

*CHS Inc. et al. v. Enterprise TE Products Pipeline Co.*

ORDER GRANTING IN PART AND CONSOLIDATING COMPLAINTS, AND  
ESTABLISHING LIMITED HEARING ON DAMAGES

145 FERC ¶ 61,056 (2013)

The Complainants claimed that Tariff 55.28.0 filed by Enterprise TE Products Pipeline Company (Enterprise) is in violation of a Settlement Agreement that was signed by Enterprise and approved by the Commission. Tariff 55.28.0 stated that Enterprise will discontinue the transportation of jet fuels or distillates on certain pipelines. After filing the Tariff, Enterprise provided shippers with a notice explaining that the interstate transportation of distillate and jet fuels would be discontinued. Enterprise challenged the standing of those complainants who were not party to the Settlement Agreement to pursue their complaint. However, the primary issue in this proceeding was a jurisdictional one and it centered on the interpretation of one phrase in the Settlement Agreement, namely that settlement rates “shall remain in effect for the remainder of the Settlement Period.” The Settlement Period was two years. On the issue of standing the Commission said that it “has not established the bright-line rule that non-parties do not have the right to enforce a settlement agreement.” Relying on verified statements and affidavits in the record which established that each complainant “is a past, present and/or future customer” of Enterprise, the Commission ruled that all parties to the proceeding had standing to challenge the Settlement Agreement. With regard to the jurisdictional issue, the Commission said that while it does not have the authority to “prevent or delay the abandonment of service by an oil pipeline” under the Interstate Commerce Act, it does have the authority to interpret the Settlement Agreement and “to hold a common carrier in violation of the law liable for the full amount of damages stemming from the violation.” The pertinent language of the Settlement Agreement was unambiguous, and the Commission ruled that by cancelling the tariff for transportation of jet fuel and /or distillates, Enterprise violated that agreement. Therefore, the Commission established a hearing for the limited purposes of determining whether damages have arisen from Enterprise’s breach of the Service Agreement and if so the amount.

20131017 0911 FERC EEP (CONSOLIDATED) 10/17/2013

145 FERC 61,056  
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.

CHS Inc.  
Federal Express Corporation  
GROWMARK, Inc.  
HWRT Oil Company LLC  
MFA Oil Company  
Southwest Airline Co.  
United Airlines, Inc.  
UPS Fuel Services, Inc.

Docket No. OR13-25-000

v.

Enterprise TE Products Pipeline Company, LLC

Chevron Products Company

Docket No. OR13-26-000

v.

Enterprise TE Products Pipeline Company, LLC

(consolidated)

ORDER GRANTING IN PART AND CONSOLIDATING COMPLAINTS, AND  
ESTABLISHING LIMITED HEARING ON DAMAGES

(Issued October 17, 2013)

1. On June 14, 2013,<sup>1</sup> CHS Inc., Federal Express Corp., GROWMARK, Inc., HWRT Oil Co. LLC, MFA Oil Co., Southwest Airline Co., United Airlines, Inc. and UPS Fuel Services, Inc. (“Complainants”) filed a complaint against Enterprise TE Products Pipeline Company, LLC (Enterprise TE) challenging the lawfulness of Enterprise TE’s FERC Tariff No. 55.28.0. On July 3, 2013, Chevron Products Co. (Chevron) filed a similar complaint in Docket No. OR13-26-000, and requested the Commission consolidate the two complaints. The Tariff in question provides that Enterprise TE will no longer accept nominations for the transportation of jet fuel or distillates. Complainants allege that in no longer accepting nominations, Enterprise TE violated a Settlement Agreement signed by Enterprise TE in Docket No. IS12-203-000 and approved by the Commission via letter order on May 31, 2013.<sup>2</sup>

2. As discussed below, the Commission grants the complaints, in part, and establishes a limited hearing for the purpose of determining damages.

### **Background**

3. Enterprise TE is a common carrier liquids pipeline providing transportation of various products from origins in the Gulf Coast. Among the products shipped by Enterprise TE are motor fuels, jet fuel, and distillates, which include diesel fuel, Ultra-Low Sulfur Diesel (“ULSD”) and petroleum distillates.

