169 FERC ¶ 61,123
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

American Aviation Supply LLC
Delta Air Lines, Inc.
JetBlue Airways Corporation
United Airlines, Inc.

Docket No. OR19-26-000

v.

Buckeye Pipe Line Company, L.P.

ORDER ON COMPLAINT ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued November 21, 2019)

1. On June 5, 2019, American Aviation Supply LLC, Delta Airlines, Inc., JetBlue Airways Corporation (Jet Blue), and United Airlines, Inc. (United) (collectively, Complainants) filed a joint complaint (Complaint) challenging the lawfulness of the rates that Buckeye Pipe Line Company, L.P. (Buckeye) charges for the transportation of jet or aviation turbine fuel from Linden, New Jersey, to Newark International Airport, J.F. Kennedy International Airport, and LaGuardia Airport (New York City Destinations). On July 22, 2019, Complainants filed an Amended Joint Complaint (Amended Complaint), which restates the Complaint and alleges that to the extent Buckeye's rates to the New York City Destinations were grandfathered under the Energy Policy Act of 1992 (EPAct 1992), such grandfathering has been broken by substantially changed economic circumstances.

2. For the reasons discussed below, we establish hearing and settlement judge procedures to address the Amended Complaint.

I. Background

3. Buckeye operates a pipeline that provides interstate transportation of petroleum products between Linden, New Jersey, and the New York City Destinations.

4. Pursuant to Opinion Nos. 360[1] and 360-A,[2] the Commission authorized Buckeye to implement an experimental program for interstate rate regulation (Experimental Rate Program). This program consisted of two parts. First, in markets determined to be competitive, Buckeye was permitted to charge market-based rates, subject to certain limitations. Second, in all other markets, no rate increase could exceed an index composed of the volume-weighted average price change in Buckeye's rates in its competitive markets since the particular rate was last increased.[3]

5. The Commission authorized Buckeye to implement the Experimental Rate Program for a three-year experimental period[4] and required Buckeye to file annual reports during the experimental period with information on volumes, revenues, and rate changes to allow the Commission to "judge whether light-handed regulation was successful in protecting shippers against monopoly abuses."[5] At the end of the experimental period, the Commission permitted Buckeye to continue the Experimental Rate Program beginning January 1, 1995, subject to reevaluation when the Commission conducted its five-year review of the indexing methodology for oil pipeline rates established in Order No. 561.[6]

6. Buckeye changed its rates from Linden to the New York City Destinations under the Experimental Rate Program until 2012,[7] when the Commission rejected tariffs filed pursuant to the program and directed Buckeye to show cause why the program should not

[1] *Buckeye Pipe Line Co., L.P.*, Opinion No. 360, 53 FERC ¶ 61,473 (1990).

[2] *Buckeye Pipe Line Co., L.P.*, Opinion No. 360-A, 55 FERC ¶ 61,084 (1991).

[3] *See* Opinion No. 360, 53 FERC at 62,675-77; Opinion No. 360-A, 55 FERC at 61,255.

[4] Opinion No. 360, 53 FERC at 61,680.

[5] *Id.*

[6] *Buckeye Pipe Line Co., L.P.*, 69 FERC ¶ 61,302, at 62,163 (1994) (*Buckeye*).

[7] Although the Commission determined in Opinion Nos. 360 and 360-A that Buckeye's rates to the New York City Destinations would continue to be subject to regulation, the Commission subsequently approved a settlement allowing Buckeye to change these rates under its Experimental Rate Program. *See Buckeye Pipe Line Co., L.P.*, Docket No. IS91-25-000, at 2-3 (July 31, 1991) (delegated order).

be discontinued.[8] After considering Buckeye's response as well as comments from shippers, the Commission terminated the Experimental Rate Program in February 2013.[9]

7. Shortly before the Commission terminated the Experimental Rate Program, several shippers filed a complaint in Docket No. OR12-28-000 challenging Buckeye's jet fuel rates to the New York City Destinations. The Commission set the complaint for hearing and settlement judge procedures,[10] and the parties ultimately reached an uncontested settlement that the Commission approved on September 29, 2015 (OR12-28 Settlement).[11]

8. The OR12-28 Settlement required Buckeye to establish new base rates (Settlement Base Rates) and a Volume Incentive Program (VIP) for the transportation of jet fuel from Linden to the New York City Destinations. The VIP allowed shippers that executed a VIP agreement to pay discounted rates (Settlement Incentive Rates) during the VIP's three-year term. The VIP terminated on October 31, 2018, and Buckeye submitted a tariff filing in Docket No. IS19-1-000 canceling the Settlement Incentive Rates effective as of that date.[12] Accordingly, as of November 1, 2018, all shippers pay the Settlement Base Rates to transport jet and aviation turbine fuel on Buckeye from Linden to the New York City Destinations.

