

157 FERC ¶ 61,214
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Delta Air Lines, Inc.
Atlas Air, Inc.
Polar Air Cargo Worldwide, Inc.

Docket No. OR16-23-000

v.

Enterprise TE Products Pipeline
Company LLC

ORDER ON COMPLAINT, ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued December 15, 2016)

1. On August 30, 2016, Delta Air Lines, Inc. (Delta); Atlas Air, Inc. (Atlas); and Polar Air Cargo Worldwide, Inc. (Polar) (jointly, Complainants) filed a complaint challenging the lawfulness of the existing jet fuel rates and charges for services on the interstate oil pipeline of Enterprise TE Products Pipeline Company LLC (Enterprise TE) running from Lima, Ohio to Cincinnati/Northern Kentucky International Airport (CVG).¹ As discussed below, the Commission sets the complaint for hearing and settlement judge procedures.

I. Background

2. Enterprise TE is an interstate common carrier pipeline that provides transportation service of jet fuel on the Lima-CVG Route. Enterprise TE implemented the Lima-CVG

¹ Complaint at P 1.

Route on March 7, 2013, and it currently provides this service under FERC Tariff No. 58.1.0.² Enterprise TE currently charges a rate of \$2.6290 per barrel of jet fuel shipped on the Lima-CVG Route.³

II. Notice

3. Public notice of the Complaint was issued August 31, 2016. Interventions and protests were due as provided in Rules 211 and 214 of the Commission's Rules of Practice and Procedure.⁴ Pursuant to Rule 214, all timely-filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

III. Complainants' Arguments

4. Complainants allege that Enterprise TE's rate for transportation of jet fuel between Lima and CVG is unjust and unreasonable.⁵ Complainants state that although Enterprise TE's 2015 Page 700 data show that its reported interstate carrier revenue (\$376.3 million) is 32.9 percent less than its reported carrier cost of service, Enterprise TE's reported cost figures appear to be overstated while reported revenue appears to be understated.⁶ To support this claim, Complainants raise four arguments: (1) Enterprise TE appears to have significant revenue that is not reported on Page 700; (2) Enterprise TE appears to drastically inflate its Account 350 rental expense; (3) Enterprise TE attempts to double recover by including a \$70.8 million dollar income tax allowance; and (4) Enterprise TE has increased its rate base by improperly incorporating two new pipeline projects, thereby driving up the company's reported cost of service.⁷ Complainants calculate a Fully Allocated Cost rate of \$1.3001 for the Lima-CVG Route based on system-wide cost data presented on Page 700 of Enterprise TE's 2015 Form No. 6.⁸

² Enterprise TE September 19, 2016 Answer at 4 (Answer).

³ Complaint at P 8; Answer at 4.

⁴ 18 C.F.R. §§ 385.211 and 385.214 (2016).

⁵ Complaint at P 3.

⁶ *Id.* P 12.

⁷ *Id.*

⁸ *Id.* P 33.

5. Complainants argue that Enterprise TE underreported revenue on its Page 700. Specifically, Complainants state that no revenue from Account 230 (Allowance Oil Revenue), Account 250 (Rental Revenue), and Account 260 (Incidental Revenue) is reported on Enterprise TE's Page 700.⁹ Complainants estimate this revenue totals \$85.1 million.¹⁰

6. Complainants contend that Enterprise TE's transfer and subsequent lease-back of storage assets resulted in an improper increase in Account 350 Rental Expense, and appears to be an effort to avoid original cost ratemaking.¹¹ Complainants argue that the transfer and lease-back of storage assets to increase costs is prohibited by Commission and court precedent unless the assets have been placed in new service or provide a substantial benefit to ratepayers.¹²

7. Complainants note that Enterprise TE included a \$70.8 million income tax allowance in its 2015 cost of service reported on Page 700 of its FERC Form 6.¹³ Complainants argue that as a limited liability company owned by a master limited partnership, Enterprise TE incurs no corporate income tax.¹⁴ Complainants argue that a recent D.C. Circuit decision, *United Airlines, Inc. v. FERC*,¹⁵ held that the inclusion of an income tax allowance in addition to a pre-investor tax return on equity results in a double recovery of investor-level income taxes for unitholders in a master limited partnership.¹⁶ Complainants argue that Enterprise TE should therefore not receive an income tax allowance.

