169 FERC ¶ 61,119
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 567

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 INITIAL DECISION

Issued November 21, 2019

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APPEARANCES

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Robert Fallon, Esq. on behalf of World Fuel Services, Inc.

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SUZANNE KROLIKOWSKI, Presiding Administrative Law Judge

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

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ORDER ON INITIAL DECISION

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1. In this order, the Commission affirms the January 30, 2018 Initial Decision issued by the presiding administrative law judge (Presiding Judge) rejecting the claims made in the Complainants' September 16, 2016 Complaint in this proceeding[1] against Respondents, Central Florida Pipeline LLC (CFPL) and Kinder Morgan Liquid Terminals LLC (KMLT).[2] Complainants allege that respondent pipeline and storage

[1] Complainants, as reflected in the case style, above, are 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 (United) and United Parcel Service, Inc. (UPS).

[2] *Aircraft Service International Group*, *Inc. v. Central Florida Pipeline LLC*, 162 FERC ¶ 63,012 (2018) (Initial Decision). This opinion likewise agrees with the Presiding Judge's disposition of certain other issues raised by respondents, in particular finding the request for summary disposition moot, in light of the finding in favor of the party asserting summary disposition on other grounds.

facility operators are providing interstate service over their facilities, including the pipeline (Central Florida Pipeline) operated by CFPL running through Central Florida from the Tampa terminal to the Orlando International Airport (Orlando Int'l Airport), without a tariff on file at the Commission as required by the Interstate Commerce Act (ICA).[3] As discussed below, the Commission affirms and adopts the Presiding Judge's finding that the facts reflect a sufficient break in the continuity of transportation under this Commission's relevant precedent such that the service provided over the Central Florida Pipeline is *intra*state in nature. On that basis, as elaborated more fully in the Initial Decision, the Commission denies the Complaint and finds no need to direct Respondents to file a tariff or cost-of-service rates, and likewise rejects Complainants' remaining requests for remedies under the ICA.

I. Background

A. Parties

2. Complainant ASIG is an independent commercial aviation services company which provides by contract a variety of services to the airlines (Airlines) operating at Orlando Int'l Airport whose fuel supply is central to the complaint.[4] ASIG operates the terminal and the fuel system at the Orlando Int'l Airport, stores jet fuel and provides aircraft fueling services for the Airlines. ASIG is a shipper of jet fuel on the Central Florida Pipeline from the KMLT Tampa terminal to Orlando.

3. ASIG, as an independent service company, coordinates the distribution of jet fuel among the Airlines and among Central Florida destinations where the Airlines consume jet fuel. These destinations include not only the Orlando Int'l Airport, served by CFPL at the Orlando terminal, but also other regional airports served through truck deliveries. ASIG operates a jet fuel terminal (ASIG Terminal) at Orlando Int'l Airport, which is the only destination for jet fuel transported on the Central Florida Pipeline.

4. The Airlines obtain jet fuel from their suppliers, chiefly Valero Services, Inc. (Valero) and Chevron U.S.A. (Chevron), through marine supply contracts which are arranged individually through a request for proposal process (or RFP).[5] The marine suppliers own the jet fuel while it is in transit, and the Airlines (or an independent

[3] 49 U.S.C. app. § 1 *et seq.* (1988).

[4] American, Delta, Southwest, United, and UPS.

[5] Joint Stipulation 1, 4, 5.

supplier, World Fuel) own the fuel that is delivered to the storage tanks at the Tampa point of delivery (i.e., the Hooker's Point tanks).[6]

5. CFPL owns and operates the Central Florida Pipeline that runs from Tampa to Orlando, Florida.[7] The origin of the pipeline is a marine terminal owned and operated by KMLT at Hooker's Point in the Tampa terminal. KMLT owns and operates the Tampa terminal.[8] CFPL and KMLT are both wholly owned subsidiaries of Kinder Morgan, Inc.

6. KMLT reserves five storage tanks for the exclusive use of the Airlines under an Airline Storage Agreement through December 31, 2018.[9] World Fuel has also obtained exclusive use of storage tanks at the terminal from KMLT, but may also use capacity reserved by the airline consortium, by agreement.[10]

7. The Airlines procure jet fuel for their own use at Orlando Int'l Airport and regional airports in Central Florida. The CFPL transportation policy states that shippers must provide facilities to tender fuel at the point of origin, tender such product at the Central Florida Pipeline point of origin pursuant to a batching schedule, and make

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[6] Joint Stipulation 13, 14, 40.

[7] Joint Stipulation 45, 48.