II. Complaint and Amended Complaint

A. Complaint

9. Complainants argue that good cause exists to believe that Buckeye's rates for the transportation of jet or aviation turbine fuel from Linden to the New York City Destinations are unjust and unreasonable.[13] Complainants request that the Commission

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[8] *Buckeye Pipe Line Co., L.P.*, 138 FERC ¶ 61,239, at P 14 (2012).

[9] *Buckeye Pipe Line Co., L.P.*, 142 FERC ¶ 61,140, at P 13 (2013).

[10] *Delta Air Lines, Inc. v. Buckeye Pipe Line Co., L.P.*, 142 FERC ¶ 61,141, at P 26 (2013).

[11] *Delta Air Lines, Inc. v. Buckeye Pipe Line Co., L.P.*, 152 FERC ¶ 61,242, at P 9 (2015).

[12] The tariff filing in Docket No. IS19-1-000 canceling the Settlement Incentive Rates became effective by operation of law.

[13] Complaint at 2.

set the Complaint for hearing to establish the just and reasonable level of Buckeye's rates and order refunds and reparations for payments that Complainants made above the just and reasonable level.[14]

10. Complainants state that because Buckeye has taken different positions in various Commission proceedings regarding the subsystem to which movements from Linden to the New York City Destinations belong, analysis of Buckeye's rates requires examining its over-recovery under two different methods of rate design.[15] First, Buckeye stated in Docket No. IS87-14-000 that movements to the New York City Destinations were part of its Eastern Products System (EPS), which included its Long Island System (LIS). Second, Buckeye stated in Docket No. OR12-28-001 that such movements were part of its LIS, which is separate from its EPS for cost-of-service purposes.[16] Complainants argue that treating the EPS and LIS as a single system is more appropriate because both the EPS and LIS receive the majority of their volumes from a shared receipt point in Linden, and Buckeye currently allocates its costs associated with Linden by dividing those costs between the EPS and LIS based on the volumes that flow out of Linden and ultimately arrive at delivery points on those systems.[17] As such, Complainants submit that the Commission should evaluate Buckeye's cost of service on an EPS (including LIS) basis, rather than an LIS-only basis.[18]

11. Complainants maintain, however, that analysis under either an EPS (including LIS) or LIS-only approach indicates that Buckeye is significantly over-recovering its cost of service and that its rates are therefore unjust and unreasonable.[19] Complainants state that Buckeye's 2017 and 2018 page 700 data demonstrate that it is over-recovering its cost of service on a system-wide basis.[20] In addition, Complainants rely upon segmented page 700 data that Buckeye provided in connection with the OR12-28 Settlement, which sets forth cost-of-service calculations for Buckeye's individual subsystems (2017

[14] *Id.* at 48.

[15] *Id.*

[16] *Id.* at 2-3.

[17] *Id.* at 22 (citing *id.*, Ex. 2 at P 10 (Affidavit of Dr. Daniel S. Arthur)).

[18] *Id.* at 23.

[19] *Id.* at 3.

[20] *Id.* at 3, 24.

Segmented Page 700).[21] Complainants claim that the 2017 Segmented Page 700 shows that Buckeye substantially over-recovered its interstate cost of service on both an EPS (including LIS) and LIS-only basis.[22]

12. Complainants claim that Buckeye's over-recovery likely exceeds the level reported in its page 700s.[23] Complainants state that the magnitude of its over-recovery increases substantially when the following necessary adjustments are made to Buckeye's page 700 data: (1) adding revenues from Accounts 230, 240, 250, and 260 to Buckeye's cost of service; (2) reversing Buckeye's removal of historical Accumulated Deferred Income Tax (ADIT) balances from the calculation of the deferred return component of rate base; (3) adjusting Buckeye's real return on equity (ROE) and the equity portion of its capital structure; and (4) in the event the Commission treats the EPS and LIS as separate systems for rate design purposes, allocating common origin costs at Linden between the EPS and LIS.[24]

