142 FERC ¶ 61,141
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Delta Air Lines, Inc.
Continental Airlines, Inc.
JetBlue Airways Corporation
United Air Lines, Inc.
US Airways, Inc.

Docket No. OR12-28-000

v.

Buckeye Pipe Line Company, L.P.

ORDER ON COMPLAINT ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued February 22, 2013)

1. On September 20, 2012, the captioned Airlines[1] filed a Joint Complaint (Complaint) challenging the lawfulness of the rates[2] charged by Buckeye Pipe Line Company, L.P. (Buckeye) for transportation of jet or aviation turbine fuel from Linden, New Jersey (NJ) to the New York City market, specifically to the three New York city area airports.[3] As discussed below, the Commission will set the Complaint for hearing and settlement judge procedures.

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[1] Delta Air Lines, Inc.; Continental Airlines, Inc.; JetBlue Airways Corporation; United Air Lines, Inc.; and US Airways, Inc., collectively the "Airlines" or "Joint Complainants."

[2] This complaint encompasses Buckeye's F.E.R.C. Tariff No. 440.3.

[3] Newark International Airport, New Jersey; J.F. Kennedy International Airport, New York; and LaGuardia Airport, New York (New York City destinations).

Background

2. Buckeye operates a pipeline that provides interstate transportation principally in the Northeastern and upper Midwestern states. Buckeye also operates a pipeline that provides interstate transportation between Linden, NJ and the New York City Destinations, the subject of the instant complaint.

3. The Joint Complainants assert that Buckeye's existing rates between Linden, NJ and the New York City destinations are unjust and unreasonable. Joint Complainants assert that Buckeye's 2011 FERC Form No. 6 (Form 6), at Page 700, reports an over-recovery of cost of service of $19.2 million, or an 8.7 percent over-recovery.[4] Joint Complainants also assert that Buckeye appears to comingle its interstate and intrastate costs on Page 700 while reporting only interstate revenues, and further fails to factor in additional revenue reported elsewhere on its Form 6 into either the costs or revenues on Page 700. Joint Complainants state that if these two apparent errors were corrected, Buckeye's alleged over-recovery increases to approximately 25 percent.

Experimental Rate Program

4. Joint Complainants note that, pursuant to Opinion Nos. 360 and 360-A issued on December 31, 1990 and April 18, 1991, respectively, the Commission authorized Buckeye to implement an experimental program for interstate rate regulation (Experimental Rate Program).[5] The program allowed Buckeye to determine rate changes based on whether its markets were established to be competitive or not.

5. On March 1, 2012, Buckeye submitted FERC Tariff No. 440.4.0 in Docket No. IS12-185-000 for the transportation of jet or aviation turbine fuel to the New York City Destinations, which canceled FERC. Tariff No. 440.3.0, the tariff at issue in the instant proceeding. FERC Tariff No. 440.4.0 was protested, and on March 30, 2012, the Commission rejected Buckeye's proposed tariff and ordered Buckeye to "show cause why the rates in its experimental program should not be rescinded and replaced with rates filed pursuant to the ratemaking methodologies contained in Part 342 of the Commission's regulations."[6] In a separately issued order in Docket No. IS12-185, the Commission has addressed Buckeye's response to the show cause order, whether the

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[4] Joint Complainants cite the Affidavit of Daniel S. Arthur (Arthur Affidavit) throughout the Complaint.

[5] *See Buckeye Pipe Line Co., L.P.*, Opinion No. 360, 53 FERC ¶ 61,473 (1990), *reh'g denied in part, granted in part*, Opinion No. 360-A, 55 FERC ¶ 61,084 (1991).

[6] *See Buckeye Pipe Line Co., L.P.*, 138 FERC ¶ 61,239, at ordering para. (B) (2012).

Experimental Rate Program should continue, and Buckeye's request for rehearing, which asserted the Commission erred in rejecting FERC Tariff No. 440.4.0 pending the outcome of the show cause order proceeding.

6. Joint Complainants maintain that because the primary issue in Docket No. IS12-185-000 is whether Buckeye may continue its Experimental Rate Program, or whether it must instead set its rates using one of the methodologies specified by Part 342 of the Commission's regulations, the Commission's decision in Docket No. IS12-185-000 may not squarely address the primary issue in the instant complaint—whether the rates charged by Buckeye for the transportation of jet or aviation turbine fuel to the New York City Destinations are just and reasonable.

Notice

7. Public notice of the complaint was issued September 21, 2012. Interventions and protests were due as provided in Rules 211 and 214 of the Commission's Rules of Practice and Procedure.[7] 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.