8. Finally, Complainants argue that Enterprise TE improperly included capital costs associated with the ATEX and Aegis Pipelines in its rate base, leading to a corresponding increase in Enterprise TE's cost of service from \$383.5 million in 2013 to \$560.8 million

⁹ *Id.* P 14.

¹⁰ *Id.*

¹¹ *Id.* PP 17-19.

¹² *Id.* PP 20-22 (citing *Northern Natural Gas Co.*, 66 FERC ¶ 61,092 (1994)).

¹³ *Id.* P 26.

¹⁴ *Id.*

¹⁵ 827 F.3d 122 (D.C. Cir. 2016).

¹⁶ Complaint at P 26.

in 2015.¹⁷ Complainants state that Enterprise TE made representations to the Commission when seeking declaratory orders for ATEX and Aegis that the assets would be transferred to another entity.¹⁸ Complainants state that discovery is needed to calculate a separate cost of service for ATEX and Aegis, and that ATEX and Aegis should file each file a separate FERC Form No. 6.¹⁹

9. Complainants request that (1) the Commission set the matter for hearing and discovery to determine just and reasonable rates for transportation of jet fuel on the Lima-CVG Route; (2) the Commission determine that the challenged rates are unjust, unreasonable and unlawful; (3) the Commission prescribe just and reasonable rates for transportation on the Lima-CVG Route; (4) reparations and/or refunds be made for all amounts paid in excess of just and reasonable charges beginning two years before the filing of the Complaint; (5) Enterprise TE be required to file separate FERC Form No. 6's for its ATEX and Aegis Pipelines; and (6) the Commission order such other relief as may be appropriate.

IV. Enterprise TE's Answer

10. In its Answer, Enterprise TE challenges the allegations made in the Complaint. Enterprise TE also argues that Complainants lack standing to bring the Complaint, and are not entitled to reparations. Concerning standing, Enterprise TE states that Complainants are neither shippers nor expected shippers on the Lima-CVG Route, and therefore lack a substantial economic interest in the rates.²⁰

11. Enterprise TE argues that the rate analyses performed by Complainants are flawed, and fail to utilize publically-available data that would demonstrate such flaws.²¹ Enterprise TE claims that the unique configuration of the Lima-CVG Route makes a system-wide analysis based on Page 700 data inappropriate and unrepresentative of the justness and reasonableness of the Lima-CVG rates.²² Enterprise TE states that it

¹⁷ *Id.* P 29.

¹⁸ *Id.* P 27.

¹⁹ *Id.* P 30.

²⁰ Answer at 2.

²¹ *Id.*

²² *Id.*

performed its own preliminary cost of service evaluation of the rates for the Lima-CVG Route and found them just and reasonable.²³

12. Further, Enterprise TE argues that Complainants did not use relevant data beyond that presented in the pipeline's FERC Form No. 6, and such data would have shown that a system-wide approach was not an appropriate methodology when analyzing the specific Lima-CVG Route rate.²⁴ Enterprise TE argues that physical configuration and usage "strongly indicate that the Lima-CVG Route is distinct from the rest of the Enterprise TE system" and therefore a system-wide approach could produce misleading results.²⁵

13. Enterprise TE also argues that the Lima-CVG Route is the only interstate movement provided by Enterprise TE that delivers jet fuel directly to an airport facility, a service that requires additional and segregated tankage facilities and greater product quality-related work than a typical movement.²⁶ Such a service, states Enterprise TE, is more costly than other services and therefore should not be compared to a system-wide fully allocated rate.²⁷

14. Enterprise TE contends that because the Lima-CVG Route is far shorter than the average length of a shipment on Enterprise TE's system,²⁸ and has a much lower throughput than other portions of Enterprise TE's pipeline system, the per barrel costs on the Lima-CVG Route are likely higher than the per barrel costs on other portions of Enterprise TE's system. This, argues Enterprise TE, further demonstrates the use of a system-wide rate to determine the justness and reasonableness of the Lima-CVG Route rate is not appropriate.²⁹

15. Enterprise TE states that it prepared a preliminary cost of service assessment for the Lima-CVG Route that supported a rate of approximately \$2.79 per barrel.³⁰

²³ *Id.* at 3.