13. Complainants state that Buckeye's 2017 Segmented Page 700 excludes revenues assigned to Account 240 (Storage Revenue), Account 250 (Rental Revenue), Account 260 (Incidental Revenue), and Account 230 (Allowance Oil Revenue). Complainants argue that the full amounts of Accounts 240, 250, and 260 should be added to Buckeye's interstate cost of service and a proportional amount of Buckeye's Account 230 should be credited to the EPS (including LIS) and LIS-only systems.[25]

14. Complainants also allege that Buckeye improperly removed its then-current and historical ADIT balances from the 2016 and 2017 total system rate base calculations reported on its 2017 page 700 and its 2017 Segmented Page 700.[26] Complainants acknowledge that the Commission has determined that a pipeline owned by a master limited partnership (MLP) may eliminate its then-current and historical ADIT balances from its rate base calculations when it removes an income tax allowance from its cost of

[21] *Id.* at 3.

[22] *Id.* at 25.

[23] *Id.* at 26.

[24] *Id.* at 26-30.

[25] *Id.* at 26-27.

[26] *Id.* at 27.

service.[27] Complainants state, however, that this determination is pending judicial review and, in the opinion of Complainants' witness Dr. Daniel S. Arthur, "the elimination of current and historical ADIT balances is not reasonable."[28] Complainants therefore propose to adjust Buckeye's cost of service to correct the removal of historical ADIT balances from the calculation of the deferred return component of rate base and amortize the overfunded ADIT balance to ratepayers over a ten-year period.[29]

15. In addition, Complainants contend that Buckeye's reported page 700 return component includes improper cost-of-capital assumptions.[30] Complainants state that Buckeye's 2017 Segmented Page 700 includes an excessive real ROE of 12.22 percent and an excessive equity-to-capital ratio.[31] Complainants propose to decrease Buckeye's real ROE to 10 percent and to reduce the equity portion of Buckeye's capital structure to 65 percent.[32]

16. In the event the Commission treats the EPS and LIS as separate systems for rate design purposes, Complainants propose to adjust Buckeye's cost of service to allocate the common origin costs at Linden between those systems. According to Complainants, Buckeye allocates the common asset and operating expenses at Linden between the LIS and EPS based on the percentage of volumes that flow from Linden to destinations on those systems. Complainants submit that this methodology is inappropriate because the fixed asset costs and direct labor costs at Linden would not vary with the volumes flowing from Linden to particular destinations. As such, Complainants use the Kansas-Nebraska formula (KN formula) to allocate common costs, including overhead costs, between the EPS and LIS.[33]

17. Complainants contend that analysis of Buckeye's rates using the fully allocated cost ratio (FAC) methodology also shows that Buckeye is significantly over-recovering

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[27] *Id.* (referring to *SFPP, L.P.*, Opinion No. 511-D, 166 FERC ¶ 61,142 (2019)).

[28] *Id.* at 27-28 (quoting Arthur Affidavit at P 17).

[29] *Id.* at 28.

[30] *Id.* at 29.

[31] *Id.* at 4, 29.

[32] *Id.* at 29.

[33] *Id.* at 30. The KN formula is based on the ratio of direct labor and capital investment of each division to total direct labor and capital investment.

its cost of service.[34] Complainants state that the FAC methodology divides total costs into distance-related and non-distance-related components.[35] Each origin-destination rate includes both an equal non-distance-related component based on non-distance-related costs and a distance-related component based on the mileage between the origin and destination multiplied by the distance-related costs per barrel mile. Complainants state that they used data from Buckeye's 2017 Segmented Page 700 to estimate the distance-related and non-distance-related portions of Buckeye's cost of service, which they then used to calculate FAC rates between Linden and each of the New York City Destinations on both an EPS (including LIS) and LIS-only basis.[36] Complainants argue that Buckeye's existing rates for service from Linden to the New York City Destinations range from 125 to 253 percent greater than the estimated FAC rates for each destination, indicating that the existing rates are unjust and unreasonable.[37]

18. Complainants compare the FAC rates to the rates Buckeye has charged to estimate the overpayments each Complainant made for shipments on Buckeye between May 1, 2017, and April 30, 2019. They calculate their respective overpayments for the period of May 1, 2017, to September 28, 2018, by comparing the indexed Settlement Incentive Rates in effect to the Settlement Incentive Rates that Buckeye implemented in September 2015.[38] For the period of September 29, 2018, to April 30, 2019, Complainants calculate their overpayments as the difference between Buckeye's effective tariff rates and the estimated FAC rates, multiplied by the total volumes shipped during that period.[39] Complainants state that their overpayments to Buckeye between May 1, 2017, and April 30, 2019, range in amount from $0.9 million to $1.7 million.[40]

19. Complainants state that, in prior proceedings, Buckeye has claimed that its rates to the New York City Destinations were grandfathered under the Energy Policy Act of 1992

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[34] *Id.* at 31.