Joint Complainants' Arguments

8. Joint Complainants argue that the publicly available data on Buckeye's 2011 Form 6 indicates an over-recovery of the cost of service, and suggests that Buckeye's current interstate rates are unjust and unreasonable. The Airlines assert that the interstate carrier revenues submitted for 2011 exceed the interstate carrier cost of service by 8.7 percent. The Airlines' expert witness, Dr. Arthur, further explains that this over-recovery follows a pattern of increasing revenue in relation to costs for 2006-2010, and based on the unadjusted, publicly available information, this over-recovery indicates that Buckeye's existing rates are not just and reasonable.

9. The Airlines further assert that the extent of Buckeye's over-recovery is likely even greater than reported in its Form 6. Joint Complainants state that two inputs should be adjusted: (1) the cost of service, which was overstated due to the comingling of interstate and intrastate costs on Page 700 while reporting only interstate revenues; and (2) the cost of service, which does not reflect $22.1 million of other revenue reported elsewhere on Buckeye's Form 6, in either the costs or revenues reported on Page 700. Joint Complainants assert that if these two inputs were adjusted, Buckeye's alleged over-recovery of its cost of service increases considerably.

[7] 18 C.F.R. §§ 385.211 and 385.214 (2012).

10. Joint Complainants allege that because Buckeye reports intrastate Trunk Revenue, it would be logical to believe that Buckeye has intrastate operations and that some costs should be attributable to intrastate operations, despite its failure to attribute any volumes to intrastate service. Dr. Arthur further explains that Page 700 interstate operating expenses reported by Buckeye exactly match the total operating expenses reported on Page 303, minus certain items resulting from Ultra Low Sulfur Diesel (ULSD) operations, which indicate that Buckeye did not allocate any of the Page 700 operating expenses to intrastate operations. The Airlines assert that by reporting intrastate Trunk Revenue, Buckeye indicates that it has both intrastate and interstate service, and operating expenses should be allocated between intrastate and interstate service, accordingly. The Airlines assert that because the only information in Buckeye's 2011 Form 6 that provides any information regarding the relative size of Buckeye's intrastate and interstate operations is the Account 210 Trunk Revenue data reported on Page 301, the only possible allocation factor contained in Buckeye's 2011 Form 6 appears to be the interstate percentage of total trunk revenue reported on Page 301, which is 89.7 percent. Dr. Arthur applied this allocation factor to Buckeye's operating expenses as reported on Page 700, and estimated that Buckeye's interstate operating expenses were $13.6 million less than what was reported on Page 700.

11. Joint Complainants further assert that Buckeye's reported over-recovery is likely understated because Buckeye did not factor into the costs and revenues reported on Page 700 a total of $22.1 million of revenue reported elsewhere in Buckeye's Form 6: specifically, $8.7 million in Account 230 (Allowance Oil Revenue); $7.5 million in Account 250 (Rental Revenue); and $5.8 million in Account 260 (Incidental Revenue). Dr. Arthur's adjusted analysis asserts that Buckeye over-recovered $52.6 million, or 26.3 percent. Joint Complainants state that the alleged over-recovery could be further exacerbated by issues such as the inclusion of non-recurring costs in operating expenses, whether rate base is derived reasonably, whether the calculation of the income tax allowance is reasonable, and whether the capital structure, return on equity, and cost of debt used to determine the weighted cost of capital reported on Page 700 are reasonable.

12. Joint Complainants state that Buckeye's New York City Destination Rates are significantly greater than what one would expect from a cost-based rate. Using the data on Pages 303 and 700 of Buckeye's 2011 Form 6 without adjustment, Dr. Arthur estimates the distance and non-distance portions of Buckeye's reported Page 700 cost of service to estimate a fully allocated cost (FAC) rate design. The methodology divides total costs into distance and non-distance-related components. Dr. Arthur submits that for the movements from Linden, NJ to the three New York City airports, the FAC rate is 78 percent less than the currently collected rate to the Newark airport; 66 percent less than the currently collected rate to JFK airport; and 52 percent less than the currently collected rate to LaGuardia airport. Dr. Arthur states that the difference between Buckeye's currently collected rates and the FAC rates based on Buckeye's 2011 Form 6 data strongly indicates that Buckeye's rates to the New York City airports are not

reasonable. Dr. Arthur further states that using the estimated FAC rates, each airline entity overpaid Buckeye by approximately $0.66 million to $7.72 million for Buckeye's FERC jurisdictional service to the New York City destinations.

