

149 FERC ¶ 61,103
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Guttman Energy, Inc., d/b/a
Guttman Oil Company, and
PBF Holding Company, LLC

Docket No. OR14-4-001

v.

Buckeye Pipe Line Company, L.P., and Laurel Pipe
Line Company, L.P.

ORDER ON REHEARING AND ESTABLISHING HEARING

(Issued November 6, 2014)

1. This order addresses a request for rehearing and clarification of a May 2, 2014 Commission order on a complaint (May 2 Order)¹ filed by Guttman Energy, Inc. (Guttman) and PBF Holding Company, LLC (PBF) (collectively, Complainants) against Buckeye Pipe Line Company L.P. (Buckeye) and Laurel Pipe Line Company, L.P. (Laurel). For the reasons discussed below, the Commission denies the request for rehearing and clarification filed by Guttman and PBF concerning the scope of the hearing on market-based rates. The order also grants rehearing in part and establishes a hearing to determine whether certain of Guttman's shipments are interstate or intrastate transportation.

Background

2. On October 15, 2013, Guttman and PBF filed a complaint against Buckeye and Laurel asserting Buckeye and Laurel misclassified Guttman's shipments as interstate rather than intrastate transportation, and challenging Buckeye's market-based rates for certain points in Pennsylvania. On May 2, 2014, the Commission issued an order dismissing the complaint against Laurel, finding Guttman's movements to be interstate transportation, and establishing a hearing to examine whether Buckeye possesses market

¹ *Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, 147 FERC ¶ 61,088 (2014).

power in Harrisburg, Pittsburgh and Chelsea Junction, Pennsylvania. On June 2, 2014, Guttman and PBF filed a request for rehearing and clarification of the May 2, 2014 order. An answer to the rehearing and clarification request was filed by Buckeye on June 19, 2014, and an answer to Buckeye's answer was filed by the Complainants on July 1, 2014.

Request for Rehearing and Clarification of Guttman and PBF

3. Complainants request rehearing of the Commission's finding that Buckeye properly charged Guttman its interstate tariff rate. Complainants assert that rehearing is required because the May 2 Order failed to properly consider all the relevant factors and pleadings in concluding that Guttman's transportation was interstate in nature.

Complainants also request clarification or rehearing regarding the status of their claim that Buckeye's rates are unjust and unreasonable under section 1(5) of the Interstate Commerce Act (ICA) because they are too high.

4. The Complainants assert that the Commission erred in ignoring factors from the relevant precedent that render Guttman's transportation service intrastate in nature, and therefore the Commission's decision was arbitrary and capricious. The Complainants contend that the relevant precedent establishes a multiple-factor test for evaluating whether transportation is interstate or intrastate in nature. The Complainants submit this multiple-factor test examines (i) the fixed and persisting intent of the shipper, or the one for whose benefit the shipment is made; (ii) the character of the billing (whether it is local or through); (iii) a change in ownership during the course of transportation; (iv) knowledge or lack of it on the part of the consignor of the ultimate destination or consignees; (v) the character and length of the transaction taking place at the point of interruption; (vi) the intent on the part of the consignor with reference to the final destination; and (vii) the breaking of bulk and commingling of the commodity shipped with other shipments of the same commodity.²

5. The Complainants also argue that the May 2 Order erred in failing to view contested issues of fact in a light most favorable to Guttman. The Complainants assert that the Commission's practice is to view contested issues of fact in a light most favorable to the non-movant when considering motions for summary disposition.³ The Complainants assert that the Commission, in effect, granted summary disposition on

² Citing, *e.g.*, *Northville Dock Pipe Line Corp.*, 14 FERC ¶ 61,111, at 61,208 (1981) (*Northville Dock*).

³ Citing, *ANR Pipeline Co.*, 71 FERC ¶ 63,004 (1995).

certain issues based wholly on the pleadings without viewing contested issues of fact in a light most favorable to Guttman.

6. The Complainants argue that the May 2 Order did not address all relevant factors in making its jurisdictional determination. In particular, the Complainants assert that the May 2 Order did not fully consider the following: (1) Guttman's and PBF's intent in making the shipments; (2) the character of the billing for the shipments; (3) the intent of the cosigner with reference to the final destination; and (4) the fact that the shipment enters breakout storage. As a result, the Complainants contend the Commission's jurisdictional determination was arbitrary and capricious, not supported by substantial evidence, and not the product of reasoned decision making.

Discussion

A. Whether Guttman's Shipment is Interstate or Intrastate

7. The Complainants make two basic arguments on rehearing: (1) the Commission did not view contested issues of fact in the light most favorable to the Complainants, and (2) the Commission improperly rejected and failed to respond to pleadings containing relevant evidence. Upon further consideration, the Commission finds that there are issues of disputed fact that in order to be examined fully, are best addressed at an evidentiary hearing. In this way, all the arguably relevant issues related to whether the shipment of Guttman should be classified as interstate or intrastate transportation will be best examined at an evidentiary hearing where an Administrative Law Judge (ALJ) can determine the relevance of all proffered evidence in light of applicable precedent, and all the parties will have an opportunity to cross-examine witnesses.