[35] *Id.*

[36] *Id.* at 31-33.

[37] *Id.* at 33-34.

[38] *Id.* at 34. Complainants state that this methodology for calculating reparations for the period of May 1, 2017, to September 28, 2018 is mandated by the OR12-28 Settlement.

[39] *Id.*

[40] *Id.* at 35.

(EPAct 1992).[41] Complainants assert that Buckeye's rates were not grandfathered because EPAct 1992 specifically excludes from grandfathering protection rates that were subject to investigation during the 365-day period prior to EPAct 1992's enactment.[42] Complainants argue the Commission's statements and actions in reviewing and ultimately approving Buckeye's Experimental Rate Program indicate that Buckeye's rates to the New York City Destinations were subject to investigation during this period.[43]

20. Complainants observe that, in authorizing Buckeye to implement the Experimental Rate Program in Opinion No. 360, the Commission stated that it would "carefully evaluate" the program, suggested that it would terminate the program under certain circumstances, and required Buckeye to file annual reports during the program's three-year experimental period.[44] Complainants also point out that at the conclusion of the experimental period, the Commission did not allow the Experimental Rate Program to continue.[45] Moreover, Complainants argue that even when the Commission later allowed Buckeye to continue the program indefinitely, it stated that it would reevaluate the program when it conducted its five-year review of the indexing methodology and would order Buckeye to cease operations under the program if necessary.[46] Complainants assert that if Buckeye's rates for non-competitive markets were deemed to be just and reasonable under EPAct 1992, there would have been no reason for the Commission to provide notice that it could require Buckeye to cease operations under the Experimental Rate Program and terminate the rates Buckeye had filed thereunder.[47]

21. Complainants argue, moreover, that the Commission's 1994 order[48] permitting Buckeye to continue the Experimental Rate Program does not entitle Buckeye's rates to

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[41] Energy Policy Act of 1992, Pub. L. No. 102-486, § 1803, 106 Stat. 2776 (1992).

[42] Complaint at 36.

[43] *Id.* at 36-41.

[44] *Id.* at 36 (quoting Opinion No. 360, 53 FERC at 62,684).

[45] *Id.* at 37 (citing *Buckeye Pipe Line Co., L.P.*, 66 FERC ¶ 61,348, at 62,169 (1994)).

[46] *Id.* (quoting *Buckeye*, 69 FERC at 62,163).

[47] *Id.* at 37-38.

[48] *Buckeye*, 69 FERC ¶ 61,302 (1994).

protection under *Arizona Grocery*.[49] According to Complainants, *Arizona Grocery* protection applies only if the rates are "conclusively determine[d]" to be just and reasonable.[50] Complainants contend that the Commission's order did not trigger this protection because it did not order any specific rates into effect or state that the Commission was prescribing rates under the ICA.[51] Instead, Complainants claim that the Commission only accepted Buckeye's proposed Experimental Rate Program rates as legal rates and has never found any specific rate for Buckeye's non-competitive markets to be just and reasonable.[52]

B. Amended Complaint

22. The Amended Complaint restates the arguments made in the Complaint and asserts that the economic circumstances that were a basis for Buckeye's rates have changed substantially, allowing the rates, even if considered grandfathered, to be changed consistent with Commission precedent.[53] Complainants request that the Commission set the Amended Complaint for hearing.[54]

23. Complainants state that, in deciding whether a substantial change in economic circumstances has occurred, the Commission applies the "C-B/A" test that compares the ROE generated by the rates in question at three points in time: when the rate was established (A period); when EPAct 1992 was enacted (B period); and when the complaint against the rates is filed (C period).[55] Dr. Arthur calculates ROEs for each period on both an EPS (including LIS) basis and LIS-only basis, using calendar year

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[49] Complaint at 38 (citing *Ariz. Grocery Co. v. Atchison Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932) (*Arizona Grocery*). The so-called *Arizona Grocery* doctrine "proscribes 'the retroactive revision of established rates through ex post reparations.'" *BP West Coast Prods., LLC v.* FERC, 374 F.3d 1263, 1304 (D.C. Cir. 2004) (quoting *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1107 (D.C. Cir. 2001)).