13. Finally, the Airlines allege that the transportation rates in question were never deemed just and reasonable by the Commission and the rates were not grandfathered by the Energy Policy Act of 1992.[8]

Buckeye's Response

14. Buckeye submitted a motion to dismiss, and an answer to the subject Complaint. Buckeye asserted that the Complaint, or portions thereof, should be dismissed on various grounds, including the Joint Complainants' purported failure to provide the showing of "substantially changed circumstances" required by Section 1803 of EPAct with respect to the challenged rates.

15. Buckeye asserts that the Airlines' allegations of unlawfulness and request for reparations are without merit. Buckeye states that, for the purposes of this analysis, the key facts for determining whether a rate is grandfathered are (i) whether the rates at issue were in effect for 365 days prior to October 24, 1992; and (ii) whether the rates were subject to protest, investigation, or complaint during such 365-day period.[9] Using these criteria, Buckeye asserts that the challenged rates were in existence via settlement well prior to the 365-day period proceeding October 24, 1992. Further, following a 1991 Settlement Order,[10] Buckeye states the investigation of Buckeye's jet fuel rates to the New York Airports was terminated prior to the 365 day period proceeding October 24, 1992, and no protest was filed regarding the rates during that time.

16. More significant, according to Buckeye, was the fact that no investigations were instigated in that period, and the Settlement Order in 1991 provided no continuation of an investigation. Buckeye contends that the mere fact the Commission approved the Buckeye program initially on an experimental basis with the intention to review the continuation of the experimental program at the end of three years creates no implied investigation, resulting in the Joint Complainants' argument effectively being rejected.

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[8] Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2772, (1992) (EPAct).

[9] *See* EPAct § 1803.

[10] *Buckeye Pipe Line Company, L.P.*, Docket No. IS91-25-000, *et al*., (July 31, 1991) (delegated letter order) (1991 Settlement Order).

Buckeye also argues that neither the March 1994 Order[11] extending the program or the December 1994[12] Order referenced an investigation, resulting in no rational basis for the Joint Complainants to assert that Section 1803(a) of EPAct does not apply to Buckeye's rates in effect as of October 1992. Buckeye states that the Commission in the *Tesoro* case[13] set out a specific test for "substantially changed circumstances," and the Airlines have failed to meet this test.

17. Buckeye disputes the Joint Complainants' premise that the experimental program can be judged against cost/revenue comparisons, and asserts that the program was premised on both market-based pricing in competitive markets and extending the market-based pricing to less competitive markets. Further, Buckeye states that the program was approved by the Commission and remains just and reasonable, as are the rates established pursuant to the program, and the program sets out specific grounds and requirements for challenging Buckeye's rates and the Airlines have failed to follow or to satisfy any of the Commission-approved requirements.

18. Buckeye asserts that the Complaint misrepresents the scope and import of Buckeye's revenue to cost differential in its Form 6, as the program is premised on both market-based pricing in competitive markets and extending the market-based pricing to less competitive markets. Buckeye argues this renders the Joint Complainants' solely cost-based assessment a failure at showing unreasonable earnings or rates.

19. Buckeye urges the Commission to judge the performance of the experimental program in light of what it considers the Commission's original purpose — reliance on competitive pricing for all of Buckeye's markets. Buckeye states that competitive pricing is highly beneficial, and the Commission has consistently concluded that competitive pricing is superior to traditional cost-based regulation, even when the two types of ratemaking produce different results.[14] Buckeye asserts that competitive market pricing can achieve several goals that cost-based pricing does not: (i) encouraging efficiency by

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[11] *Buckeye Pipe Line Company, L.P.*, 66 FERC ¶ 61,348, 62,169 (1994) (March 1994 Order).

[12] *Buckeye Pipe Line Company*, L.P., 69 FERC ¶ 61,302, at 62,162 (1994) (December 1994 Order).

[13] Buckeye cites *Tesoro Refining and Marketing Company v. Calnev Pipe Line Company, LLC, et al.*, 134 FERC ¶ 61,214, at PP 17 – 18 (2011) (Tesoro).

[14] Buckeye cites *Market-Based Ratemaking for Oil Pipelines*, FERC Stats. & Regs., Order No. 572, Regulations Preambles January 1991 - June 1996 ¶ 31,007 (1994), *order on reh'g*, Order No. 572-A, 69 FERC ¶ 61,412 (1994), *pet. for rev. denied, Assoc. of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

the regulated company; (ii) allowing the regulated company to react to changes in market conditions; and (iii) sending more accurate signals regarding demand and supply to other market participants.

