

157 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Aircraft Service International Group, Inc.
American Airlines, Inc.
Delta Air Lines, Inc.
Hooker's Point Fuel Facilities LLC
Southwest Airlines Co.
United Aviation Fuels Corporation
United Parcel Service, Inc.

Docket No. OR16-26-000

v.

Central Florida Pipeline LLC
Kinder Morgan Liquid Terminals LLC

ORDER ON COMPLAINT AND ESTABLISHING HEARING

(Issued December 15, 2016)

1. On September 16, 2016, Aircraft Service International Group, Inc. (ASIG), American Airlines, Inc. (American), Delta Air Lines, Inc. (Delta), Hooker's Point Fuel Facilities LLC (Hooker's Point LLC), Southwest Airlines Co. (Southwest), United Aviation Fuels Corporation (UAFC), and United Parcel Service, Inc. (UPS) (collectively, Joint Complainants) filed a complaint against Central Florida Pipeline LLC (CFPL) and Kinder Morgan Liquid Terminals LLC (KMLT) (Respondents). Joint Complainants assert that Respondents are providing interstate service without a Commission tariff. Joint Complainants request that the Commission direct Respondents to file tariffs governing the rates and practices associated with their services, including cost-of-service information supporting the rates charged. Joint Complainants also request reparations pursuant to the Interstate Commerce Act (ICA)¹ for all amounts paid in excess of the rates and charges determined to be just and reasonable, beginning two years before the filing of this complaint. Finally, Joint Complainants request that the Commission

¹ 49 U.S.C. app. § 1 *et seq.* (1988).

establish just and reasonable rates for the jurisdictional services on a prospective basis. For the reasons discussed below, the Commission establishes a hearing to address the issues raised by the complaint.

Background

2. CFPL, a subsidiary of Kinder Morgan, Inc. (Kinder Morgan), operates a pipeline that transports refined fuels from Tampa, Florida to Orlando, Florida. The system consists of two pipelines: (1) a 110-mile, 16-inch diameter pipeline that transports gasoline and ethanol, and (2) an 85-mile, 10-inch diameter pipeline that transports diesel fuel and jet fuel. The pipeline system originates at the KMLT Tampa Terminal in Tampa, Florida. KMLT is also a subsidiary of Kinder Morgan. According to Joint Complainants, gasoline, ethanol, and diesel fuels are transported on the CFPL system to a liquids terminal in Taft, Florida (Orlando Terminal), which is also owned and/or operated by Kinder Morgan or a subsidiary thereof. Moreover, Joint Complainants explain that jet fuel is transported by the CFPL system directly from the KMLT Tampa Terminal to a liquids terminal at Orlando International Airport (Orlando Airport) in Orlando, Florida operated by ASIG (ASIG Terminal).

3. Joint Complainants further explain that CFPL is the sole pipeline supplying jet fuel to Orlando Airport. CFPL holds 48,000 barrels of line fill between Tampa and the Orlando Airport. Joint Complainants explain that the pumping rates range from 1,300-1,800 barrels per hour, creating an average transition time of 32 hours from the KMLT Tampa Terminal into Orlando Airport storage. Joint Complainants note that jet fuel volumes on the CFPL system were approximately 15,900 and 17,800 barrels per day in 2014 and 2015, respectively.²

4. According to Joint Complainants, all jet fuel transported on CFPL is received through the KMLT Tampa Terminal from sources outside of Florida (either foreign or domestic) and delivered to CFPL through that terminal.

5. Joint Complainants allege and CFPL does not dispute that it does not have a rate on file with the Commission for the transportation of jet fuel from Tampa to Orlando. CFPL has, however, published a Transportation Policy that establishes a rate of \$1.0018 per barrel for transportation from the Kinder Morgan KMLT Tampa Terminal to the ASIG Terminal at Orlando Airport. It is Joint Complainants' understanding that this rate applies to all jet fuel transportation on CFPL. The Transportation Policy also lists a rate of \$0.9946 per barrel for transportation from the KMLT Tampa Terminal to the Orlando Terminal. Joint Complainants understand that gasoline, ethanol, and diesel fuel are carried to the Orlando Terminal. The Transportation Policy further indicates that a

² Complaint at 5.

