

123 FERC ¶ 61,106
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Valero Marketing and Supply Company

Docket No. OR08-4-000

v.

Longhorn Partners Pipeline, L.P and
Flying J, Inc.

ORDER ON COMPLAINT ESTABLISHING HEARING PROCEDURES

(Issued May 1, 2008)

1. On November 27, 2007, Valero Marketing and Supply Company (VMSC) filed a complaint against Longhorn Partners Pipeline, L.P. (Longhorn) and its parent, Flying J, Inc. (Flying J), jointly, Respondents, alleging undue discrimination and unreasonably preferential treatment of an affiliate in the transportation of refined petroleum products in contravention of sections 3(1) and 15(13) of the Interstate Commerce Act (ICA).¹ VMSC requests that the Commission set this complaint for investigation, hearing and discovery and that reparations and damages be awarded to compensate VMSC for damages incurred as the result of Respondents' actions. As discussed below, we will set this matter for hearing before a duly designated Administrative Law Judge.

The Parties

2. Longhorn operates an approximately 700-mile products pipeline that originates at the Kinder Morgan terminal in Galena Park, Texas and terminates in El Paso, Texas. Longhorn transports petroleum products from Gulf Coast refineries to communities in West Texas and to El Paso, Texas, where it connects with the SFPP, L.P.'s (SFPP) East Line, which extends from El Paso to the Tucson and Phoenix, Arizona markets. SFPP's East Line is the only common carrier refined products pipeline from El Paso which serves the Arizona markets.

¹ 49 App. U.S.C. §§ 3(1) and 15(13) (1988).

3. Flying J is a fully integrated petroleum company engaged in the exploration of crude oil and the refining, transportation, wholesaling, and retail marketing of petroleum products. Flying J owns 100 percent of Longhorn and is a past and current shipper on the Longhorn pipeline system.

4. VMSC is a wholly owned indirect subsidiary of Valero Energy Company (Valero). Valero, through its affiliates and subsidiaries, owns and operates 17 refineries throughout the United States, Canada and the Caribbean. Valero owns the McKee Refinery in Sunray, Texas, north of Amarillo, Texas, as well as several refineries along the Gulf Coast of Texas. VMSC is engaged in the purchase, marketing and transportation of various hydrocarbon products, including crude oil and refined petroleum products, and is responsible for the marketing and transportation of the refined products produced by Valero's refineries.

5. The Valero McKee refinery is a primary source for VMSC to obtain refined products for serving its customers in El Paso as well as in Tucson and Phoenix. To reach its El Paso and Arizona markets, VMSC transports its product from the McKee Refinery on a third-party pipeline that connects with terminal facilities near El Paso and the pipeline facilities of SFPP's East Line.

The Pleadings

6. As stated above, VMSC's Complaint was filed on November 27, 2007. Longhorn and Flying J filed an answer and motion to dismiss the Complaint on January 8, 2008 (Respondents' Answer), an extension of time having been granted for filing the answer by notice issued December 14, 2007. On February 21, 2008, VMSC filed an answer to the answer and motion to dismiss of respondents (VMSC's Answer). On February 19, 2008, Respondents filed a motion for leave to file, and response to the answer of VMSC (Respondents' Response). Although Rule 213(a) of the Commission's Rules of Practice and Procedure² does not allow an answer to an answer, the Commission will grant waiver of this Rule and permit VMSC's Answer and Respondents' Response as they provide information and clarification that aid the Commission in addressing the issues raised by the Complaint. *See, e.g., Texas Eastern Transmission L.P.*, 106 FERC ¶ 61,066, at P 16 (2004); *ISO New England, Inc.*, 105 FERC ¶ 61,263, at P 10 (2003).

Complaint

7. VMSC's Complaint is supported by the affidavit of David Parker, a Vice President of VMSC. VMSC alleges that Respondents have acted in concert to unreasonably discriminate against VMSC by denying VMSC access to available capacity on the Longhorn pipeline system during a time of emergency and providing undue preferential

² 18 C.F.R. § 385.213(a) (2007).

treatment to Flying J and its capacity nominations in order to extract from and gain an undue economic advantage over VMSC in violation of the ICA. Specifically, VMSC alleges that Longhorn provided an undue and unreasonable preference to its affiliate, Flying J, who was preferentially permitted to acquire pipeline system capacity on Longhorn and used its access to this capacity to deprive VMSC access to common carrier capacity and take undue economic advantage of VMSC. VMSC further alleges that Respondents have violated section 3(1) of the ICA, which prohibits the granting of any undue or unreasonable preference or advantage to any particular person in any respect whatsoever, and section 15(13) of the ICA, which declares unlawful the sharing of shipper information by a common carrier with any other shipper which may be used to the detriment or prejudice of a shipper.