4. In Docket No. IS12-203-000, Enterprise TE filed to substantially increase its rates for transportation of refined petroleum products and NGLs across its system. A number of shippers protested, including Complainants CHS, GROWMARK, HWRT and Chevron. The Commission issued an order accepting and suspending the tariff, and established a hearing.<sup>3</sup>

5. The parties ultimately entered into a Settlement Agreement resolving the protests and “establish(ing) new forward-looking rates for movements of refined petroleum products and natural gas liquids (NGLs) on Enterprise TE’s System.”<sup>4</sup> The Settlement Agreement called for forward-looking rates to go into effect and not change for a period of two years, with Shipper parties agreeing not to file any protest or complaint challenging any matter settled in the Settlement Agreement for the same two-year period.

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<sup>1</sup> The Complaint was amended June 21, 2013.

<sup>2</sup> *Enterprise TE Products Pipeline Co., LLC*, 143 FERC ¶ 61,197 (2013).

<sup>3</sup> *Enterprise TE Products Pipeline Co., LLC*, 139 FERC ¶ 61,036 (2012).

<sup>4</sup> See Explanatory Statement, Docket No. IS12-203-000 at 2 (April 3, 2013).

The Settlement Agreement included rates for distillate and jet fuel shipments. On May 31, 2013, the Commission approved the Settlement Agreement.<sup>5</sup>

6. On May 1, 2013, prior to entering into the Settlement Agreement in Docket No. IS12-203-000, Enterprise TE filed FERC Tariff No. 55.28.0. The tariff stated that Enterprise TE will cease to accept nominations for interstate transportation of distillates and jet fuel for both volume incentive rates and non-incentive rates, with exceptions for currently-tariffed service (FERC No. 58.0.0) from Lima, Ohio to the Cincinnati airport as of June 1, 2013.<sup>6</sup> Enterprise TE stated that, given the limited existing demand for interstate distillate and jet fuel movements, it was not commercially feasible to undertake a substantial capital investment to upgrade its 14/16 inch mainline,<sup>7</sup> or to interrupt service on its 20 inch mainline, to accommodate these movements. The filing of the tariff followed a notice, provided shippers on March 22, 2013, that Enterprise TE would no longer provide interstate transportation service for distillate and jet fuel (March Notice).

### Complaints

7. Complainants allege that the unambiguous language of the Settlement Agreement requires Enterprise TE to provide distillate and jet fuel service for the duration of the Agreement. Complainants point out that the Settlement Agreement contained no exceptions permitting Enterprise TE to stop accepting nominations of any product, or discontinuing service associated with any of the effective rates, and abandonment of distillate and jet fuel service is therefore in violation of the Settlement Agreement. Complainants argue that where the proposed abandonment of services alters an earlier agreement concerning jurisdictional service, the Commission has clarified that it “has the jurisdiction to appropriately remedy the situation.”<sup>8</sup>

8. Complainants state that the Commission must ignore arguments that the Settlement Agreement should be interpreted in light of the March Notice, which was issued before the Settlement Agreement was submitted to the Commission. Complainants state that the March Notice was not incorporated into the Settlement Agreement.

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<sup>5</sup> *Enterprise TE Products Pipeline Co., LLC*, 143 FERC ¶ 61,197.

<sup>6</sup> The Cincinnati airport is located in the State of Kentucky.

<sup>7</sup> This line is now part of the ATEX Pipeline project that the Commission approved November 4, 2012, in Docket No. OR13-7-000.

<sup>8</sup> Complainants cite *Enterprise TE Products Pipeline Co., LLC*, 143 FERC ¶ 61,191, at P 26 (2013) (*Enterprise TE*).

9. Further, Complainants state that the Settlement Agreement specifically preserved their rights to challenge Enterprise TE to the extent it did something contrary or not covered by the Settlement Agreements, including making changes to its operations. Complainants cite Section III.D.3(a) of the Settlement Agreement for the proposition that “nothing in this Settlement Agreement shall in any way restrict or prohibit any Shipper Party from filing a complaint, protest, or taking any other action against any change in Enterprise TE’s operations or other matters not covered by this Settlement Agreement seeking reparations, refunds, rate reductions, or other relief....” Complainants state that this language indicates the shippers memorialized their ability to protect themselves to the extent Enterprise TE made any attempt to change its operations in a manner incompatible with the Settlement Agreement.