surcharge of \$0.0736 per barrel will be applied to the transportation of diesel, regardless of destination point. Finally, the Transportation Policy contains an incentive rate of \$0.8318 per barrel for delivery of jet fuel to the ASIG Terminal which applies to qualifying shippers.³

6. According to the Joint Complainants, ASIG is an independent commercial aviation services company that, under contract with the airlines operating at Orlando Airport, provides a variety of services to the airlines. ASIG operates the fuel system at Orlando Airport, including the terminal to which jet fuel is shipped via CFPL, handles storage of jet fuel at Orlando Airport, and provides aircraft fueling services. ASIG is a shipper of jet fuel on CFPL from the KMLT Tampa Terminal to the ASIG Terminal in Orlando, Florida.

7. Joint Complainants also contend ASIG has responsibilities regarding five Jet A tanks at the KMLT Tampa Terminal which are leased by Hooker's Point LLC, an LLC formed by the airlines operating at Orlando Airport for the purpose of providing logistical services for jet fuel supply (sometimes referred to as the Hooker's Point Fuel Committee). Hooker's Point LLC contracts with ASIG to provide management services associated with fuel scheduling, inventory accountability, billing, and other matters related to the Jet A storage tanks leased by Hooker's Point LLC at the KMLT Tampa Terminal.

8. Joint Complainants further explain that ASIG is responsible for coordinating offloading of jet fuel from marine vessels into the Hookers Point tanks, transfer of that fuel to CFPL, for transportation to Orlando Airport from Tampa. Joint Complainants state that ASIG is the shipper of record for jet fuel shipped on CFPL from the Hookers Point tanks and pays all tariff charges for these shipments, regardless of the ultimate consignee. Joint Complainants note, however, that ASIG does not take title to jet fuel at any point; title remains with either the individual airline or fuel service provider that procured the jet fuel. Joint Complainants contend that some shipments on behalf of World Fuel originate from the Hookers Point tanks leased by Hooker's Point LLC while others originate from separate tanks at the KMLT Tampa Terminal controlled by World Fuel. According to Joint Complainants, ASIG charges a fee to the airlines for its services that includes the tariff rate on CFPL, and ASIG pays the tariff for shipments on behalf of World Fuel Services Corporation (World Fuel) from Tampa to Orlando Airport on CFPL. Joint Complainants state that ASIG bills World Fuel a fixed rate, as determined by Hooker's Point LLC, for the use of the line. Joint Complainants note that ASIG pays the

³ Complaint at 5-6.

CFPL tariff rate for all the World Fuel volumes on CFPL regardless of the originating tank.⁴

9. According to Joint Complainants, ASIG coordinates the transportation of jet fuel from the time it is delivered to Hooker's Point to the time it is placed into wing of the aircraft at Orlando Airport. Therefore, the Joint Complainants contend ASIG is in a position to understand the entire flow of jet fuel to the Orlando Airport. Further, Joint Complainants allege ASIG can identify the source (i.e., foreign or domestic origin and supplier) of all of the volumes it ships on CFPL and the ultimate recipient of the jet fuel at Orlando Airport.⁵

10. Joint Complainants describe the Hooker's Point facility as consisting of five Jet A tanks with a total capacity of 260,000 barrels and an average useable capacity of 235,000 barrels. Joint Complainants explain that these tanks are located at the KMLT Tampa Terminal and are leased by Hooker's Point LLC and operated by KMLT. Joint Complainants also point out that ASIG provides management services, including fuel scheduling and billing, for these tanks. According to Joint Complainants, the leased tanks consist of two 70,000 barrel tanks and three 42,000 barrel tanks, which are allegedly used exclusively for Jet A fuel delivered to Hooker's Point via marine cargo deliveries.⁶

11. Joint Complainants suggest that the Hooker's Point tanks have limited capacity in comparison to the amount of fuel required by the airlines at Orlando Airport. According to the Joint Complainants, the Hooker's Point tanks can hold an average of only eight days of supply, so the tanks' contents regularly turn over. Joint Complainants point out that the KMLT Tampa Terminal receives approximately 8-10 vessels per month delivering Jet A fuel to the leased tanks, resulting in a monthly average volume flowing through the tanks of 452,400 barrels, with an average annual throughput of 5,595,400 barrels.⁷

12. Joint Complainants allege the Hooker's Point tanks serve solely as a means of facilitating the transfer of jet fuel from marine transportation to the CFPL system or tank truck for delivery to its ultimate destination. Joint Complainants further allege that all of the jet fuel received into the Hooker's Point Tanks is delivered out of the tanks on a

⁴ Complaint at 7.