[8] The terms "Hooker's Point tanks" and "Tampa terminal" are used interchangeably in this order to refer to the site where the jet fuel that is off-loaded from ocean carriers enters Florida and is stored before further movement within Florida.

[9] Joint Stipulation 20 (cross-referencing the Airline Storage Agreement No. 118-0092 (agreement between airlines and KMLT predecessor in interest, GATX Terminals Corp., for storage and handling of jet fuel at Hooker's Point, Tampa, Florida terminal and delivery to the Central Florida Pipeline, dated Jan. 9, 1998) (Storage Agreement), Ex. AIR-0051), 22. In a minor factual dispute, the parties refer to this reservation under the storage agreement as a lease, despite KMLT's reserving the tanks for the use of the Airlines, rather than transferring a right to possession and use of the tanks, as in a conveyance of a property interest. KMLT argues that it is excused from this proceeding, on the grounds that, as a lessor, it would not be responsible for complying with common carrier obligations should the tanks otherwise be found subject to the Commission's jurisdiction. However, as determined in the Initial Decision and as summarized below, the issue is moot, as the Presiding Judge held in favor of KMLT on other grounds.

[10] Joint Stipulation 27.

arrangement for receipt of their product at the delivery point.[11] Under this batch system, CFPL transports one type of product at a time. Consequently, it pumps jet fuel to the ASIG Terminal from Thursday through Sunday or Monday and diesel fuel at other times.[12]

B. Central Florida Pipeline and Hooker's Point Storage

8. At the Orlando Int'l Airport, the Airlines rely upon jet fuel acquired from their out-of-state sources and transported through the Central Florida Pipeline. In their Complaint, Complainants requested that the Commission assert jurisdiction over movements on the Central Florida Pipeline by requiring that CFPL (a) file tariffs with the Commission for interstate transportation of petroleum products, (b) pay reparations for amounts collected in the previous two years in excess of historical rates established under the ICA and (c) establish prospective rates under the ICA.[13] The Commission set the Complaint for hearing by order dated December 15, 2016.[14]

9. According to Complainants, the Airlines formed a limited liability company, Hooker's Point LLC, to lease jet fuel tanks at KMLT's Tampa terminal. Hooker's Point LLC uses the tanks to provide logistical services for jet fuel supply. 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 fuel storage tanks.

10. ASIG coordinates and offloads jet fuel that is delivered by sea to the Hooker's Point tanks and transfers the fuel to CFPL, for transportation to Orlando Int'l Airport from Tampa. Complainants identify ASIG as the shipper of record for jet fuel shipped on CFPL from the Hooker's Point tanks and state that ASIG pays all tariff charges for these shipments, regardless of the ultimate consignee. According to Complainants, ASIG does not take title to jet fuel at any point; instead, title remains with either the individual airline or fuel service provider that procured the jet fuel.

11. CFPL operates the pipeline in Central Florida that transports refined fuels from the KMLT Tampa terminal to a liquids terminal owned and/or operated by Kinder Morgan in Taft, Florida (Orlando terminal). Jet fuel is also transported over the CFPL system

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[11] Joint Stipulation 50.

[12] Joint Stipulation 52, 53, 54.

[13] *Aircraft Service International Group, Inc. v. Central Florida Pipeline LLC*, 157 FERC ¶ 61,206, at P 1 (2016) (Order on Complaint).

[14] *Id.*

directly from the KMLT Tampa terminal to the ASIG Terminal, with CFPL operating the Central Florida Pipeline, the sole pipeline supplying jet fuel to the Orlando Int'l Airport.

C. Hearing

12. On December 15, 2016, the Commission issued its order finding that the Complaint raised genuine issues of material fact and setting the proceeding for hearing.[15] The Commission stated that "[t]he threshold issue is whether the [Central Florida Pipeline] and the KMLT terminal facilities are providing interstate oil pipeline transportation service subject to the Commission's ICA jurisdiction."[16] The Commission noted that "[a] finding of jurisdiction would require the Respondents to file tariffs with the Commission and to support their respective rates pursuant to the ICA and the Commission's regulations."[17] Additionally, the Commission stated that such a finding "could potentially subject Respondents to the payment of reparations."[18] Finally, the Commission directed the Presiding Judge "to establish appropriate hearing procedures, including whether a phased hearing is required," stating that, "if jurisdiction is not found, issues concerning tariff filings, filing and supporting rates, and reparations are moot."[19]

13. The assigned Presiding Judge, Hon. Suzanne Krolikowski, established a bifurcated procedural schedule on January 25, 2017, with the first phase to determine jurisdiction and the second phase to address all remaining issues set for hearing, such as filing a jurisdictional tariff and rates and other remedies (if necessary).[20] Parties submitted prehearing briefs August 22, 2017. Phase 1 of the evidentiary hearing was held from August 31 through September 21, 2017, with intervenor World Fuel in attendance but not participating in the examination of witnesses. In addition, the Presiding Judge denied KMLT's August 31, 2017 motion for summary disposition, in which KMLT had asserted that, as a lessor, it would not be responsible for complying with any applicable common carrier obligations should the tanks be found subject to the Commission's jurisdiction.[21]

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[15] Order on Complaint, 157 FERC ¶ 61,206.