[50] *Id.* (citing *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1438 n.32 (D.C. Cir. 1996)).

[51] *Id.*

[52] *Id.* at 39-41.

[53] Amended Complaint at 44.

[54] *Id.* at 47, 51.

[55] *Id.*

1991 cost and revenue data to calculate the A period ROEs, calendar year 1992 data to compute the B period ROEs, and data from the 2017 Segmented Page 700 to derive the C period ROEs.[56] For the A period, Dr. Arthur calculates ROEs of 23.37 percent for EPS (including LIS) and 26.72 percent for LIS-only. For the B period, he calculates ROEs of 25.24 percent for EPS (including LIS) and 20.75 percent for LIS-only. For the C period, he calculates ROEs of 51.98 percent for EPS (including LIS) and 49.78 percent for LIS-only.[57] Applying the C-B/A test, Dr. Arthur estimates that Buckeye's realized ROE has increased by 114 percent on an EPS (including LIS) basis and 109 percent on an LIS-only basis.[58] Complainants state that both figures exceed the 25 percent threshold the Commission established in *Tesoro Refining and Marketing Company v. Calnev Pipe Line LLC*[59] for finding a substantial change in economic circumstances.[60]

24. Complainants also claim that even if Buckeye's rates to the New York City Destinations are grandfathered, *Arizona Grocery* protection does not apply to those rates because Buckeye has increased them on multiple occasions since they became effective.[61] Complainants therefore argue that they may recover reparations to the extent Buckeye's current rates exceed the grandfathered rate levels.[62]

III. Public Notices and Interventions

25. Notice of the Complaint was issued on June 6, 2019, providing for answers, protests, and interventions to be filed on or before July 5, 2019. On June 19, 2019, World Fuel Services, Inc. filed a motion to intervene. On July 5, 2019, Buckeye filed an answer to the Complaint (July 5 Answer). On July 22, 2019, Complainants filed a motion for leave to file response and response to Buckeye's July 5 Answer.

26. Notice of the Amended Complaint was issued on July 23, 2019, providing for answers, protests, and interventions to be filed on or before August 21, 2019. On

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[56] *Id.* at 45.

[57] *Id.* at 46.

[58] *Id.*

[59] 134 FERC ¶ 61,214, at PP 60-62 (2011) (*Tesoro v. Calnev*).

[60] Amended Complaint at 46-47.

[61] *Id.* at 41.

[62] *Id.* at 43-44.

August 13, 2019, Buckeye filed an answer to the Amended Complaint and to Complainants' July 22 response (August 13 Answer). On August 28, 2019, Complainants filed a motion for leave to file response and response to Buckeye's August 13 Answer. On October 1, 2019, Buckeye filed a motion for leave to reply and reply to Complainants' August 28 Response.

IV. Buckeye's Answers

A. July 5 Answer to the Complaint

27. Buckeye argues that the Complaint fails to make a *prima facie* showing to warrant investigation and hearing under section 13(1) of the Interstate Commerce Act (ICA).[63]

28. Buckeye contends that cost and revenue data for 2017 and 2018 demonstrate that its rates to the New York City Destinations are reasonable, whether analyzed on a company-wide basis using page 700 data or solely using the costs and revenues of jet fuel service to the New York City Destinations.[64] On a company-wide basis, Buckeye states that although its revenues exceeded costs by 17.6 percent in 2017, this divergence decreased to 3.5 percent in 2018.[65] In addition, Buckeye states that the OR12-28 Settlement bars Complainants from seeking relief during 2017, which renders Buckeye's 2017 page 700 figures of attenuated significance. As a result, Buckeye asserts that Complainants' challenge to Buckeye's rates can rely solely upon the 3.5 percent divergence between Buckeye's page 700 costs and revenues in 2018.[66]

29. Buckeye also contends that an analysis using LIS-only jet fuel service costs and revenues shows that its costs and revenues were nearly aligned in 2017 and 2018.[67] Buckeye submits a verified statement from Dr. Michael J. Webb that compares Buckeye's LIS jet-fuel service costs and revenues on a standalone basis for both years.[68] Buckeye states that, using rate design methodologies that Dr. Arthur has previously

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[63] 49 U.S.C. app. § 13(1) (1988).