⁵ Complaint at 7.

⁶ Complaint at 7-8.

⁷ Complaint at 8.

regular basis in a matter of days. According to Joint Complainants, approximately 94 percent of the product delivered out of the Hooker's Point tanks is transported on the CFPL system to the ASIG Terminal, with a small amount (approximately 34,000 barrels per month) being transferred to tank trucks for delivery to other airports throughout Florida. Joint Complainants allege that no jet fuel is stored in the Hooker's Point tanks for distribution operations, no sales of jet fuel are made out of the Hooker's Point tanks, and jet fuel does not undergo any processing at this location before it is transported on CFPL.⁸

13. Joint Complainants note ASIG pays KMLT both a monthly warehousing charge and per barrel charges for the use of the leased tanks.⁹

Public Notice and Interventions

14. Notice of the complaint was issued on September 16, 2016, providing for answers, protests and interventions to be filed on or before October 17, 2016. On October 14, 2016, World Fuel filed a motion to intervene and limited comments. World Fuel takes no position on the merits of the issues raised in this proceeding. With that said, to clarify the record, World Fuel states it is a jet fuel supplier that provides jet fuel to airlines at the Orlando Airport. World Fuel states that the complaint differentiates between: (i) suppliers of jet fuel; and (ii) jet fuel service providers, identifying World Fuel as a service provider. World Fuel states it is a supplier of physical jet fuel to the Orlando Airport. World Fuel uses the KMLT facility to hold its inventory, ships barrels on CFPL (albeit over capacity held by ASIG) to the airport, and holds inventory at the airport. At many other airports, World Fuel states suppliers like itself provide jet fuel and related services in a similar fashion.

15. The complaint and the answer are discussed below. The Commission acknowledges that both Joint Complainants and Respondents filed additional responses in the proceeding. The pleadings simply further enhance the contradictory and competing narratives, therefore the Commission will not summarize them here.

Complaint

16. Under the ICA and the Commission's procedural rules, any person may bring a complaint seeking relief from an alleged legal violation over which the Commission may have jurisdiction.¹⁰ Joint Complainants state that each of them has standing to bring this

⁸ Complaint at 8.

⁹ Complaint at 8.

¹⁰ ICA § 13(1); 18 C.F.R. § 385.206(a) (2016).

complaint. ASIG maintains it is the shipper of record for jet fuel that is shipped from the Hooker's Point LLC tanks, and it also pays the CFPL tariff for all such shipments. ASIG also contends it pays the tariff for shipments on behalf of World Fuel from Tampa to Orlando Airport. American, Delta, Southwest, United, and UPS all represent that each relies on CFPL to supply them with jet fuel at Orlando Airport. Joint Complainants state that while these airlines are not shippers of record and do not pay the CFPL tariff directly the fuel ASIG ships on CFPL is shipped on their behalf. Further, these airlines reimburse ASIG for its payment of the CFPL tariff rates plus service fees. Joint Complainants seek reparations for the volumes for which ASIG paid the tariff rate directly. Joint Complainants state that the airlines are not individually seeking reparations.

17. In addition to representing the interests of American, Delta, Southwest, United, and UPS, Hooker's Point LLC leases five Jet A tanks at the KMLT Tampa Terminal. Joint Complainants allege that the services provided by Hooker's Point LLC are essential to the interstate transportation of jet fuel and subject to the Commission's jurisdiction. Joint Complainants state that Hooker's Point LLC will be directly affected by a decision on this issue as this decision will determine Hooker's Point LLC's rights with respect to the services provided and rates charged by the KMLT Tampa Terminal pursuant to its lease. Additionally, Joint Complainants point out that while the monthly warehousing charge and per barrel charges for the use of the leased tanks are paid to KMLT directly by ASIG, the funds for these payments are ultimately provided by the Hooker's Point LLC member airlines.