20. Buckeye's expert, Dr. Michael Webb, observed that Buckeye has engaged in behavior that one would expect a competitive pipeline to exhibit, including persistent efforts to become more efficient.[15] Further, Dr. Webb stated that Buckeye's price changes have been generally within the boundaries of the generic oil pipeline index, as well as Buckeye's competitors and peers, providing support for the conclusion that Buckeye's rates as established under the experimental program are consistent with the results that one would expect in a competitive pricing situation.

21. Buckeye filed a market-based rate application in Docket No. OR13-3-000, and asserts it could justify the jet fuel rates to the New York Airports as just and reasonable based on the nature of the facilities used to serve the airports. Specifically, Buckeye claims its system's percentage of non-distance costs to distance costs is extremely high, and contends Joint Complainants ignore all of the principal cost drivers on the facilities serving the New York Airports.

22. Buckeye disputes the Joint Complainants' request for reparations dating back to September 2010, stating that the terms of the Buckeye program itself, and the established policy against retroactive ratemaking, require any changes to Buckeye's current rates to be prospective, and it would be unlawful under *Arizona Grocery* to rescind any of those rates retroactively.[16]

Joint Complainants' Response

23. On October 25, 2012, Joint Complainants filed a response to Buckeye's motion to dismiss and to Buckeye's answer to the subject Complaint. Joint Complainants state that Buckeye failed to establish any basis for rejecting any portion of their Complaint. Joint Complainants reiterate their position that Buckeye's rates for the transportation of jet fuel from New Jersey to the New York City destinations remained under investigation during the entire 365-day period preceding October 24, 1992, the date of enactment of the EPAct, resulting in no portion of Buckeye's rates being entitled to grandfathering protection under the EPAct. Further, Joint Complainants argue it is unreasonable to claim that the EPAct grandfathered experimental rates that were under review and investigation pursuant to Commission order. Joint Complainants point out that under Buckeye's definition of "investigation," if the Commission had determined in 1994 that

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[15] Webb at P 23.

[16] *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932) (Arizona Grocery).

the Experimental Rate program produced grossly unjust and unreasonable rates, it could have done no more than order Buckeye to discontinue the program while leaving those rates in effect as they were not protested in the year leading up to the enactment of the EPAct.

24. Joint Complainants assert that because there is insufficient publicly available information from which one can derive Buckeye's rate of return on equity associated with the rate at the time it was established or at the time of the enactment of the EPAct, dismissing the Complaint at this stage would deprive Joint Complainants of an opportunity to contest any potentially grandfathered portion of Buckeye's rates on the basis that a substantial change has occurred in Buckeye's economic circumstances that were a basis for that rate. Joint Complainants further state that even if the Commission concludes that Buckeye's rates at the time of enactment of the EPAct are grandfathered, Buckeye's rate increases above that level since the enactment of EPact are not themselves entitled to grandfathering protection. Joint Complainants emphasize that *Arizona Grocery* protection only applies when the Commission has declared a rate reasonable and lawful, and assert that since the Commission has never declared Buckeye's rates to non-competitive markets just and reasonable, *Arizona Grocery* doesn't apply. Joint Complainants again urge the Commission to set the Compliant for hearing to allow the development of a full factual record on the issue of substantially changed circumstances.

Commission Determination

25. 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. In the instant case, the Commission will accept the Joint Complainants' answer because it has provided additional information and argument relevant to the issues.

26. The Commission's preliminary analysis indicates that Joint Complainants raise significant issues about Buckeye's rates for the transportation of jet or aviation turbine fuel from Linden, NJ to the New York City market, specifically the three New York City area airports 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.

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 that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[17] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this

[17] 18 C.F.R § 385.603 (2012).

proceeding; otherwise, the Chief Administrative Law Judge (Chief ALJ) will select a judge for this purpose.[18] 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 the ICA, a public hearing shall be held concerning Joint Complainants' complaint against Buckeye Pipe Line. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the body of this order and the ordering paragraphs below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure,[19] the Chief ALJ is hereby directed to appoint a settlement judge in this proceeding within 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 ALJ within five days of the date of this order.

(C) Within 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 60 days thereafter, informing the Commission and the Chief ALJ of the parties' progress toward settlement.

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[18] If the parties decide to request a specific judge, they must make their joint request to the Chief ALJ by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

[19] 18 C.F.R. § 385.603 (2012).

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a Presiding ALJ, to be designated by the Chief ALJ, shall, within 15 days of the date of the Presiding ALJ'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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.