[64] July 5 Answer at 2, 7-8.

[65] *Id.* at 9.

[66] *Id.*

[67] *Id.* at 2, 11-13.

[68] Buckeye submitted Dr. Webb's verified statement as Exhibit 1 to its July 5 Answer.

employed, Dr. Webb calculates that the divergence between Buckeye's 2017 and 2018 LIS jet-fuel service costs and revenues was much more limited than Complainants claim. For 2017, when Buckeye's Settlement Incentive Rates were in effect, Dr. Webb calculates that Buckeye's jet fuel service revenues exceeded costs by only 0.4 percent.[69] For 2018, Dr. Webb calculates that Buckeye's jet fuel service revenues exceeded costs by 7.8 percent.[70] Buckeye asserts that cost-revenue divergences of this magnitude indicate that Buckeye's rates are within the zone of reasonableness.[71]

30. Buckeye claims that Complainants improperly seek to increase its cost-revenue divergences by treating the EPS and LIS as a single, integrated system and by adjusting Buckeye's page 700 cost of service.[72] Buckeye maintains that Complainants' proposal to evaluate Buckeye's rates on an EPS (including LIS) basis ignores that the EPS and LIS are separate and distinct systems. Buckeye states that, while the EPS and LIS share a common origin point at Linden, they utilize different assets, serve different customers and geographic areas, transport different products over different distances, and experience different peak seasons.[73] Buckeye also states that it manages the LIS separately from the EPS by maintaining separate budgets and tracking costs and revenues separately.[74] Moreover, Buckeye contends that treating the EPS and LIS as a single system would be contrary to Commission precedent[75] and violates cost causation

[69] July 5 Answer at 12. If Buckeye's Settlement Base Rates had been in effect, Dr. Webb calculates that LIS jet-fuel service costs would have exceeded revenues by 12.1 percent. *Id.*

[70] *Id.* at 12-13.

[71] *Id.* at 13-17.

[72] *Id.* at 18-23.

[73] *Id.* at 20. Buckeye states that the EPS is a more complex system that serves a broader geographic area.

[74] *Id.* at 23-24.

[75] *Id.* at 30-31 (citing *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022, at 61,079-81 (1999); *Mid-America Pipeline Co., LLC*, 124 FERC ¶ 63,016 (2008); *S. Pac. Pipe Lines, Inc.*, 39 FERC ¶ 63,018 (1987)).

principles by inappropriately shifting costs that Buckeye incurs in operating the LIS to EPS ratepayers.[76]

31. Buckeye claims that Complainants' proposed adjustments to Buckeye's cost of service should be rejected. Buckeye asserts that Complainants' proposal to credit certain categories of non-transportation revenue in Accounts 230, 240, 250, and 260 against Buckeye's cost of service violates the principle of cost causation, which requires matching a pipeline's costs with the services associated with those costs. Buckeye maintains that under this principle, the costs it incurs in providing jurisdictional transportation services should be separated from costs it incurs in providing non-transportation services so that shippers only pay for costs associated with the transportation service they receive. Buckeye claims that Complainants' proposal to credit non-transportation revenues against Buckeye's cost of service ignores the rule of cost causation because it assumes that revenues Buckeye earns in providing non-transportation services to a separate set of customers should serve to reduce the transportation rates that Complainants and other LIS shippers pay.[77]

32. Buckeye opposes Complainants' proposal to adjust Buckeye's cost of service by amortizing ADIT balances to shippers over a ten-year period. Buckeye states that under the Commission's policy, when an MLP or other pass-through pipeline eliminates an income tax allowance from its cost of service in accordance with *United Airlines*,[78] it should also remove ADIT balances.[79] Buckeye states that it has eliminated the income tax allowance from its cost of service and, in preparing its 2016 and 2017 page 700s and the 2017 Segmented Page 700, it eliminated its ADIT balances beginning in 1986, the year in which Buckeye became an MLP.[80] Buckeye argues that Complainants' proposal to restore those ADIT balances to Buckeye's cost of service violates Commission policy

[76] *Id.* at 27-28.

[77] *Id.* at 36-40.