18. Joint Complainants state that the ICA specifically indicates that carriers engaging in transportation "from or to any place in the United States to or from a foreign country" are subject to the act "insofar as such transportation takes place within the United States."¹¹ Joint Complainants asserts that CFPL's failure to file a tariff for the interstate movement of jet fuel on the CFPL system violates the ICA.¹² Accordingly, Joint Complainants seek an order requiring CFPL to file a tariff for the transportation of jet fuel on CFPL to the ASIG Terminal and to the Orlando Terminal and submit cost-of-

¹¹ Complaint at 13 (citing 49 U.S.C. app. § 1(1)(b) and § 1(2)(a) (exempting from the statute's reach only intrastate transportation that is "not shipped to or from a foreign country from or to any place in the United States"))).

¹² Complaint at 13 (citing 49 U.S.C. app. § 3, 6(1) and 6(7) ("No carrier...shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter"))).

service data to justify its current rates within 60 days pursuant to 18 C.F.R. § 342.1 and Part 346 (2016).¹³

19. Joint Complainants assert that the determination of whether a pipeline provides interstate transportation of oil depends on the “essential character” of the transportation.¹⁴ Joint Complainants submit that the Commission has previously explained that the “fixed and persisting transportation intent of the shipper” is the “factor most often relied on” when “determining the ‘essential character of the commerce.’”¹⁵

20. Joint Complainants contend that the Commission also has considered other “essential character” factors such as the commingling of product in transit as well as in storage, processing before shipment, bills of lading, and the specific turnover rate of product in storage.¹⁶ Joint Complainants submit that no single factor is to be regarded as conclusive in the final determination as to the “essential character” of a shipment, and the factors must be looked at in combination.¹⁷

21. Joint Complainants assert that the Commission’s general policy is that all interstate-related product movements are to be considered jurisdictional unless the facts reflect a sufficient break in the continuity of transportation such that shippers do not have a fixed and persisting intent to move the product in interstate commerce.¹⁸ Joint Complainants submit that where a terminal or other facility is simply a “link in the chain of interstate transportation,” the interstate character of the transportation will not be

¹³ Complaint at 13 (citing 49 U.S.C. app. §§ 1, 6(1) and 6(7)).

¹⁴ Complaint at 14-15 (citing *Atl. Coast Line R.R. Co. v. Standard Oil Co.*, 275 U.S. 257, 268 (1927); *Baltimore & Ohio Southwestern R.R. Co. v. Settle*, 260 U.S. 166 (1922)).

¹⁵ Complaint at 15 (citing *Hydrocarbon Trading & Transport Co., Inc. v. Texas Eastern Transmission Corp.*, 26 FERC ¶ 61,201, at 61,470 (1984)).

¹⁶ Complaint at 15 (citing *Northville Dock Pipe Line Corp.*, 14 FERC ¶ 61,111, at 61,207 (1981)).

¹⁷ Complaint at 15 (citing *Dep’t of Defense v. Interstate Storage & Pipeline Co.*, 353 ICC 397, 407 (1977)).

¹⁸ Complaint at 15 (citing *Texaco Ref. & Mktg., Inc. v. SFPP, L.P.*, 80 FERC ¶ 61,200, at 61,805 (1997), *reh’g denied*, 81 FERC ¶ 61,388 (1997) (*Texaco*)).

broken.¹⁹ Joint Complainants state that to break the chain of interstate transportation, it must be shown that “the continuity of transportation has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased.”²⁰ Joint Complainants argue that the fact that a transportation service takes place entirely within one state, like the jet fuel service on CFPL from the KMLT Tampa Terminal to the ASIG Terminal, is not determinative of the jurisdictional status.²¹

22. Joint Complainants contend that the essential character of the transportation of jet fuel on the CFPL system is interstate in nature. Joint Complainants submit that the “fixed and persisting transportation intent of the shipper” in this instance is to supply jet fuel from refineries in other states or foreign countries directly to the ASIG Terminal at Orlando Airport. Joint Complainants state that because there are no refineries in the state of Florida, all of the parties responsible for delivering jet fuel to the ASIG Terminal understand that the fuel originates out of state, regardless of whether the party contracts directly with a supplier or with a fuel service provider such as World Fuel. According to Joint Complainants, the sale of jet fuel to the airlines or World Fuel occurs, and the product’s intended destination is well known, before the product arrives at the KMLT Tampa Terminal.