[16] *Id*. P 36.

[17] *Id*.

[18] *Id*.

[19] *Id*. P 39.

[20] *See* Order on Complaint, 157 FERC ¶ 61,206 at P 39.

[21] Initial Decision, 162 FERC ¶ 63,012 at P 50. In addition, the Presiding Judge found material issues of fact precluded a summary finding that the Airlines' storage

The participants filed post-hearing initial briefs on October 31, 2017, and reply briefs on November 21, 2017. The Presiding Judge rendered the Initial Decision on January 30, 2018.

II. Initial Decision

14. In the Initial Decision, the Presiding Judge concluded that the essential character of CFPL's transportation of jet fuel on its Central Florida Pipeline is intrastate and that the transportation moves in intrastate commerce. Accordingly, the Presiding Judge concluded that the transportation of jet fuel on the Central Florida Pipeline is not subject to the Commission's jurisdiction under the ICA.[22]

15. The Presiding Judge followed the approach that the Commission applied most recently in *Guttman*,[23] providing for a factual inquiry under established legal criteria to examine the jurisdictional status of the Central Florida Pipeline. The Commission had used this approach in earlier orders, namely *Northville*[24] and *Interstate Energy.*[25]

A. The *Northville* Criteria

16. The Presiding Judge applied the Commission's precedent in these prior cases to assess the jurisdictional issues in this case, where transportation wholly within one state follows an initial movement in interstate or foreign commerce. First, the Presiding Judge

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agreement covering the tanks at Hooker's Point was a lease, noting that the agreement contained tariff-like charges, minimum volumes and other features that might indicate common carrier-like responsibilities. *Id*. PP 39-49.

[22] *Id*. PP 90, 470; *see also id.* P 2 (summarizing findings, including a "threshold ruling" that "the transportation of jet fuel on the CFPL pipeline is intrastate in nature and thus not subject to the Commission's jurisdiction under the ICA").

[23] *Guttman Energy, Inc. v. Buckeye Pipe Line Co., L.P.*, Opinion No. 558, 161 FERC ¶ 61,180, at P 49 (2017) (*Guttman*).

[24] *Northville Dock Pipe Line Corp.*, Opinion No.111, 14 FERC ¶ 61,111, at 61,207 (1981) (*Northville*). In *Northville*, the Commission overturned in part an order of the Interstate Commerce Commission (ICC)'s Division 2, applying applicable precedent including *Atlantic Coast Line R.R. Co. v. Standard Oil Co. of Ky.*, 275 U.S. 257 (1927) (*Atlantic Coast*) (finding the interstate or foreign commerce of marine deliveries of oil ends at seaboard storage tanks, and subsequent distribution is intrastate commerce).

[25] *Interstate Energy Co.*, 32 FERC ¶ 61,294 (1985) (*Interstate Energy*).

determined that the jet fuel "comes to rest" in the Hooker's Point tanks, noting that none of the participants appear to take the position in their briefs that the jet fuel fails to come to rest.[26] The Presiding Judge next applied the three main Commission criteria to assess whether there was a *sufficient break* in continuity of the transportation such that the foreign or interstate journey came to an end in Tampa and, as a consequence, subsequent movements within the state of Florida constituted intrastate transportation. The Presiding Judge also performed a detailed examination of certain other factors relevant to jurisdictional determinations.[27]

17. The three main criteria to determine whether a break is a sufficient break, as described in *Guttman*, *Northville*, and *Interstate Energy*, are as follows:

> A sufficient break in interstate transportation may be shown if the product comes to rest at a terminal, storage facility, or distribution point, and –
>
> (1) at the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage,
>
> (2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and
>
> (3) transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation from storage.[28]

18. As an initial matter, the Presiding Judge concluded that that the jet fuel "comes to rest" at the Tampa terminal, noting that there is never a continuous flow of jet fuel out of the barges, into the tanks, and onto the Central Florida Pipeline.[29] The Presiding Judge used the prior Commission decisions as support for the fact that the Tampa terminal

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[26] Initial Decision, 162 FERC ¶ 63,012 at P 89.