10. Complainants further argue that reading the Settlement Agreement to allow Enterprise TE to completely abandon the services for which a rate is specified in the agreement would essentially nullify the entire agreement. Complainants state that the consideration for the agreement (the inducement to shippers to abandon their protest and forgo litigation) was the promise that Enterprise TE would provide service at the agreed upon rates and under the tariffs provided in the Settlement Agreement for the term of the Settlement Agreement. Without this consideration, Complainants state that the Settlement Agreement is a nullity, and it would be grossly inequitable and unfair to permit Enterprise TE to reap the benefits of avoiding the risks of litigation and the institution of the Settlement Agreements rate it likes and reject, after the fact, those Settlement Agreement rates and services it no longer cares for.

11. Complainants state that Enterprise TE forfeited any rights it may have had to abandon service when it signed the Settlement Agreement. Complainants argue that the right to decline distillate and jet fuel nominations and discontinue those services on its pipeline was waived by entering into a Settlement Agreement which expressly requires Enterprise TE to leave the rates agreed to therein in effect for two years. Complainants point to Section III.3.D.(a) of the Settlement Agreement, which states that “Enterprise TE shall refrain from changing its rates that are subject to the Settlement Agreement, except in accordance with certain defined exceptions set forth herein.” Complainants state the only defined exceptions relate to indexing.

12. Finally, Complainants argue that enforcing the Settlement Agreement is essential to preserving the parties’ expectations for the next two years. Complainants argue that the Commission should not allow Enterprise TE to evade its responsibilities under the Settlement Agreement, upend shipper expectations, and create uncertainty by simply cancelling services in direct contravention of the express language of the Settlement Agreement and related tariffs. Complainants state that allowing Enterprise TE to evade the promises made in the Settlement Agreement will have an impact beyond the instant proceeding, in that shippers will be less likely to engage in settlement discussions to

resolve rate proceedings if they know the pipeline might simply abandon service rather than provide the service at the agreed upon rates.

### **Relief Requested**

13. Complainants request that, pursuant to sections 13(1) and 15(1) and using its equitable authority under the ICA, the Commission enforce the Settlement Agreement and direct Enterprise TE to continue providing distillate and jet fuel service at the rates established by the Settlement Agreement for the remaining term of the Settlement Agreement. Complainants further request the Commission award monetary damages as a result of Enterprise TE's violation of the Settlement Agreement.

### **Interventions and Comments**

14. Notice of the complaint in Docket No. OR13-25-000 was issued on June 17, 2013. Notice of the complaint in Docket No. OR13-26-000 was issued on July 5, 2013.<sup>9</sup>

15. Several parties filed motions for leave to intervene and comments regarding the complaint in Docket No. OR13-25. Murphy Oil USA, Inc. (Murphy Oil) and Chevron noted that the Commission's ruling on the Complaint will have ramifications for every future proceeding and dispute that comes before the Commission, noting that the settlement process will be severely handicapped if regulated entities are able to settle a rate case and then submit a revised tariff that frustrates the purpose of the settlement simply to gain a greater profit. Chevron and Murphy Oil state that efforts to settle any proceeding would result in protracted negotiations, and cause shippers to be far less inclined to settle and withdraw protests for fear that a regulated entity will simply be able to evade the terms of a settlement by submitting a new tariff.<sup>10</sup>

16. Similarly, the National Propane Gas Association (NPGA) echoes these concerns, and further points out that the Commission has the authority to enforce the Settlement even if the breach thereof is an abandonment that would otherwise be outside the Commission's jurisdiction.<sup>11</sup> Further, NPGA notes that the Settlement Agreement plainly contemplated that Enterprise TE would provide the service for which rates were specified in the Settlement Agreement for the entire term of the Settlement Agreement.

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<sup>9</sup> JP Energy ATT, LLC filed a motion to intervene in Docket No. OR13-26-000.

<sup>10</sup> On July 24, 2013, Murphy Oil withdrew its comments in support of the Complaint.

<sup>11</sup> See *Enterprise TE*, 143 FERC ¶ 61,191 at P 26.

**Answer**

17. On June 28, 2013, Enterprise TE filed an answer addressing the complaint received by the Commission in Docket No. OR13-25-000, and on July 15, 2013, filed similar comments addressing the complaint in Docket No. OR13-26-000. Enterprise TE asserts that, as an initial matter, Complainants that are not parties to the Settlement Agreement must be dismissed for lack of standing and failure to state a claim upon which relief can be granted. Enterprise TE notes that CHS, GROWMARK, HWRT and Chevron are the only Complainants that are parties to the Settlement Agreement, and all others listed in the complaint's caption should be dismissed as Complainants.