8. Upon consideration of the request for rehearing, the Commission finds that there are potentially significant details of the transactions between the Complainants and Buckeye as well as the relationship between PBF and Guttman that cannot be uncovered based upon the pleadings alone. The issues that need to be explored further include but are not limited to (1) how Buckeye fulfills its obligation under the ICA to properly classify shipments, (2) the nature of the contractual relationship between PBF and Guttman and whether the contract can be construed as a device to defeat interstate jurisdiction, (3) the physical flow of the oil transported and the nature of the facilities through which the oil is transported, (4) the operation of the T-4 nomination system, (5) how the respective parties are charged and billed, and (6) how the treatment of the Complainants compares to other shippers on Buckeye's pipeline for purposes of classifying interstate or intrastate shipments.

9. The only issue to be addressed at hearing is whether the Complainants' shipment should be considered interstate or intrastate transportation. The other issues that were raised in the original complaint concerning whether Laurel should be a party to the proceeding and whether the Buckeye interstate rate is too high compared to the Laurel

intrastate have already been decided and no further proceedings are necessary. Buckeye will continue to charge the interstate rate to Guttman pending the outcome of the hearing. Guttman will be adequately protected because if it is determined that the shipments should have been classified as intrastate transportation, Buckeye will be responsible for refunds.

10. There is an ongoing hearing concerning Buckeye's market-based rates and whether Buckeye no longer lacks market power in certain Pennsylvania markets. The Commission will leave it to the discretion of the Chief Administrative Law Judge to determine whether the issue of the classification of Guttman's shipments as interstate or intrastate should be consolidated with the ongoing hearing or should proceed on a separate track.

B. Scope of the Existing Hearing

11. The Complainants state that the Commission set for hearing the issue of whether Buckeye possesses market power in the Harrisburg, Pittsburgh, and Chelsea Junction markets. The Complainants state that the order mentioned the Complainants' related claim regarding whether "the Buckeye rates are unjust and unreasonable under section 1(5) of the ICA because they are too high," but otherwise did not address that claim. Accordingly, Complainants request that the Commission clarify that this claim regarding the justness and reasonableness of Buckeye's rates is included within the scope of the hearing on the market power question. To the extent that the May 2 Order did not intend to set for hearing Complainants' claim that Buckeye's rates exceed a just and reasonable cost-based level in violation of section 1(5) of the ICA, Complainants request rehearing.

12. The Complainants assert that, as discussed in the Complaint, page 700 of Buckeye's Form No. 6 for 2012 shows that Buckeye reports Total Interstate Operating Revenue of \$267.3 million and Total Cost of Service of \$215.3 million, which is an overrecovery of \$52.2 million. The Complainants contend that this represents a 24.2 percent overrecovery of total costs. The Complainants submit that this showing establishes a sufficient prima facie case that Buckeye's rates are not just and reasonable to set the matter for hearing. The Complainants assert that setting both market power and cost-of-service issues for hearing would be consistent with the approach taken in *Southwest Airlines*.⁴

13. In their complaint, the Complainants listed several reasons why they asserted that Buckeye's rates were not just and reasonable pursuant to section 1(5) of the ICA. The

⁴ *Southwest Airlines Co. v. Colonial Pipeline Co.*, 147 FERC ¶ 61,024 (2014) (*Southwest Airlines*).

Complainants contended Buckeye's rates were not just and reasonable because circumstances had changed and Buckeye no longer lacked market power. The Complainants contended that the fact that Laurel's intrastate rates were lower than Buckeye's interstate rates for a similar service showed that the rates were not just and reasonable. Finally, the Complainants contended that an examination of Buckeye's Form 6 showed that Buckeye's revenue exceeded its cost-of-service.

14. The Commission determined that the Complainants had provided sufficient evidence of changed circumstances to examine Buckeye's market based-rates for the various Pennsylvania markets at a hearing. The Commission also dismissed the Complainants' claim that the Buckeye interstate rates were unjust and unreasonable because they were higher than the Laurel intrastate rates for a similar service. The Commission found that the interstate and intrastate rates applied to distinct services and to require Buckeye to decrease its interstate rate to the level of an intrastate rate would undermine federal regulation of oil pipelines. The Complainants' other argument, that Buckeye's revenues exceed its costs, which Complainants have raised again on rehearing, is irrelevant because the only rates that the Complainants are challenging are those for three Pennsylvania markets that are subject to market-based rates. The only evidence that is considered in determining whether market-based rates are still valid is whether the pipeline no longer lacks market power in the relevant market and not whether the market-based rates exceed cost-based rates.⁵ Finally, the Commission rejects the argument of the Complainants that the Commission erred by failing to set cost-of-service issues for hearing as in *Southwest Airlines* because in that proceeding unlike here both the market-based rates as well as other, cost-of service rates of the pipeline were challenged. Accordingly, the Complainants' request for clarification and rehearing on this issue is denied.

The Commission orders:

(A) The Complainants' request for rehearing and clarification is granted in part and denied in part, as discussed above.

⁵ *Id.* PP 33 and 34.

(B) The Chief Administrative Law Judge shall establish a hearing to determine whether Guttman's shipments that are the subject of the October 13, 2013 complaint of the Complainants are interstate or intrastate transportation, as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.