[78] *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016).

[79] July 5 Answer at 41 (citing *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 164 FERC ¶ 61,030, at PP 9, 13 (2018)).

[80] *Id.*

and relies upon arguments that the Commission has already rejected in other proceedings.[81]

33. Buckeye also opposes Complainants' proposed reductions to Buckeye's real ROE and adjustment to Buckeye's capital structure. Buckeye claims that the 12.22 and 16.19 percent real ROEs that it reported in its 2017 and 2018 page 700s are legitimate outputs of the Commission's discounted cash flow (DCF) methodology, while Complainants' proposed 10 percent real ROE is arbitrary.[82] In addition, Buckeye asserts that reducing the equity ratio in its capital structure to 65 percent would be inconsistent with the Commission's Opinion No. 154-B[83] methodology and the Commission's policy regarding the treatment of deferred earnings.[84]

34. Buckeye further argues that, to the extent the Commission treats the EPS and LIS as separate systems for rate design purposes, using the KN formula to allocate direct operating costs at Linden between the EPS and LIS would be inconsistent with Commission precedent and would drive the majority of such costs to the EPS.[85] Buckeye submits that the Commission should instead allocate these costs on a volumetric basis based on the barrels delivered out of Linden to the EPS or the LIS.[86]

35. Buckeye contends that Complainants' claims for relief are limited by grandfathering under EPAct 1992, the *Arizona Grocery* doctrine, and the OR12-28 Settlement. First, Buckeye contends that its rates for the transportation of jet fuel from Linden to the New York City Destinations were grandfathered under EPAct 1992 because they were not subject to investigation during the one-year period preceding EPAct 1992's enactment on October 24, 1992.[87] Buckeye acknowledges that its LIS jet fuel rates were subject to a general investigation in Docket No. IS87-14, but contends that

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[81] *Id.* at 42-43 (citing Opinion No. 511-D, 166 FERC ¶ 61,142 at PP 65-67, 75-87, 96-108).

[82] *Id.* at 44-45.

[83] *Williams Pipe Line Co.*, Opinion No. 154-B, 31 FERC ¶ 61,377 (1985).

[84] July 5 Answer at 49-50 (citing *ARCO Pipe Line Co.*, Opinion No. 351-A, 53 FERC ¶ 61,398, at 62,389 (1990)).

[85] *Id.* at 51-53.

[86] *Id.* at 51, 54.

[87] *Id.* at 56-57.

this investigation terminated in July 1991 when the Commission approved a settlement resolving that proceeding.[88] Buckeye maintains that because the Commission had previously accepted the tariff provisions establishing the Experimental Rate Program when this investigation ended, its LIS jet fuel rates were in effect and not subject to any protest, investigation, or complaint during the 365-day period ending on October 24, 1992.[89]

36. Buckeye states that Complainants' arguments to the contrary are meritless. Buckeye rejects Complainants' claim that Buckeye's LIS jet fuel rates were under investigation because they were subject to the Commission's review when the three-year experimental period ended in March 1994.[90] Buckeye argues that Complainants mistake ongoing Commission oversight of Buckeye's rates for the actual initiation of an investigation under section 13(1) of the ICA.[91] Buckeye also points to language from Commission orders addressing the Experimental Rate Program that, in Buckeye's view, demonstrates that its LIS jet fuel rates were not subject to investigation when EPAct 1992 was enacted.[92] In addition, Buckeye contends that the Complaint fails to allege a substantial change in the economic circumstances that were a basis of Buckeye's rates and thus has not established grounds for challenging the grandfathered portion of those rates under section 1803(b) of EPAct 1992.[93]

37. Second, Buckeye contends that Complainants' claims for relief are limited by *Arizona Grocery*.[94] Buckeye states that under *Arizona Grocery*, if the Commission determines that a rate is just and reasonable and therefore lawful under the ICA, any

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[88] *Id.* (citing *Buckeye Pipe Line Co., L.P.*, Docket No. IS91-25-000 (July 31, 1991) (delegated order)).

[89] *Id.* at 57 (citing *Buckeye Pipe Line Co., L.P.*, Docket No. IS87-14-003 (Mar. 22, 1991) (delegated order)).

[90] *Id.* at 58-61.

[91] *Id.* at 58-59.