8. On February 16, 2007, a fire erupted at the VMSC McKee Refinery, requiring the shut-down of refining operations at the facility for approximately two months. VMSC states that, after the fire at the McKee Refinery, VMSC faced the prospect of being unable to fulfill all its commercial obligations in its El Paso and Arizona markets unless it could source refined products from a location other than McKee Refinery and transport the same to the El Paso market and to SFPP's East Line for further delivery to the Arizona markets. VMSC states that it was thus required to seek alternative arrangements for supplying and transporting refined product to El Paso and its Arizona markets. VMSC states that it was imperative for it to maintain its ability to move product into the El Paso market in order to continue to serve its customers in El Paso and Arizona.³

9. VMSC contends that it knew Longhorn had the capacity to carry its requested volumes, based on Longhorn's operating history, and public statements of Longhorn personnel as to the capability of the Longhorn system to transport up to 72,000 barrels per day.⁴ VMSC further states that Longhorn had traditionally been significantly undersubscribed. VMSC thus believed that Longhorn would have sufficient capacity to provide transportation of products from refineries on the Texas Gulf Coast to the El Paso and the Arizona markets.⁵

³ According to VMSC, the only other option for serving the Phoenix market is via SFPP's West Line which extends from the Los Angeles, California area to Phoenix.

⁴ According to VMSC, extending from the time Flying J acquired Longhorn in 2006, Longhorn had represented that it had daily capacity to carry between 70,000 and 72,000 barrels, and that it was seeking to expand that capacity. Parker affidavit at P 9; Attachment A to Parker affidavit.

⁵ VMSC states that it was also registered as a potential shipper on Longhorn, even though it had never shipped on Longhorn, to facilitate its ability to find sources of supply in the event of a supply disruption to the McKee Refinery. Parker affidavit at P 8.

10. VMSC states that it contacted Longhorn by telephone on Friday, February 23, 2007, informed Longhorn of VMSC's situation and orally requested nomination of 700,000 barrels (approximately 23,000 barrels per day), for the month of March 2007.⁶ VMSC states that during the February 23 conversation Longhorn operations personnel led VMSC to believe that Longhorn had capacity available and would be willing to transport VMSC's product to El Paso.⁷ VMSC acknowledges that its nomination was subsequent to Longhorn's nomination deadline of February 15 for March product movements, but that the need for such movement did not arise until after that date, and that VMSC contacted Longhorn as early as February 23 with a verbal nomination and followed that up with a written nomination on February 27.⁸ VMSC states it then submitted its March nomination in writing, by e-mail, on February 27, 2007. VMSC states that it was notified by Longhorn that it could not accept any nomination from VMSC for the month of March inasmuch as its capacity was oversubscribed.⁹ and that for the months of April and May, it could only provide one percent of capacity in accordance with its curtailment policy, which placed VMSC in the category of being a New Shipper.¹⁰

11. VMSC states that, pursuant to Longhorn's instructions, it contacted Flying J in an attempt to obtain product to replace that which had been lost as the result of the McKee Refinery fire.¹¹ According to VMSC, the deal struck between the VMSC and Flying J required VMSC to sell product to Flying J in the Gulf Coast area at the Gulf Coast posted price and buy it back from Flying J at El Paso for the West Coast posted price. The deal also required that VMSC provide terminal capacity in Phoenix off of SFPP's East Line since Phoenix terminal operators had told Flying J that they did not have terminal

⁶ The account of the date and content of the initial contact with Longhorn is in dispute. *See* discussion at P 21 and accompanying footnote, *infra*. VMSC further contends that Longhorn must have shared this information with its affiliate, Flying J, in violation of section 15(13) of the ICA, and that Flying J used this information to VMSC's detriment. Complaint at P 38.