23. Joint Complainants submit that the transfer of jet fuel from the out-of-state refinery to the Hooker’s Point tanks does not break the chain of interstate transportation. Joint Complainants suggest that while the jet fuel is briefly stored in the Hooker’s Point tanks, the ultimate destination of the jet fuel is known at the time that it is transferred from the marine vessel to the tanks. Moreover, Joint Complainants assert that the Hooker’s Point tanks are not used as a distribution center to sell or allocate the jet fuel; rather Joint Complainants suggest the jet fuel is only stored in the Hooker’s Point tanks long enough to permit orderly delivery to CFPL or tank trucks for continuing transportation of the product to its intended destination.

24. In addition, Joint Complainants contend that preliminary analysis indicates that CFPL’s rates are unjust and unreasonable. While Joint Complainants acknowledge discovery and a hearing are needed to definitively determine a just and reasonable level for CFPL’s rates, they assert that their expert witness, Dr. Daniel S. Arthur, has

¹⁹ Complaint at 15 (citing *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 522 (1911)).

²⁰ Complaint at 16 (citing *Interstate Energy Co.*, 32 FERC ¶ 61,294, at 61,690 (1985)).

²¹ Complaint at 16 (citing *United States v. Illinois Terminal R.R. Co.*, 168 F. 546, 548 (S.D. Ill. 1909); *Texaco*, 80 FERC at 61,805).

determined, based on currently available information, that CFPL is likely over-recovering its cost-of-service by 56.7 percent, and CFPL's rates would need to be reduced by 36.2 percent to align its revenues with its cost-of-service.²²

25. Joint Complainants submit that all facilities essential to providing jurisdictional transportation service are jurisdictional under ICA §§ 1(3) and 1(6).²³ Joint Complainants assert that KMLT's failure to file a tariff for the jurisdictional services provided at the KMLT Tampa Terminal violates the ICA.²⁴ Accordingly, Joint Complainants seek an order requiring KMLT to file a tariff governing the rates and services associated with the KMLT Tampa Terminal and submit cost-of-service data to justify the current rates pursuant to 18 C.F.R. § 342.1 and Part 346 (2016).²⁵

26. Joint Complainants contend that because the pipeline services provided by CFPL are jurisdictional, all facilities essential to providing that service are jurisdictional as well.²⁶ Joint Complainants state that CFPL holds itself out in its July 2016 and September 2015 Transportation Policies as providing jet fuel transportation. Joint Complainants states that CFPL is only capable of receiving jet fuel, however, through the KMLT Tampa Terminal. Joint Complainants assert that the use of the KMLT Tampa Terminal, which they contend is under common ownership with CFPL, is therefore essential to providing transportation of jet fuel to Orlando Airport via CFPL. Joint Complainants assert that this terminal service is, consequently, part of the transportation service provided by CFPL and subject to the Commission's jurisdiction. Accordingly, Joint Complainants request the establishment of hearing and discovery procedures to determine the just and reasonable rates for the KMLT services and charges.

²²Complaint at 33 (citing Arthur Affidavit (Exhibit E at ¶ 13)).

²³ Complaint at 25 (citing 49 U.S.C. app. §§ 1(3) and 1(6); *Lakehead Pipe Line Co.*, 71 FERC ¶ 61,338, at 62,325 (1995) (holding jurisdictional those facilities "without which the Lakehead system cannot operate"), *order on reh'g*, 75 FERC ¶ 61,181, at 61,601 (1996) (requiring Lakehead to provide "'all instrumentalities and facilities of shipment and carriage' as required by section 1(3) [of the ICA]" (*Lakehead*)).

²⁴ Complaint at 26 (citing 49 U.S.C. app. §§ 1(3) and 6(1) (common carriers must "state separately all terminal charges.")).

²⁵ Complaint at 4 and 14 (citing 49 U.S.C. app. §§ 1, 6(1) and 6(7)).

²⁶Complaint at 25.

27. Finally, pursuant to ICA §§ 8, 9, and 16, Joint Complainants seek reparations for all amounts paid by Complainant ASIG in excess of the rates and charges ultimately determined to be just and reasonable extending two years back from the date of this complaint. Joint Complainants assert that Complainant ASIG's injury can be estimated using volume data provided by ASIG and transportation rates based on an estimated 2015 CFPL cost-of-service. Joint Complainants contend overpayments can be calculated as the difference between collected tariff rates and the estimated just and reasonable rates. Based on these calculations, Joint Complainants contend that Complainant ASIG can be shown to have, in the aggregate, overpaid for shipment on the CFPL system by approximately \$4,254,547 for the period of August 1, 2014 through July 31, 2016.