²⁴ *Id.* at 12.

²⁵ *Id.* at 14.

²⁶ *Id.* at 15.

²⁷ *Id.* at 16-17.

²⁸ *Id.* at 18.

²⁹ *Id.* at 21.

³⁰ *Id.* at 22.

Enterprise TE's preliminary cost of service, it states, reflected only those movements related to the Lima-CVG Route, and utilizes segmenting developed in Docket No. IS12-203.³¹ Enterprise TE states that it did not include any storage costs or litigation expenses resulting from an expected rate case.³² Enterprise TE also states that it excluded any costs associated with the ATEX and Aegis Pipelines.³³

16. Enterprise TE disputes Complainants' charge that it failed to include revenues in its FERC Form No. 6 relating to Allowance Oil Revenue (Account 230), Rental Revenue (Account 250) and Incidental Revenue (Account 260). Enterprise TE states these accounts are not included in Instruction 3 on Page 700 as accounts that must be included in revenues.³⁴ Further, Enterprise TE states that the revenue in these accounts has no relation to the Lima-CVG Route.³⁵

17. Enterprise TE also challenges Complainants' arguments concerning storage costs. Enterprise TE states that contrary to the claims of Complainants, its lease of storage is appropriate and is equivalent to the rate reached in an arms-length transaction. Enterprise TE also states that Complainants' calculation of storage costs is understated.³⁶

18. Concerning the issue of an income tax allowance, Enterprise TE states that its inclusion of an income tax allowance in its Page 700 was and remains consistent with Commission policy.³⁷ The remanded case, notes Enterprise TE, is now pending before the Commission, and any investigation or hearing would be subject to the Commission's actions and rulings on remand.³⁸

19. Enterprise TE disputes Complainants' charge that the declaratory order determination for the ATEX and Aegis Pipelines was improperly complied with.³⁹

³¹ *Id.* at Attachment C, p. 11.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 24.

³⁵ *Id.*

³⁶ *Id.* at 28-29.

³⁷ *Id.* at 30.

³⁸ *Id.*

³⁹ *Id.* at 31.

Enterprise TE also asks the Commission reject Complainants' call that separate FERC Form No. 6's be filed for ATEX and Aegis, as it is, claims Enterprise TE, outside the scope of a complaint against the Lima-CVG Route rates and is being addressed in the Docket No. RM15-19 proceeding.⁴⁰

20. Finally, Enterprise TE argues that under Commission practice and court precedent, Complainants are not shippers on the Lima-CVG Route and, therefore, are not entitled to receive reparations even if the rate were found unjust and unreasonable.⁴¹

V. Complainants' Response

21. Complainants filed a Motion for Leave to Respond and Response to Enterprise TE's Answer. In the Response, Complainants argue that they do in fact have standing to challenge the Lima-CVG Route rates.⁴² Complainants also maintain that the Lima-CVG Route rates should be set for hearing, and that the hearing is the proper venue to determine reparations.⁴³

VI. Commission Determination

22. Rule 385.213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to answers unless otherwise ordered by the decisional authority.⁴⁴ In the instant case, the Commission will accept Complainants' answer because it has provided additional information and argument relevant to the issues.⁴⁵

⁴⁰ *Id.* at 32.

⁴¹ *Id.* at 33 (citing *Big West Oil Co. v. Frontier Pipeline Co.*, 108 FERC ¶ 61,183, at P 69 (2004), *aff'd sub. nom. Frontier Pipeline Co. v. FERC*, 452 F.3d 774 (D.C. Cir. 2006)).

⁴² Response at 2-8.

⁴³ *Id.* at 8-12.

⁴⁴ 18 C.F.R. § 385.213(a)(2) (2016).

⁴⁵ See *Transwestern Pipeline Co.*, 50 FERC ¶ 61,211 (1990), *Transwestern Pipeline Co.*, 50 FERC ¶ 61,362 (1990).