18. Enterprise TE argues that the Settlement Agreement excludes service discontinuance from the subject matter of the agreement, through Sections III.A.3(b) and III.D.3(a)<sup>12</sup> Further, Enterprise TE argues that the complaint is contrary to Commission precedent that a settlement agreement establishing rates for certain services does not obligate the oil pipeline to "establish or maintain service." Thus, argues Enterprise TE, the Settlement was not violated when the pipeline abandoned certain services related to the settlement rates during the term of the agreement.<sup>13</sup>

19. Enterprise TE asserts that all shippers were on notice prior to the execution of the Settlement Agreement that Enterprise TE planned to cancel the services in question, and therefore cannot have reasonably believed that the Settlement Agreement was intended to prevent that abandonment. Further, Enterprise TE states that the Commission has already made clear that it has no authority to prevent Enterprise TE from abandoning service even as an equitable remedy in the context of enforcing a settlement agreement.<sup>14</sup>

20. Enterprise TE asserts that the filed tariff does not violate the Settlement Agreement. Enterprise TE argues that Section 13(1) of the ICA requires the Commission

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<sup>12</sup> Enterprise TE states that "change(s) in Enterprise TE's operations" are among the "matters not covered by this Settlement Agreement."

<sup>13</sup> Enterprise TE cites *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022, at 61,076-77 (1999), *order on reh'g and compliance filings*, Opinion No. 435-A, 91 FERC ¶ 61,135 (2000), *order on reh'g and directing revised compliance filing*, Opinion No. 435-B, 96 FERC ¶ 61,281 (2001), *order granting clarification and reh'g in part*, 97 FERC ¶ 61,138 (2001), *order on reh'g*, 100 FERC ¶ 61,353 (2002), *aff'd in part, vacated in part, and remanded to sub nom. BP West Coast Products, LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004) (Opinion No. 435).

<sup>14</sup> Enterprise TE cites *Enterprise TE*, 143 FERC ¶ 61,191 at P 27.

to investigate a complaint only if there is a “reasonable ground” to do so.<sup>15</sup> Enterprise TE argues that since the Complainants have not shown that Enterprise TE violated the Settlement Agreement in any way, the complaint must be dismissed. Further, Enterprise TE states nothing in the Settlement Agreement requires Enterprise TE to provide interstate distillate and jet fuel transportation or prohibits Enterprise TE from abandoning any services as it is permitted to do under the ICA. Enterprise TE notes that while the Settlement Agreement establishes certain “Settlement Rates,” which constitute the applicable ceiling rates for services, it does not specifically state that Enterprise TE waived its right to cancel or abandon service. Enterprise TE states that it is not illogical or unusual for parties to a rate proceeding to settle the case by agreeing to keep certain rate ceilings in place for a given amount of time without obligating the pipeline to give up its right under the ICA to abandon the service subject to the settled rates; if a rate case does not settle, the Commission can establish new just and reasonable rates that are different than the filed rates, but could not require a pipeline to continue to provide the service at those rates, if the service were abandoned.

#### **Answer to Enterprise TE’s Answer**

21. On July 8, 2013, Complainants filed an answer to Enterprise TE’s answer. Complainants state that Enterprise TE mischaracterizes Commission precedent and the text of the Settlement Agreement throughout its Answer. While answers to answers are ordinarily prohibited under the Commission’s procedures, the Commission will waive that bar here, as these answers have assisted the Commission in reaching its decision. Specifically, Complainants argue Enterprise TE misspoke in asserting that non-parties to a settlement agreement do not have the right to enforce it.<sup>16</sup> Complainants point out that under the ICA, “any person” has standing to file a complaint, and all Complainants in the instant case have established through Verified Statements and affidavits that they actually used each of the services and incurred the rates or charge that are subject to the complaint.<sup>17</sup>

22. Complainants argue that the Settlement Agreement is not simply an agreement between private parties; it was filed with the Commission, approved as “fair and reasonable and in the public interest,” and established the terms of the common carrier services provided by Enterprise TE to the public, including the Settlement Rates that shall

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<sup>15</sup> Enterprise TE cites to 49 U.S.C. app. § 13(1) (1988).

<sup>16</sup> Enterprise TE cited *Power Auth. of New York v. Long Island Lighting Co.*, 58 FERC ¶ 61,213 (1992) (*Long Island Lighting*).