⁷ Parker affidavit at P 7.

⁸ Complaint at P 17 and Attachment C (e-mail nomination).

⁹ Complaint, Attachment D, February 28, 2007 e-mail from Moore of Longhorn to Welch of VMSC: "we just don't see any room to add any more barrels (at this time)...."

¹⁰ *See* Complaint, Attachment E, Longhorn's Proration Policy, section II B; *see also* Attachment H, March 15, 2007 letter from Longhorn to all shippers concerning April prorationing and curtailments.

¹¹ Complaint at P 26.

capacity at Phoenix.¹² Although VMSC continued to seek to transport 700,000 barrels per month (or about 25,000 barrels per day) over Longhorn for the months of March, April and May 2007, the period when it was anticipated that the McKee Refinery would be shut down, it was rebuffed in its efforts.

12. Meanwhile, Longhorn contacted VMSC, indicating that it (Longhorn) could possibly facilitate making line space available in the event VMSC were willing to enter into a long-term volume commitment for the shipment of approximately 600,000 barrels per month on the system. VMSC further contends that the correspondence associated with this proposal identified Flying J as the source of the capacity, and would require that VMSC provide Flying J with certain storage and throughput capacity concessions for both trucks and pipelines in El Paso as well as line history and terminal space on SFPP's East Line.¹³

13. VMSC states that the basis for its claim of undue discrimination under section 1(4) of the ICA¹⁴ arises from the fact that it submitted its final out-of-time request for transportation for March on February 27 at 4:30 PM, and that Longhorn told it that Longhorn had no capacity remaining for March transportation. However, according to VMSC, Longhorn did in fact receive and grant a nomination from Flying J, its affiliate, of an additional 540,000 barrels of capacity which was submitted after the nomination by VMSC.¹⁵ VMSC contends that the two shippers were similarly situated in that both had submitted late requests for transportation, and that since its nomination was first in point of time, it should have been given the excess capacity. Longhorn's failure to grant adequate capacity on its line to VMSC while it granted the full amount requested by Flying J constituted undue discrimination against VMSC in favor of Longhorn's affiliate, Flying J.

14. VMSC further contends that, at the same time it was being denied access to transportation on the Longhorn pipeline, VMSC was forced to purchase refined products from Flying J at an undue and substantial premium in order to meet its commitments in the El Paso and Arizona markets. VMSC contends that Flying J used its controlling

¹² Complaint at P 32, Parker affidavit at P 33. A copy of the relevant contracts are contained in VMSC's Answer, Exhibits 1-G through 1-K.

¹³ Complaint at P 28, and Exhibit F.

¹⁴ Section 1(4) requires every common carrier to provide and furnish transportation upon reasonable request therefor.

¹⁵ Complaint at P 24; VMSC Answer at p.10 – 13.

influence over the Longhorn pipeline in order to reap unjust profits from above-market sales to VMSC because VMSC was discriminatorily denied the opportunity to ship its own barrels on Longhorn to El Paso.

15. VMSC contends that it was forced to purchase refined product from Flying J in El Paso at premium above-market prices (West Coast or Phoenix prices for Gulf Coast barrels) during the months of March, April and May 2007, resulting in estimated overpayments of \$10.3 million.¹⁶ Further, VMSC contends that, based on Longhorn's verbal representation on February 23, 2007, that there was pipeline capacity available for VMSC to ship, VMSC acquired some 100,000 barrels of Arizona grade gasoline which it intended to ship on Longhorn in late February and early March. Because it was denied access to Longhorn to ship any meaningful volumes, it was required to ship this product via marine vessel from the Texas Gulf Coast to the West Coast for further transportation to Arizona, which allegedly cost VMSC some \$594,300 more than if VMSCV had been allowed to transport its product on Longhorn.¹⁷ Thus, VMSC contends that it has incurred approximately \$10.9 million in damages, not including interest, as a result of not being able to ship its own product on Longhorn. VMSC requests that the Commission set this complaint for investigation, discovery and hearing; order Longhorn and its affiliate Flying J to cease and desist from engaging in unlawful activities; direct the payment of damages and reparations to VMSC; and order such other remedies and corrective actions as the Commission may deem appropriate, including disgorgement of unjust profits realized by Longhorn and Flying J.