Answer

28. Respondents assert that CFPL solely provides intrastate service. Respondents contend that the shipment of jet fuel on CFPL from Tampa to Orlando is not part of a continuous interstate movement. Respondents argue that every fact and every factor under the decisional law of the Commission and the courts supports the conclusion that CFPL is in intrastate service, and the complaint should be denied for failure to establish facts warranting further investigation.

29. Respondents state that Joint Complainants assert that the waterborne movement of jet fuel from out-of-state refineries to storage tanks within the KMLT Tampa Terminal and the subsequent movement of a portion of that fuel on CFPL to ASIG's Orlando terminal are a single interstate movement. Respondents state that the Commission and the courts evaluate such claims by looking at a number of key factors: (1) "breaks" in the course of transportation; (2) the character of the billing; (3) whether the components of transportation (e.g., ocean and inland) are arranged for separately; (4) the passing of title during transportation; (5) breaking of bulk and commingling of the commodity shipped with other shipments of the same commodity; and (6) the power of the owner to divert the shipment after the initial movement has begun.²⁷ Respondents submit that applying these factors to the facts demonstrates that Joint Complainants' assertion is wrong, and that the movements on CFPL are purely intrastate in nature.

30. Respondents assert that the waterborne movement is initiated at out-of-state or foreign locations by jet fuel suppliers (typically Chevron or Valero) (each a Supplier and collectively, the Suppliers), which are not complainants. Respondents submit that during the waterborne movement, the Suppliers can, and routinely do, divert vessels destined for Tampa elsewhere, and, similarly, ASIG can, and routinely does, divert vessels elsewhere or limit the amount of jet fuel offloaded at Tampa. Respondents assert that upon arrival

²⁷ Answer at 2 (citing *Guttman Energy, Inc.*, 155 FERC ¶ 63,008, at P 74 (2016) (*Guttman*)).

at Tampa, title to the jet fuel passes from the Supplier to one of the Airlines. It then comes to rest in one of the five jet fuel tanks within the KMLT Tampa Terminal that are leased to Hooker's Point LLC, and controlled and managed by Hooker's Point LLC and ASIG. Respondents contend that once in the Hooker's Point tanks, the jet fuel is tested, certified, and may sit for 20 days or more.²⁸ Respondents submit that while in the Hooker's Point tanks, the jet fuel volumes are commingled.

31. Respondents assert that after the jet fuel has been delivered into the Hooker's Point tanks, ASIG makes a decision regarding which volumes of jet fuel to send to the truck rack for delivery to one of five regional airports and which volumes to send to CFPL for delivery to the ASIG terminal at Orlando. Respondents assert that the allocation of jet fuel to these various destinations is determined after the jet fuel arrives in the Hooker's Point tankage, and is highly variable, reflecting the impact of various factors, such as the pace of jet fuel consumption at the Orlando Airport and regional airports and the available capacity at ASIG's Orlando terminal tankage, and, as a result, is wholly disconnected from the volumes of jet fuel originally scheduled for waterborne shipment. Respondents argue that these facts and circumstances evidence a clear "break" between the waterborne movement of jet fuel to Tampa and the intrastate storage, allocation, and distribution of jet fuel, including the movement on CFPL, that occurs entirely within Florida.

32. Respondents also contend that the Tampa Terminal tankage is not jurisdictional and not controlled by KMLT. Respondents submit that the Complaints' claims regarding the Tampa Terminal jet fuel tanks are rendered moot by the fact that CFPL solely provides intrastate service and that the tankage is not essential to CFPL's transportation service.²⁹ Moreover, Respondents state that all of the Tampa Terminal jet fuel tanks are exclusively leased by Hooker's Point LLC, a consortium of the Airline Complainants, and World Fuel.³⁰ Respondents submit that if the tanks were nonetheless found to be subject to the Commission's jurisdiction, the Airline Complainants and World Fuel would be responsible for compliance with such a ruling.

