D. *TE Products Pipeline Matter Establishes a Rebuttable Presumption in Favor of BEAs for Refined Petroleum Pipelines and Requires Detailed Cost Comparisons to Justify a Rebutted BEA, an Expanded BEA, or Alternative Sources Outside a BEA*

In 2000, in the TE Products Pipeline Company (TEPPCO) proceeding, the Commission established a rebuttable presumption in favor of BEAs for refined petroleum pipelines. The Commission held that if an applicant refined petroleum pipeline defines its geographic markets as the relevant BEAs, alternative sources of transportation within the BEA will be included in the market power statistics unless protesters and intervenors raise a reasonable doubt as to the appropriateness of the use of BEAs. If protesters and intervenors raise a reasonable doubt about the use of BEAs, the applicant pipeline will have to provide detailed cost data justifying the alternative sources within the BEA are viable in terms of cost. Likewise, if an applicant pipeline does not use the relevant BEAs as its geographic market or includes alternative sources of transportation outside the BEAs, cost studies showing the included alternative sources are cost competitive will have to be provided. The Commission did not directly overrule the presumption in favor of BEAs for refined petroleum pipelines in the *Enterprise/Enbridge* proceeding or in Opinion No. 529. The Commission did modify in those proceedings when detailed cost studies are required to justify proposed alternative sources of transportation.

TEPPCO requested permission to charge market-based rates for the transportation of refined petroleum products from its origin points in the West Gulf Coast, Shreveport, and Indianapolis areas to destination points in Houston, Beaumont, Shreveport, Little Rock, Memphis, St. Louis, Indianapolis/Evansville, Chicago, Cincinnati, Dayton, and Toledo.[446] TEPPCO started with the relevant BEAs as the geographic markets, but then either included external sources within 75 to 100 miles of the BEA or expanded the geographic region beyond the BEA.[447] The Commission granted authority to charge market-based rates in the uncontested markets, the Indianapolis and Chicago origin markets and the Houston, Beaumont, St. Louis, Indianapolis/Evansville, Chicago, and Toledo destination markets.[448] The Commission then analyzed each contested market, and either set the market for hearing or directed its staff to conduct a conference to explore the market's particular facts.[449] The Commission did so on the basis that the contested geographic markets included alternative sources outside the BEA or were geographic markets in excess of the relevant BEAs, and no party had provided persuasive, verifiable cost comparisons that justified the various alternative sources included in their market power statistics.

<u>Geographic Market and Alternative Sources of Transportation</u>. In assessing the appropriate geographic market and the viable alternative sources, the Commission established a rebuttable presumption in favor of BEAs for refined petroleum pipelines, and included the requirement that cost justification must be provided to justify a rebutted BEA:

> It is practical to presume that a BEA is a reasonable approximation of a relevant geographic market, even in cases where the applicant has not provided detailed

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[446] *TE Products*, 92 FERC ¶ 61,121 at 61,462.
[447] *Id.* at 61,463-64.
[448] *Id.* at 61,462.
[449] *Id.*

> evidence demonstrating that all of the alternatives within the BEA are indeed good alternatives. However, that is merely a rebuttable presumption. The parties to a proceeding in which an oil pipeline seeks to implement market-based rates always should be permitted to challenge the use of a BEA as a relevant geographic market. If their protests raise reasonable doubt about a particular BEA as an appropriate geographic market, the applicant must provide a detailed justification of the BEA as a relevant market, including a demonstration that all of the alternatives within the BEA are good alternatives in terms of price.[450]

The Commission then established that detailed cost data comparing proposed alternative sources to the applicant pipeline is also needed to justify geographic markets different than BEAs or to include alternative sources outside BEAs in the market power statistics. The Commission noted that in the *Buckeye* and *Williams* proceedings, the Commission started with the BEAs as the relevant geographic market, but included alternative sources outside the BEAs based on studies that showed those sources were competitive in terms of cost.[451] It concluded that in protested geographic markets that are different than BEAs or that included alternative sources outside the BEA, detailed cost analyses are necessary to support the geographic market and proposed alternative sources.[452] The Commission recognized that mechanical mileage limits from BEAs were also inappropriate because distance itself may not be indicative of viability. A high wholesale price, for example, may prevent a nearby alternative from being competitive, and vice-versa for a more distant alternative.[453]