23. Under section 13(1) of the Interstate Commerce Act (ICA), any person can file a complaint with the Commission challenging an existing oil pipeline rate.⁴⁶ A complainant need not be a customer of the pipeline if it can show that it is, in some way, adversely affected by the challenged rate.⁴⁷ Such adverse effects must be defined with a certain degree of specificity, and cannot be too speculative in nature.⁴⁸

24. In the present case, Complainants purchase jet fuel at CVG that has been shipped over the Lima-CVG Route.⁴⁹ Complainants state that each are ultimately responsible for paying the rates and charges that are at issue in the Complaint.⁵⁰ The Commission has found in prior cases that non-shippers that purchase significant quantities of jet fuel and are affected by the rates for transporting that fuel can establish standing in a complaint proceeding.⁵¹

25. In its Answer, Enterprise TE states that a complainant must have a “substantial economic interest” in order to establish standing.⁵² The substantial economic interest

⁴⁶ 49 U.S.C. App. § 13(1) (1988); *see also* 18 C.F.R. § 343.1(a) (2016), 18 C.F.R. § 385.206 (2016).

⁴⁷ *Continental Resources, Inc. v. Bridger Pipeline, LLC*, 113 FERC ¶ 61,178, at P 8 (2005) (*Continental Resources*).

⁴⁸ *Id.* P 11; *see also* 18 C.F.R. § 385.206 (2016) (A complaint must make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction); *R. Gordon Gooch v. Colonial Pipeline Co.*, 142 FERC ¶ 61,220, at P 15 (2013) (Pipeline rate effects on retail gas prices too speculative to demonstrate adverse effect).

⁴⁹ Complaint at P 10.

⁵⁰ *Id.*, *see also* Complaint at Exhibit C, Verified Statement of Economic Interest of Delta Air Lines, Inc. (“[C]harges for the shipment of jet fuel on Enterprise (TE) from Lima, Ohio to CVG are passed on to Delta), and Complaint at Exhibit D, Verified Statement of Economic Interest of Atlas Air, Inc. and Polar Air Cargo Worldwide, Inc. (“[C]harges for the shipment of jet fuel on Enterprise (TE) from Lima, Ohio to CVG are passed on to Atlas and Polar”).

⁵¹ *CHS Inc. v. Enterprise TE Products Pipeline Co., LLC*, 145 FERC ¶ 61,056, at P 25 (2013).

⁵² Answer at 8 (citing 18 C.F.R. § 343.2 (b) (2016)).

test, however, is only applicable to protests, and not complaints.⁵³ Under the adversely affected standard, which is the appropriate standard to use concerning complaints, Complainants have established that they have proper standing to bring their Complaint.

26. The Commission's preliminary analysis indicates that Complainants raise significant issues about Enterprise TE's Lima-CVG Route rates that cannot be resolved absent the development of a full record at hearing. Therefore, the Commission will set all issues raised by the Complaint for hearing and settlement judge procedures, with the exception of Complainants' request that Enterprise TE file separate FERC Form No. 6's for the ATEX and Aegis Pipelines. This request is denied.⁵⁴ The issue is outside of the scope of an individual cost of service proceeding.

27. While the Commission is setting this matter for hearing, the Commission encourages parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, the Commission will hold the hearing in abeyance and direct a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁵⁵ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; The Chief Administrative Law Judge (Chief ALJ), however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability. The settlement judge shall report to the Chief ALJ and the Commission within 30 days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief ALJ shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a Presiding Administrative Law Judge (Presiding ALJ).

The Commission orders:

(A) Pursuant to the authority conferred on the Commission by the ICA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under

⁵³ 18 C.F.R. § 343.2(b) (2016) ("Standing to file protest").

⁵⁴ The issue of whether oil pipelines should be required to file separate Form No. 6's for different parts of a pipeline system is currently pending in Docket No. RM17-1-000, *Revisions to Indexing Policies and Page 700 of FERC Form No. 6*, Advance Notice of Proposed Rulemaking, 157 FERC ¶ 61,047 (2016).

⁵⁵ 18 C.F.R. § 385.603 (2016).

the ICA, a public hearing shall be held concerning Complainants' Complaint against Enterprise TE. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the body of this order and ordering paragraphs below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2016), the Chief ALJ is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief ALJ designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief ALJ on the status of the settlement discussions. Based on this report, the Chief ALJ shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a Presiding ALJ for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief ALJ of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a Presiding ALJ, to be designated by the ALJ, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The Presiding ALJ is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.