<sup>17</sup> See 49 U.S.C. app. § 13(1); Complainants also cite *Texaco Ref’g & Mktg. Inc. v. SFPP, LP.*, 86 FERC ¶ 61,035, at 61,141 (1999).

remain in effect for the remainder of the Settlement Period. Complainants state that Enterprise TE's proposition that the Settlement Agreement does not cover changes in Enterprise TE's operations is incorrect, and is based on a forced reading of the Settlement Agreement. Additionally, Complainants argue that Enterprise TE mischaracterizes the Settlement Agreement by repeatedly referring to the Settlement Rates established by the Settlement Agreement as nothing more than "rate ceilings." Complainants point out that the Settlement Agreement plainly establishes rates to be charged during the term of the agreement, rather than establishing rate ceilings.

23. Complainants argue that the cases Enterprise TE cites regarding the correct interpretation of the Settlement Agreement are not directly on point, and shed little light on how the settlement Agreement in this case should be interpreted. Complainants argue that Enterprise TE erroneously applies the parol evidence rule in reference to the March Notice. Specifically, Complainants view the language of Sections III.D.2(b) and III.D.3(a)<sup>18</sup> as unambiguous, therefore they maintain the Commission need not look to other sources, such as the March Notice, to supply some contrary meaning to these provisions.<sup>19</sup> Complainants aver that the March Notice was a unilateral statement by Enterprise TE promulgated outside of the settlement negotiations.

24. Complainants also argue that Enterprise TE misstates the standard for alleging damages in a complaint. Complainants point out that the ICA precedent Enterprise TE points to support the claim that Complainants are not entitled to monetary damages only stands for the proposition that Complainants must prove their damages over the course of a proceeding.

## Discussion

### Standing

25. The Commission will first address Enterprise TE's argument that complaints from parties that are not parties to the Settlement Agreement should be dismissed. Generally, "one who is not a party to an agreement cannot enforce its terms against one who is a

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<sup>18</sup> Section III.D.2(b) of the Settlement Agreement reads in part "[t]he Parties agree that the Settlement Rates ... shall remain in effect for the remainder of the Settlement Period." Section III.D.3(a) of the Settlement Agreement reads in part "[d]uring the Settlement Period...Enterprise TE shall refrain from changing its rates that are subject to this Settlement Agreement."

<sup>19</sup> Complainants cite *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281, 283-284 (4<sup>th</sup> Cir. 1984).

party.”<sup>20</sup> However, contrary to Enterprise TE’s argument, the Commission has not established the bright-line rule that non-parties do not have the right to enforce a settlement agreement.<sup>21</sup> The Commission has, for example, allowed non-parties to intervene in complaint proceedings between the parties to a settlement agreement.<sup>22</sup> Furthermore, the verified statements and affidavits establish that each complainant is a past, present and/or future customer of the Enterprise TE pipeline for transportation of either jet fuel or distillate. Enterprise TE, in its answer, admitted that each complainant has shipped distillate and/or jet fuel on Enterprise TE in the past with the exception of FedEx. FedEx states in its verified statement that it is a purchaser and consumer of significant jet or aviation turbine fuel that can be transported on the Enterprise TE system, and that it has a contract to obtain supply through the Enterprise TE system. The Commission finds all of the complainants in this proceeding have standing to bring their complaints.

### **Violation of the Settlement**

26. This dispute centers on the interpretation of one phrase set forth in the Settlement Agreement, which provides that the Settlement Rates<sup>23</sup> “shall remain in effect for the remainder of the Settlement Period.”<sup>24</sup> Complainants argue that the phrase requires Enterprise TE to provide service for the transportation of jet fuel and distillates for the entirety of the two-year Settlement Period. Enterprise TE first states that in agreeing that the rates would remain in effect, Enterprise TE was agreeing not to charge rates in excess of the applicable rate ceilings.<sup>25</sup> Enterprise TE also argues that by its express terms, abandonment of service was not part of the subject matter of the Settlement Agreement.

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<sup>20</sup> *Bahamas Sales Associate, LLC v. Byers*, 701 F.3d 1335, 1342 (11<sup>th</sup> Cir. 2012).

<sup>21</sup> Enterprise TE states that such a finding exists in *Long Island Lighting*, 58 FERC ¶ 61,213. That case, however, found that a non-party’s consent was not needed to revise a settlement agreement.