The Commission noted that one way to analyze costs is to perform a "laid-in cost study" that identifies the good economic alternatives available in the market.[454] Generally, a laid-in cost study compares the cost of proposed alternative sources of transportation to the competitive price. At this time, the applicant pipeline's tariff was often used as a proxy for the competitive price. Therefore, in a cost study for a destination market, the wholesale price at the applicant pipeline's terminal plus trucking costs to each county within the relevant geographic market would be compared with the wholesale price at each proposed alternative source's terminal plus trucking costs to those same counties.[455] Alternative sources of transportation would be included in the geographic market and market power statistics if they provided buyers a delivered price that was within a certain threshold increase above the applicant pipeline. For the Little Rock destination market, TEPPCO included alternative sources in excess of 100 miles based on a laid-in cost study comparing each alternative source's costs with TEPPCO's costs to each county in the Little Rock BEA.[456] TEPPCO had used bills of lading, trucking surveys, and analyses of posted price movements at terminals to calculate the wholesale price and trucking costs.[457] Intervenors contested numerous inputs in the cost study, and provided their own cost studies that showed sources 75 miles outside the BEA were not economical.[458]

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[450] *Id.* at 61,465-66.
[451] *TE Products*, 92 FERC ¶ 61,121 at 61,466.
[452] *Id.* at 61,467.
[453] *Id.* at 61,474.
[454] *Id.* at 61,467.
[455] *See id.* at 61,468 n.46.
[456] *TE Products*, 92 FERC ¶ 61,121 at 61,468.
[457] *Id.*
[458] *Id.*

The Commission found several errors in TEPPCO's cost study, including that the provided gas station surveys revealed only a very small number of gas stations received deliveries from sources in excess of 100 miles from the BEA. In addition, the wholesale prices in some external markets were substantially higher than the Little Rock BEA suggesting they could not be good alternatives, and TEPPCO failed to detail where the per-gallon per-mile prices used to calculate the trucking costs were derived.[459] The Intervenors' cost-studies provided individual price quotes for truck movements, but also failed to identify their origin.[460] The Commission stated that "[a]lthough the trucking cost information provided by the protesting parties is more detailed than TEPPCO's, consisting of individual quotes for transporting gasoline and diesel fuel, the protesters do not disclose the sources of this information, thus it cannot be verified."[461] It determined that, "despite the appearance that TEPPCO possesses significant market power in the Little Rock destination market, the Commission will set this market for hearing in order to develop a more complete and accurate record that will permit a conclusive market power ruling to be made."[462]

The Commission made similar findings for the other contested markets. In the Shreveport/Arcadia destination market, for example, TEPPCO expanded the size of the geographic market to twice the size of the Shreveport BEA.[463] The Commission held that "TEPPCO must show that each alternative supply source included in the expanded geographic market has the ability to constrain TEPPCO's ability to exercise market power within that market."[464] Having failed to provide accurate and verifiable cost studies, the Commission set the matter for hearing.[465]

In TEPPCO, the Commission established a rebuttable presumption in favor of BEAs for refined petroleum pipelines. The recent *Enterprise/Enbridge* and Opinion No. 529 proceedings did not directly overrule this presumption. In addition, the Commission in TEPPCO established a requirement that an applicant pipeline must justify through detailed and verifiable cost studies alternative sources of transportation within a BEA if a reasonable doubt as to their appropriateness has been raised, alternative sources within a geographic market that is different than the relevant BEAs, and any alternative sources of transportation outside a BEA.[466] The Commission has modified the circumstances when detailed costs studies are required to justify alternative sources of transportation in the *Enterprise/Enbridge* and Opinion No. 529 proceedings.

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[459] *Id.* at 61,471.
[460] *Id.*
[461] *TE Products*, 92 FERC ¶ 61,121 at 61,472.
[462] *Id.*
[463] *Id.* at 61,473.
[464] *Id.* at 61,474.
[465] *Id.*
[466] This matter was settled before a hearing was conducted. *See TE Products Pipeline Co., L.P.*, 95 FERC ¶ 61,108 (2001). TEPPCO's successor company, Enterprise TE Products Pipeline Company LLC, subsequently applied for market-based rate authority in three locations, which was denied *See Enterprise TE Products Pipeline Co. LLC*, 137 FERC ¶ 61,027, at PP 1, 6 (2011); *Enterprise TE Products*, Opinion No. 529, 146 FERC ¶ 61,157.