Answer

16. Longhorn and Flying J filed an answer and motion to dismiss the Complaint on January 8, 2008 (Respondents' Answer). Respondents deny any collusion on their part to deny capacity to VMSC, and specifically deny that there was any inappropriate or illegal contact between the two companies, Longhorn and Flying J. Respondents' Answer is supported by the affidavits of Mr. Jeff Foote, President of Longhorn; Kenneth Moore, formerly employed as Longhorn's Logistics Manager; and John Hillam, Director of Supply and Logistics for Flying J.

¹⁶ Parker Affidavit at P 34-35. The calculation of overpayments to Flying J was computed, according to Mr. Parker, by taking the amount actually paid to Flying J during that month and comparing it to what VMSC would have paid to acquire refined products on the Texas Gulf Coast plus the cost of transportation from Galena Park to El Paso under Longhorn's published tariff rates.

¹⁷ Parker Affidavit at P 36.

17. Respondents contend that the Complaint rests entirely upon the affidavit of Mr. David Parker, a VMSC employee who had no personal dealings with any of the Longhorn or Flying J personnel and thus no personal knowledge of the conversations that did go on.¹⁸

18. Respondents contend that immediately after the fire on February 16, 2007, without any input from Longhorn, Flying J offered to assist VMSC by providing VMSC with 540,000 barrels of products it needed in March in El Paso at market based prices, which was willingly accepted by VMSC before any nominations were made on Longhorn and before any decisions were made or communicated about Longhorn's capacity.¹⁹

19. As to other dealings with VMSC, Respondents contend that VMSC did not contact Flying J as a "last resort" and only after its request for transportation had been turned down. Respondents further state that VMSC did not contact Longhorn on February 23 and receive a commitment that Longhorn had 700,000 barrels of capacity available for March transportation. Respondents answer further that no one at Longhorn ever disclosed VMSC's inquiries or nominations to Flying J, and no one at Flying J ever asked for this information. Respondents state that Flying J did not suddenly increase its nominations on Longhorn between February 23 and February 27. Finally, Respondents allege that Longhorn did not reverse its position or have capacity available for March on February 27 when Valero made a nomination on Longhorn.²⁰

20. Respondents contend that the Commission should dismiss the complaint in its entirety because (1) it does not meet the Commission's pleading requirements; and (2) the claims that Respondents have violated the ICA are unfounded. Further, Respondents assert that respondent Flying J is not subject to the Commission's jurisdiction and that the claims against Flying J should be dismissed.

VMSC Answer

21. On February 1, 2008, VMSC filed an answer to Respondents' answer and motion to dismiss. Its answer is supported by a second affidavit of David Parker, the affidavit of Rodney Reese, Vice President of Marketing Logistics for VMSC, and the affidavit of Jason Welch, formerly employed by VMSC and who had substantial contact with Longhorn personnel during the times essential to this Complaint. In its answer, VMSC disputed Respondents' factual presentation, and corrected a factual error it had made in the original Complaint. That is, the date of the initial call between VMSC and Longhorn

¹⁸ Respondent's Answer at P 4.

¹⁹ Respondents' Answer at P 5.

²⁰ Respondents' Answer at P 7.

was corrected and VMSC no longer claims that there was a call between its personnel and Longhorn on February 23, 2007.²¹ VMSC vigorously denies Respondents' claims that there are no disputed factual issues existing between the parties, and renews its request that this matter be set for hearing and discovery proceedings. VMSC contends that Respondents have failed to refute the three central disputed factual issues: (1) Longhorn discriminatorily rejected VMSC's late nominations and accepted Flying J's late and incomplete nomination and related late revised nomination when VMSC and Flying J were similarly situated shippers under Longhorn's tariff and were entitled to equal treatment; (2) Longhorn discriminatorily withheld available pipeline capacity from VMSC to provide an undue preference to its affiliate, Flying J; and (3) Longhorn and Flying J have engaged in inappropriate conduct and communications which, on a *prima facie* basis, has provided an undue affiliate preference. VMSC contends that the material facts are still in dispute and requests that the Commission set the Complaint for investigation, discovery and hearing. VMSC argues that Flying J should not be dismissed from this proceeding because, given the alleged intricate nature of the transactions leading to the Complaint and the central part played by Flying J in these transactions which are claimed to constitute unlawful conduct and discrimination under the ICA, the Commission has the power to take action against non-carrier defendants. Numerous authorities are cited by VMSC in support of its contention that Flying J is a proper respondent.²²