33. Respondents further assert that Joint Complainants have engaged in a flawed rate analysis and their claim that CFPL is over-recovering its costs and that its rates should be reduced is fundamentally flawed. Respondents contend that Joint Complainants' claim is based upon an evaluation performed by their consultant, Dr. Arthur, who did not utilize a

²⁸ Answer at 3 (citing Affidavit of Michael McBurney at P 14).

²⁹ Answer at 4 (citing Affidavit of Doreen McBurney at P 5).

³⁰ Answer at 4 (citing Complaint at PP 13, 16; Affidavit of Michael McBurney at PP 4-5).

fully-allocated cost (FAC) analysis,³¹ despite the fact that Dr. Arthur has elsewhere repeatedly relied upon an FAC analysis. Respondents state that just two weeks before the complaint was filed, Dr. Arthur submitted an affidavit in support of another complaint by Delta, stating unequivocally that the “standard methodology employed by the Commission for setting individual cost-based rates is referred to as ‘fully allocated cost’ (‘FAC’) rate design.”³² Respondents assert that an FAC analysis, based on information included in Dr. Arthur’s affidavit, would shrink Joint Complainants’ reparations claim by 65 percent, to about \$1.5 million.³³ Respondents submit that this amount would be further reduced or eliminated entirely by a full development of the facts and a thorough analysis.

34. Respondents assert that a number of factors weigh against awarding reparations here including the reality that the facts available to CFPL support the intrastate nature of its service. Even if reparations were found to be warranted, Respondents contend that the Airline Complainants would not be eligible to receive them because they are not shippers on CFPL.

35. Respondents argue that if the Commission nonetheless establishes an investigation in this docket, then it would be reasonable and efficient to separate and phase the jurisdictional inquiry from any cost-of-service and rate evaluation given the lack of commonality of issues and evidence.

Discussion

36. The threshold issue in this proceeding is whether the CFPL pipeline and the KMLT terminal facilities are providing interstate oil pipeline transportation service subject to the Commission’s ICA jurisdiction. A finding of jurisdiction would require Respondents to file tariffs with the Commission and to support their respective rates pursuant to the ICA and the Commission’s regulations. In addition, a determination of jurisdiction could potentially subject Respondents to the payment of reparations for allegedly charging Joint Complainants rates that were unjust and unreasonable.

³¹ The FAC rate design methodology separates a pipeline’s cost of service into distance and non-distance costs and serves to allocate costs over individual product movements.

³² Answer at 5 (citing Delta Air Lines, Inc., Atlas Air, Inc., and Polar Air Cargo Worldwide, Inc., Affidavit of Daniel S. Arthur, Docket No. OR16-23-000 (filed August 30, 2016)).

³³ Answer at 5 (citing Affidavit of Dr. Michael J. Webb at P 7).

37. There are two competing and contradictory pictures being painted by the Joint Complainants and Respondents. Joint Complainants assert that based upon court and Commission precedent, the intent of the shippers is to transport jet fuel in interstate commerce. Respondents assert that there is no intent to ship jet fuel in interstate commerce and that, even if there was, there is a sufficient break in the interstate chain between the waterborne movement of the jet fuel and the intrastate transportation on CFPL.

38. As the Respondents themselves recognize “the determination of whether a movement of oil is in interstate commerce is an intensely factual inquiry.”³⁴ The Commission finds that because of the need for an intensely factual inquiry and the need to examine closely the complex nature of the transactions and relationships between various entities on both sides of the complaint, it would not be appropriate to make a jurisdictional determination based upon the pleadings alone. The Commission finds that there are genuine issues of material fact in dispute that require discovery and an evidentiary hearing before an Administrative Law Judge (ALJ).

39. The Respondents have requested a phased hearing to determine the jurisdictional issue first. The Commission declines to grant the request, however, the Commission recognizes that if jurisdiction is not found, issues concerning tariff filings, filing and supporting rates, and reparations are moot. The Commission directs the ALJ to establish appropriate hearing procedures, including whether a phased hearing is required.

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 Respondents.

(B) A Presiding ALJ, to be designated by the Chief ALJ within 15 days of this order, 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

³⁴ Respondents’ Answer at 6 (citing *Atl. Coast Line R.R. Co. v. Standard Oil Co.*, 275 U.S. 257, 268-269 (1927) (“the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it.”)).

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.