[27] *See id.* PP 90-330 (examining criteria 1, 2 and 3), PP 331-445 (assessing 12 other factors).

[28] *Guttman*, 161 FERC ¶ 61,180 at P 50 (editorial marks omitted).

[29] Initial Decision, 162 FERC ¶ 63,012 at P 89.

facility is a point of interruption in the movement of the jet fuel.[30] The Presiding Judge then applied the three *Northville* criteria to the facts of this case.

1. Criterion 1: Through Movement

19. The first criterion of the Commission's three-part test to determine whether there is a *sufficient* break in continuity of transportation such that the interstate journey comes to an end at the point of interruption is whether "at the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage."[31] Examining the factual record relevant to this criterion,[32] the Presiding Judge found that "at the time of the initial shipment there is no specific order being filled for a specific quantity of jet fuel to be moved through to a specific destination [i.e., Orlando Int'l Airport] beyond the terminal storage [i.e., Tampa terminal]."[33] The Presiding Judge noted that her analysis differed for the Chevron-supplied airlines and the Valero-supplied airlines but stated that "the conclusion is the same."[34] The Presiding Judge concluded that criterion-one considerations support finding "a sufficient break in the continuity of transportation of the jet fuel at Tampa Terminal, such that movement of jet fuel on the [Central Florida Pipeline] is intrastate."[35]

20. The Presiding Judge reviewed the circumstances surrounding the deliveries from suppliers, Valero and Chevron, to the Tampa storage tanks. For Valero (and Chevron's international shipments), the Presiding Judge found no specific order being filled to move product "through to a specific destination beyond the terminal storage."[36] The Presiding Judge found that the analysis for Valero also applies to Chevron's international shipments

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[30] *Id.*

[31] *Guttman*, 161 FERC ¶ 61,180 at PP 21, 50 (quoting *Interstate Energy*, 32 FERC at 61,690).

[32] Initial Decision, 162 FERC ¶ 63,012 at PP 103-70.

[33] *Id.* P 171.

[34] *Id.*

[35] *Id.*

[36] *Id.* P 172. *See also Guttman*, 161 FERC ¶ 61,180 at P 50; *Interstate Energy*, 32 FERC at 61,690).

because they are "materially similar."[37] The Presiding Judge noted that Valero's vessels depart with no specific destination, and tankers "may or may not" deliver fuel to Tampa.[38] The Presiding Judge concluded that, "at the time of the initial shipment of jet fuel by marine vessel, there is no order being filled to be moved to any particular destination. Because the vessels do not have a specific destination at the time of the initial shipment, they clearly are not fulfilling specific orders for jet fuel to be moved through to the Orlando Airport."[39]

21. The Presiding Judge cited the fact that Valero loads its vessels without regard to customer need or nominations as a factor indicating that there is no specific order for any specific quantity by Valero.[40] The judge noted that "Valero has multiple vessels on the water at all times capable of delivering jet fuel to any number of potential destinations in the United States," so that "at the time of initial shipment of jet fuel, not only is it unknown whether the vessel will deliver jet fuel to American, Delta, Southwest, or any other Valero-supplied Airline at the Tampa terminal or to other customers at other locations around the globe, it is unknown how much jet fuel that particular ship might deliver."[41] The Presiding Judge determined that the initial shipment by Valero is unrelated to a specific order for a specific quantity of jet fuel.

22. The Presiding Judge noted that jet fuel is commingled on both Valero and Chevron vessels and in the Tampa storage tanks, "as acknowledged by the participants."[42] The Presiding Judge concluded that, just as in *Interstate Energy*, "there is no designation of any particular [jet fuel] for any particular place within the State beyond the storage facilities into which the [jet fuel] is first delivered by the ocean-going vessels."[43]

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[37] Initial Decision, 162 FERC ¶ 63,012 at P 176.

[38] *Id.* P 172.

[39] *Id.*

[40] *Id.* P 173.

[41] *Id.*

[42] *Id.* P 174 (noting fuel is also commingled with that of independent fuel supplier World Fuel and others in the Tampa storage).

[43] *Id.* (citing *Interstate Energy*, 32 FERC at 61,691; *Atlantic Coast*, 275 U.S. at 271 ("No oil which comes in is labeled or identified in any particular way with

23. The Presiding Judge also noted that the jet fuel volumes that ASIG nominates for transportation on the Central Florida Pipeline are not based on the Valero shipment quantities or on the Airlines' monthly nominations to Valero.[44] The Presiding Judge instead characterized ASIG's arrangements and nominations on the pipeline as being made "to ensure that the Airlines have a sufficient supply of jet fuel in the Tanks at the Orlando Airport to satisfy the inventory targets set by ASIG."[45] The Presiding Judge described the quantities of jet fuel shipped by Valero as therefore being "disconnected from the quantities that are shipped to the Orlando Airport on the [Central Florida Pipeline]."[46] The judge stated that this disconnect suggests that there is no specific order being filled for a specific quantity of jet fuel to be moved to Orlando on the pipeline at the time of the initial shipment.