<sup>22</sup> *Cities of Newark, et al. v. Delmarva Power & Light Co.*, 35 FERC ¶ 61,209 (1986).

<sup>23</sup> Section III.D.2(a) of the Settlement Agreement provides that “Enterprise TE shall file tariffs containing new rates (Settlement Rates). . . .”

<sup>24</sup> Settlement Agreement at Section. III.D.2(b). Section III.A.2 defines the Settlement Period as “two (2) years from the Effective Date [of the Settlement Agreement].”

<sup>25</sup> Enterprise TE Answer at 6.

Further, Enterprise TE states that shippers were on notice prior to the execution of the Settlement Agreement that Enterprise TE planned to cancel the services in question, and therefore could not reasonably believe that the Settlement Agreement was intended to prevent abandonment.

27. In determining what a settlement says or does not say, general principles of contract interpretation apply.<sup>26</sup> The generally accepted canons of contract interpretation require that (1) a contract should be interpreted as an integrated whole; (2) provisions of a contract should normally not be interpreted as being in conflict; and (3) a more particular and specific clause of a contract should prevail over a more general clause.<sup>27</sup> In following these well-established principles, the Commission finds that the Settlement Agreement does require Enterprise TE to provide transportation of all services identified in the Settlement Agreement for the entirety of the settlement period.

28. The Commission has analyzed the entirety of the Settlement Agreement and finds as follows. Pursuant to the Settlement Agreement, a rate was placed into effect upon the filing of a tariff with the Commission, and that tariffed rate was to remain in effect for the Settlement's term.<sup>28</sup> The clear meaning of the term "shall remain in effect" is that once the tariff is filed and the rate is placed into effect, the tariff must remain on file.

29. The arguments of Enterprise TE concerning the meaning of the term "shall remain in effect" are inconsistent with both the clear meaning of the term as well as in conflict with other provisions of the Settlement Agreement. Enterprise TE argues that by agreeing that rates "shall remain in effect" it was agreeing not to charge rates in excess of the applicable rate ceilings. The specific agreement that rates shall remain in effect is set forth in Section III.D.2(b) of the Settlement Agreement. In a separate section entitled "Moratorium," however, the parties agree that during the settlement period shippers will not challenge the settlement rates and, importantly, Enterprise TE shall refrain from changing its rates except in accordance with certain defined exceptions as described in the Settlement.<sup>29</sup> To accept Enterprise TE's argument would be to accept that the term

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<sup>26</sup> *Mid Louisiana Gas Co. v. FERC*, 780 F.2d 1238, 1242-43 (5<sup>th</sup> Cir. 1986).

<sup>27</sup> *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at P 25 (2004) (*SW Power Pool*).

<sup>28</sup> Settlement Agreement at Section III.B.1 and Section III.D.2(b).

<sup>29</sup> Settlement Agreement at Section III.D.3

“shall remain in effect” meant only the very same thing that the parties were agreeing to in a separate section, and was therefore superfluous.<sup>30</sup>

30. Enterprise TE argues in its Answer that in Opinion No. 435, the Commission held that a settlement agreement regarding rates and rate ceilings does not in itself obligate an oil pipeline to continue to provide service during the term of the agreement.<sup>31</sup> The settlement agreement at issue in Opinion No. 435 is distinguishable, however, from that in the present proceeding, for in that case the pipeline did not agree that the rates would remain in effect for a specific length of time.<sup>32</sup>

31. Enterprise TE’s argument that abandonment of service was not implicated in the subject matter of the Settlement conflicts with the clear meaning of the Settlement language at issue. An explicit agreement that rates shall remain in effect is, as discussed above, an agreement that the tariff placing the rates in effect will remain filed. A promise that a tariff will remain filed is an explicit promise not to file a replacement tariff to cancel the original tariff so as to abandon the service which the original tariff provided for. The Settlement thus triggered an obligation for Enterprise TE to provide the service consistent with the obligations of common carriage set forth in the ICA.

32. That the term “abandonment” is not expressed in the Settlement is not dispositive. To adopt Enterprise TE’s argument would render the term “shall remain in effect” to mean shall remain in effect until Enterprise TE unilaterally decides to abandon service by filing a cancellation tariff nullifying the tariff that was to stay in effect. This qualification, which Enterprise TE would have us read into the Settlement Agreement, is unsupported by the express terms of the agreement, and is inconsistent with the Commission’s reasonable interpretation of the Settlement.