[92] *Id.* at 61-64 (quoting *Buckeye*, 69 FERC ¶ 61,302 at 62,161-63; *Buckeye Pipeline Co., L.P.*, 66 FERC ¶ 61,348 at 62,169-70; *Buckeye Pipe Line Co., L.P.*, Docket No. IS91-25-000, at 2-3 (July 31, 1991) (unpublished order); Opinion No. 360, 53 FERC ¶ 61,473 at 62,682).

[93] *Id.* at 64-69.

[94] *Id.* at 69-72.

changes the Commission orders to that rate in the future must be prospective in nature.[95] According to Buckeye, this principle likewise applies to Commission-approved tariff provisions that establish a rate formula.[96] Buckeye states that the Commission found that Buckeye's Experimental Rate Program produced just and reasonable rates and therefore had determined that Buckeye's LIS jet fuel rates were lawful.[97] Buckeye therefore contends that, to the extent Complainants seek to reduce those rates below the levels that the Commission already found to be lawful, any relief can only be prospective from a Commission determination that the rates are no longer just and reasonable.[98]

38. Third, Buckeye states that under the OR12-28 Settlement, Complainants may only seek reparations for up to two years before the filing date of the Complaint and only to the extent that the rates resulting from the indexing of Buckeye's Settlement Incentive Rates during that period exceeded FAC rates.[99] Buckeye asserts that United cannot recover such reparations because United did not pay the Settlement Incentive Rates.[100] In addition, Buckeye states that JetBlue is not entitled to relief because it is not a shipper on the LIS pipeline and therefore has not paid the LIS jet fuel rates.[101]

B. August 13 Answer to Amended Complaint and to Complainants' July 22, 2019 Response

39. Buckeye maintains that the Commission should reject the Amended Complaint or limit any relief Complainants may be afforded as to Buckeye's grandfathered rates because the Complaint did not attempt to show a "substantial change" in economic circumstances despite Complainants possessing the information necessary to present such a claim.[102]

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[95] *Id.* at 69-70 (citing *Arizona Grocery*, 284 U.S. at 388-89).

[96] *Id.* at 69 (citing *Ala. Power Co. v. ICC*, 852 F.2d 1361, 1373 (D.C. Cir. 1988)).

[97] *Id.* at 70-71 (quoting *Buckeye*, 69 FERC at 62,162-63).

[98] *Id.* at 72.

[99] *Id.* at 73.

[100] *Id.* at 73-74.

[101] *Id.* at 74.

[102] August 13 Answer at 3-7.

40. Buckeye asserts that the Amended Complaint's "substantial change" showing is overbroad because it improperly relies upon company-wide data rather than the actual circumstances of Buckeye's LIS jet fuel rates and makes no effort to assess whether Buckeye's 2017 ROE was anomalous or sustained, as required under the Commission's *Tesoro v. Calnev* test.[103] Buckeye claims that when these issues are corrected, the change in its ROE under the C-B/A test falls below the Commission's 25 percent threshold.[104]

V. Discussion

41. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[105] all unopposed and timely filed motions to intervene and any unopposed motion to intervene out of time filed before this order issues are granted. Rule 213 of the Commission's Rules of Practice and Procedure[106] prohibits answers to answers unless otherwise ordered by the decisional authority. We are not persuaded to accept Complainants' and Buckeye's answers to answers and will, therefore, reject them.

42. We find that the Amended Complaint raises issues of material fact concerning the rates that Buckeye charges for the transportation of jet or aviation turbine fuel from Linden, New Jersey, to the New York City Destinations that cannot be resolved based on the current record and are properly addressed at an evidentiary hearing before an Administrative Law Judge. Accordingly, we will set all issues raised by the Amended Complaint for hearing and settlement judge procedures.

43. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their 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.[107] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based

[103] *Id.* at 9 (quoting *Tesoro v. Calnev*, 34 FERC ¶ 61,214 at P 61).

[104] *Id.* at 9-10.

[105] 18 C.F.R. § 385.214 (2019).

[106] 18 C.F.R. § 385.213(a)(2) (2019).

[107] 18 C.F.R. § 385.603 (2019).

on workload requirements which determine judges' availability.[108] 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) 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 the allegations raised in the Amended Complaint, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in the ordering paragraphs below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief 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.

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

(D) If settlement judge procedures fail and a trial-type evidentiary hearing 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 this proceeding in a hearing room of the Commission, 888 First Street, NE, Washington,

[108] 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 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).

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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.