²¹ According to Respondents' Answer, Jason Welch of VMSC first called Mr. Kenneth Moore of Longhorn on February 16, inquiring about the availability of between 300,000 and 700,000 barrels of capacity for the month of March 2007. Longhorn denies that there was a call from VMSC on February 23, 2007. Respondents' Answer at 56. In its Answer to Respondents' Answer, VMSC seems to agree that there was no call as such on February 23. *See* VMSC's Answer at Exhibit I, Affidavit of David Parker (Parker Affidavit II) at P 3: "I originally recalled that the first conversation with Longhorn took place on Friday, February 23, but based on the information Respondents provided with their Answer...and additional discussions with Jason Welch [a VMSC employee], the first time that VMSC contacted Longhorn...was actually a week earlier, Friday, February 16." Thereafter, nothing more is said about the supposed phone call between the parties on February 23. It thus appears that VMSC is in agreement that there was no phone call on February 23. However, whether the February 16 phone call amounted to a nomination is in dispute.

²² *See* VMSC's Answer at 43-46.

Respondents' Response

22. On February 19, 2008, Respondents responded to VMSC's Answer.²³ In its response, Respondents contend that VMSC has virtually abandoned the central allegations in its Complaint – i.e., the supposed phone call of February 23, 2007, and the contention that VMSC did not deal with Flying J until after February 28. It then characterizes VMSC as having selectively picked out facts from Respondents' Answer to bolster its claim of discrimination. Respondents contend that VMSC has failed to provide reasonable grounds for its allegations, specifically because the Affidavit of Mr. Parker relied on a date of February 23 for a phone call between VMSC employee Jason Welch and Kenneth Moore of Longhorn.

Discussion

23. The Complaint and subsequent pleadings of the parties provide a reasonable basis upon which to set this matter for hearing. Based on the pleadings, it is not possible for the Commission to determine whether violations of the ICA by Longhorn have occurred in the series of events that led to the complaint. Each party has cast the facts in the light most favorable to it. The contrary contentions of the parties raise questions that must be decided by a finder of fact, and given the various contentions of the parties, we have determined that a hearing before an Administrative Law Judge is appropriate.

24. At this stage of the proceeding it would be premature to dismiss the complaint against Flying J until the facts of the case are developed at hearing. If Flying J has obtained shipper information from Longhorn to VMSC's detriment in violation of section 15(13) of the Interstate Commerce Act as alleged, then the Commission has the authority under the Interstate Commerce Act to determine an appropriate remedy.²⁴ We agree that

²³ Motion for Leave to File, and Response of Longhorn Partners Pipeline, L.P. and Flying J Inc. to Answer of Valero Marketing and Supply Company (Respondents' Response).

²⁴ Section 15(13) of the Interstate Commerce Act provides as follows:

It shall be unlawful for any common carrier. . .knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee. . .and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used
(Emphasis added.)

only by maintaining Flying J as a party to this proceeding at this time can the Commission properly evaluate whether there has been an unlawful receipt of shipper information by Flying J as alleged and what the remedy should be for such a violation of the statute. If, however, the evidence to be presented does not establish such action by Flying J, then a motion to dismiss could be in order.

25. Due to the extent of the controversy between the parties, it does not appear that settlement proceedings before a settlement judge would be productive at this juncture. If, however, the parties desire to proceed with settlement discussions, they may do so in conjunction with the hearing process.

The Commission orders:

(A) Pursuant to the authority of the Interstate Commerce Act, particularly sections 13(1), 15(1), and 15(13) thereof, and the Commission's regulations, a hearing is established to address the issues raised in the instant docket.

(B) Pursuant to the section 375.304 of the Commission's regulations, 18 C.F.R. § 375.304 (2007), the Chief Administrative Law Judge shall designate a presiding administrative law judge for the purpose of conducting a hearing. The presiding administrative law judge is authorized to conduct further proceedings pursuant to this order and to the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.