33. Enterprise TE states that the language in the Settlement finding that changes in Enterprise TE’s operations are matters not covered thereunder shows that the Settlement Agreement does not prevent abandonment of service within the two-year settlement period. This is not a reasonable or correct interpretation of this provision. Operational changes are different from cancellation of service. Agreeing that changes in operations are not within the scope of the Settlement, as the parties did here, does not mean that the parties agreed that the Settlement could be modified by Enterprise TE simply by labeling

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<sup>30</sup> A contract should be interpreted as a whole, with no part assumed to be superfluous. Restatement (Second) of Contracts § 203(a), *cited in SW Power Pool*, 109 FERC ¶ 61,010 at P 25.

<sup>31</sup> Enterprise TE Answer at 7.

<sup>32</sup> Motion for Leave to Answer and Answer of Complainants at Appendix B.

the modification an operational change. The general statement that the Settlement did not cover changes in operations does not supersede or nullify the specific agreement that the tariffed rates shall remain in effect for the entire two-year term of the Settlement Agreement.<sup>33</sup>

34. To adopt Enterprise TE's argument that the Settlement did not prevent unilateral discontinuation of service would not only render much of the Settlement a nullity as Complainants argue, but could have a chilling effect on other oil pipeline contracts and settlements.

35. Enterprise TE's final argument is that complainants were put on notice prior to the filing of the Settlement that Enterprise TE intended to cancel distillate and jet fuel service, and therefore the parties "could not have intended that an agreement to establish rate ceilings also required Enterprise TE to give up its right under the ICA to abandon service."<sup>34</sup> As an initial matter, the courts and the Commission have found that, when the terms of a contract are clear and unambiguous, the terms of the contract control and the Commission is not to consider parol evidence to interpret the contract's intention.<sup>35</sup> As discussed above, the Settlement is clear that the term "shall remain in effect" requires Enterprise TE to keep the original tariff on file for two years. To determine whether an agreement is ambiguous, the Commission looks within the four corners of the agreement and not to outside sources, such as the March Notice.<sup>36</sup> As the Commission finds no ambiguity in the Settlement Agreement, reference to the March Notice is improper.

36. Even if the Commission were to reference the March Notice in its interpretation of the settlement agreement, the conclusions would not change. That Enterprise TE announced plans to abandon service prior to settlement does not impact what the parties subsequently agreed to in the Settlement Agreement. Most settlements involve parties agreeing to alter previous plans, just as the Settlement Agreement in this proceeding altered Enterprise TE's pursuit of its originally-filed rates. It is in fact more telling of the parties' intent that the right to abandonment was not preserved in the final document. The intent of the parties that the March Notice was not to be part of the final settlement is set forth expressly and undeniably in Section V.F, which states that the Settlement

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<sup>33</sup> *SW Power Pool*, 109 FERC ¶ 61,010 at P 25.

<sup>34</sup> Enterprise TE Answer at 11-12.

<sup>35</sup> *Xcel Energy Services Inc. v. American Transmission Co., LLC*, 140 FERC ¶ 61,058, at P 60 (2012).

<sup>36</sup> The Settlement also contains a merger clause, sec. V.F, stating that all terms of the Settlement Agreement are fully expressed and incorporated therein.

Agreement supersedes any other written exchanges between them concerning the subject matter of the settlement. As the Commission has held above, the agreement that rates shall remain in effect puts the discontinuation of the service within the subject matter of the Settlement. As such, the March Notice is not relevant in determining the meaning of the Settlement Agreement.

37. As discussed above, the Commission finds that Enterprise TE violated the terms of the Settlement Agreement in Docket No. IS12-203-000 by cancelling the tariff for the transportation of jet fuel and/or distillates.

### **Relief**

38. Complainants requested two forms of relief in this proceeding: (a) that the Commission require Enterprise TE to continue to provide transportation service of jet fuel and distillates; and (2) economic damages stemming from the breach of the settlement agreement.

39. As the Commission has stated, while it does possess jurisdiction to determine whether an abandonment of service would violate the Settlement Agreement, it does not possess the authority to, as an equitable remedy, prevent or delay the abandonment of service by an oil pipeline.<sup>37</sup> Thus, Complainants' request that the Commission direct Enterprise TE to continue to provide distillate and jet fuel service is denied. The Commission cannot grant this relief.

