosure (staff) is not a competitor, it has an interest in seeking to ensure that the resultant rates are just and reasonable. However, the ALJ found that release of the cost data would likely result in competitive harm to Buckeye. Thus, even though cost data might generally be the type of information typically released to the public, the fact that this data was submitted pursuant to a protective order and its release could result in competitive harm, are circumstances that favor continued protection.

While FOIA generally supports open and public Commission proceedings, it provides exceptions to that general rule, and the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.903) recognize this by providing procedures for nondisclosure. Further, open decision-making objectives do not require disclosure now and can be met by disclosure at a later stage of the proceeding or at the conclusion of the proceeding. If the Commission ultimately determines in the first stage of this proceeding that point-to-point cost data is relevant and required and that public ratemaking concerns supersede any likely potential for competitive injury, disclosure can then be directed and the previously sealed portions of the record released. In this regard, it should be remembered that this appeal comes at an intermediate stage of the proceeding, when all interests and relevant factors have yet to be clearly delineated. Further, as noted above, staff is the party seeking disclosure, and does not need disclosure to protect its interests as it is a party to the protective order and will have access to the cost data even without disclosure. Thus, forcing Buckeye, at this stage, to risk competitive injury from disclosure based on a generalized concept favoring public scrutiny of regulated industry ratemaking may be premature and unduly harsh.

The FOIA exemption provided by 5 U.S.C. § 552 (b)(4) accommodates the government's need for information and the competitive interests of parties providing information. Thus, the general public interest in open Commission proceedings should give way to continued protection of Buckeye's cost data in order to ensure that Buckeye and other oil pipelines will continue to provide the type of cost-of-service data the Commission needs to make determinations under the ICA, consistent with Opinion No. 154-B. Further, the Commission has emphasized that once material has been treated confidentially, that treatment should govern throughout the proceeding absent good reason to do otherwise. Here, continued protection is warranted because the ALJ found that release of the cost data would likely result in competitive harm to Buckeye, and because the relevance of the data is still at issue.

The Commission concludes that Buckeye, at this point, should not be compelled to make public the cost data at issue in this interlocutory appeal. Release of this data, submitted under a protective order, would, under the ALJ's finding, subject Buckeye to the likelihood of competitive harm and since this determination is made at an interim stage of the proceeding, ordering Buckeye to publicly disclose the cost data prior to an ultimate determination of its relevance in the first stage of this proceeding would unfairly subject it to the likelihood of competitive harm from release of information that ultimately could be found to be irrelevant. *See Northern Natural Gas Company*, 38 FERC ¶ 61,012, at p. 61,047 (1987). In this regard, we note that at the conclusion of the first stage of the proceeding, after a determination concerning whether light-handed regulation is justified for some, or all, of Buckeye's markets, the Commission may evaluate the relevance of the

[15] Buckeye conceded that the publication of rate-specific cost data and the filing of comprehensive and specific cost allocations has been routine in the electric and natural gas industries.

involved cost data and reconsider whether disclosure can be directed and previously sealed portions of the record can be made public as warranted.

B. Reformation Order

As to the Reformation Order, the Commission notes that the challenged Paragraph 9 as revised by the ALJ is unclear on its face. While it purports to grant full appellate rights to parties challenging orders by the ALJ to remove materials from protected status, it also contains a provision stating that nothing in the paragraph ". . . shall operate to prevent the Presiding Judge's rulings at hearings . . . from becoming immediately effective, and they will not be subject to the time limits otherwise imposed . . . ." In explaining the modification the ALJ stated that the " . . . judge's determination rather than the unilateral determination of an objecting party will govern the course of the proceeding." Reformation Order at 4.

The Commission concludes that revised Paragraph 9 places an overriding emphasis on the ALJ's ability to maintain control over the proceeding and undermines the ability of all parties to pursue meaningful appeals. Thus, the ALJ failed to balance all relevant factors that should be considered in such determinations. As discussed above, the Commission has previously indicated that such protection should not be removed lightly. *Mojave supra*, and *Transco,* 38 FERC ¶ 61,245. If a party were to file an interlocutory appeal, the immediately effective language of revised Paragraph 9 would operate to make such an appeal meaningless. If the Commission were to ultimately find error in any order releasing protected cost-of-service data, such a finding would have little meaning if the data had been released. Accordingly, the April 22, 1988 Reformation Order will be reversed and Paragraph 9 of the protective order will operate as it would have prior to the ALJ's April 22 order.

The Commission orders:

(A) Buckeye's interlocutory appeal, to the extent granted by the ALJ's May 17, 1988 "Order Granting and Denying Leave to File Interlocutory Appeals," is granted and the ALJ's April 15, 1988 order requiring publication of exhibits is reversed to the extent it orders publication of the cost data at issue in this interlocutory appeal.

(B) Buckeye's interlocutory appeal of the ALJ's April 22, 1988 Reformation Order is granted and the ALJ's order of that date is reversed. The appellate rights set forth in the stipulated protective order in effect prior to the issuance of the Reformation Order shall remain in effect.

(C) The ALJ is directed initially to take evidence consistent with this order and determine whether Buckeye lacks significant market power in the market or markets where it seeks less strict ratemaking scrutiny, and to submit his findings on that issue to the Commission for further direction.

[¶ 61,067]

Williston Basin Interstate Pipeline Company, Docket No. CP83-254-312

Order Denying Rehearing

(Issued July 18, 1988)

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

On June 17, 1988, Williston Basin Interstate Pipeline Company (Williston Basin) filed a timely request for rehearing of the order issued in Docket No. CP83-254-303, *Williston Basin Interstate Pipeline Company,* 43 FERC ¶ 61,265 (May 18, 1988), which denied an appeal of a letter order issued by the Director, Office of Pipeline and Producer Regulation (Director). The Director rejected an amended Exhibit C to Williston Basin's service agreement under Rate Schedule S-2 with Tenneco Oil Company. The amended Exhibit C provided for an extension of the date of final deliveries from February 21, 1988, until May 24, 1988.

Storage under the service agreement was performed pursuant to a limited-term certificate issued on May 25, 1984, in Docket No. CP83-335-000 et al., 27 FERC ¶ 61,312. The certificate authorized service to be performed pursuant to Rate Schedule S-2, as modified by the settlement approved in the May 25, 1984 order. The settlement amended the service agreement to provide a four-year term of service from the date of initial deliveries.

As in the appeal to the Director's letter order, Williston Basin reiterates its view that the four-year period of service ends no earlier than four years after the issuance of the permanent certificate. It notes that authorized ser-