40. However, pursuant to the ICA, specifically sections 8 and 13(1), the Commission does have the authority to hold a common carrier in violation of the law liable for the full amount of damages stemming from the violation. The determination of any damages resulting from Enterprise TE's breach of the Settlement Agreement is a factual matter that cannot be properly calculated based on the filings made to date. The Commission will therefore establish a hearing, before an Administrative Law Judge, for the limited purpose of determining if damages have arisen from Enterprise TE's breach of the Settlement Agreement in Docket No. IS12-203-000 by abandoning distillate and jet fuel interstate service.

41. The purpose of this hearing is to determine whether damages have arisen and, if so, to calculate the damages incurred due to Enterprise TE's breach of the Settlement Agreement. Complainants, in setting forth their damages in the Amended Complaint, have included damage estimates not related to Enterprise TE's breach and thus outside the scope of this proceeding. For example, Complainants argue that capital investments made in relation to transportation of distillate and jet fuel should be recouped based on

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<sup>37</sup> *Enterprise TE*, 143 FERC ¶ 61,191 at P 27.

Enterprise TE's breach. Yet these investments were made, in most if not all instances, prior to the settlement being agreed to.<sup>38</sup> Complainants chose to incur these investments at a time when Enterprise TE, unbound by its agreement that rates shall remain in effect, could have abandoned service by unilaterally cancelling the tariff by which it held itself out to provide that service. Complainants are sophisticated parties aware of the regulatory regime in which they operate, a regime which allows, absent an agreement to the contrary, an oil pipeline to abandon service at any time. Decisions made prior to the Settlement Agreement can in no way be based on Enterprise TE's assurances that service would remain for a set period of time.

42. In addition to demonstrating that any damages stem directly from the breach of the Settlement Agreement, Complainants not original parties to the settlement agreement<sup>39</sup> must demonstrate damages not related to the concessions granted by those Complainants who were parties to the Settlement Agreement. If these entities are not shippers on Enterprise TE, they must show that they are, in some way, adversely affected by Enterprise TE's breach of the Settlement Agreement. Parties must at a minimum demonstrate that they actually would have used the service that should have been provided by Enterprise TE under its tariff.<sup>40</sup>

43. Finally, Complainants must set forth what efforts have been undertaken to mitigate any damages they have incurred as a result of Enterprise TE's breach of the Settlement Agreement.<sup>41</sup>

44. While we are setting the matters in Docket Nos. OR13-25-000 and OR13-26-000 for a limited evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their

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<sup>38</sup> For example, HWRT states that it made capital expenditures of \$155,000 in 2011 and \$170,000 in 2012 that it would not have spent had it been notified that Enterprise TE would discontinue distillate service in 2013. Enterprise TE was under no obligation to notify HWRT of its plans prior to the filing of a tariff cancelling service, and HWRT assumed the risk that abandonment could occur at any time. It is simply not possible for investment decisions in 2011 and 2012 to be based on a promise to provide service made in 2013.

<sup>39</sup> UPS Fuel Services, Inc., United Airlines, Inc., Southwest Airline Co., and Federal Express Corporation.

<sup>40</sup> See *Texaco Ref'g & Mktg., Inc. v. SFPP, L.P.*, 86 FERC ¶ 61,035, at 61,141 (1999).

<sup>41</sup> See Restatement (Second) of Contracts § 350 (1981).

settlement efforts, we 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.<sup>42</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding, otherwise the Chief Judge will select a judge for this purpose.<sup>43</sup> The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge 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 judge.

The Commission orders:

(A) The subject Complaints are granted in part to the extent the Commission finds, as discussed above, that Enterprise TE breached the Settlement Agreement in Docket No. IS12-203-000 by filing a cancellation tariff to abandon transportation service for jet fuels and distillates during the Settlement Period.

(B) The subject Complaints are consolidated for purposes of a limited hearing to determine if Complainants have incurred any damages, and, if so, to calculate the damages resulting from Enterprise TE's breach of the Settlement Agreement as discussed in the body of this order and the ordering paragraphs.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge 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 Judge 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.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the

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<sup>42</sup> 18 C.F.R. § 385.603 (2013).

<sup>43</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a limited 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 Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a limited evidentiary hearing to determine if Complainants have incurred any damages, and, if so, to calculate the damages resulting from Enterprise TE's breach of the Settlement Agreement is to be held, a presiding judge, to be designated by the Chief Judge, 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 judge 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.