24. For Chevron's shipments from refining in Pascagoula, Mississippi to Tampa, the Presiding Judge found that the facts also support the conclusion that the shipments are not made to fill a specific order for a specific quantity of jet fuel to be moved through to a specific destination beyond storage at the Tampa terminal, although less strongly "in some respects" than for Valero.[47]

25. The Presiding Judge distinguished the circumstances concerning Chevron's shipments to Tampa from Valero's. The Presiding Judge noted that Valero-chartered vessels depart from international ports without an established destination, while Chevron's vessels tend to depart from its refinery with Tampa as the vessel's established destination. The Presiding Judge also noted that Valero's vessels are loaded before Valero receives monthly nominations from the Airlines so that Valero does not load its marine vessels based on the specific needs or nominations of the Airlines for Tampa deliveries.[48] The Presiding Judge contrasted Valero's situation with Chevron's, citing

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any particular company, except after it is shipped to that company from Tampa or from Jacksonville")).

[44] *Id.* P 175.

[45] *Id.*

[46] *Id.*

[47] *Id.* P 177.

[48] *Id.* P 178.

evidence showing that Chevron receives the Airlines' aggregated monthly nomination before it loads the marine vessels to ship product to Tampa.[49]

26. Nevertheless, the Presiding Judge described other facts relating to Chevron's shipments as being identical to Valero's shipments.[50] The Presiding Judge noted that jet fuel supplied by Chevron, similar to Valero shipments, is commingled in transit and in Hooker's Point storage, with fuel to be shipped to various destinations in addition to Orlando, including various Regional Airports in Florida. The Presiding Judge concluded that, as in *Interstate Energy*, for Chevron fuel deliveries "there is no designation of any particular [jet fuel] for any particular place within the State beyond the storage facilities into which the [jet fuel] is first delivered by the ocean-going vessels."[51]

27. Also, the Presiding Judge noted that, as with Valero, neither the monthly nominations to Chevron nor quantities shipped form the basis for subsequent shipments on CFPL's pipeline.[52] Rather, the Presiding Judge described shipments on CFPL as being made by ASIG to ensure that the Airlines meet inventory targets at Orlando. The Presiding Judge therefore found that the quantities of jet fuel delivered to Tampa terminal were "disconnected" from quantities shipped on the Central Florida Pipeline.[53] The judge stated that, "[a]s with Valero, this disconnect indicates that, at the time of the initial movement of jet fuel from Chevron's refinery in Pascagoula, there is no specific order being filled for a specific quantity of jet fuel to be moved through to the Orlando Airport on the Central Florida Pipeline."[54]

28. The Presiding Judge noted that Chevron's shipments to Tampa are unilaterally allocated by ASIG among the Airlines, with such allocations going beyond simply ensuring that each Airline receives its monthly nomination.[55] Instead, ASIG shipments are allocated to ensure that each Airline has the same number of days' supply available at

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[49] *Id.*

[50] *Id.* P 179.

[51] *Id.* (quoting *Interstate Energy*, 32 FERC at 61,691).

[52] *Id.* P 180.

[53] *Id.*

[54] *Id.*

[55] *Id.* at P 181.

Tampa.[56] The Presiding Judge relied on the re-allocation to find that, at the time of initial shipment, Chevron's shipments are not made to fill a specific order for a specific quantity of jet fuel to be moved through to a specific destination beyond the Tampa terminal. The Presiding Judge concluded that criterion one considerations weigh in favor of finding a sufficient break in the continuity of transportation of the jet fuel when the jet fuel comes to rest at Tampa, based on Chevron's shipments.[57]

2. Criterion 2: Character of Storage

29. The Presiding Judge next examined the second criterion for assessing whether there is a sufficient break in the continuity of transportation at the point of interruption—the "character of the storage"—or whether "the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated."[58] The Presiding Judge cited a number of facts examined by the Commission and the Interstate Commerce Commission (ICC) in relation to this criterion, such as (a) length of "non-operational" storage[59] and the rate of withdrawals,[60] (b) the reasons for product withdrawals from storage, including marketing and distribution,[61]

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[56] *Id.* ("Chevron does not know the specific quantity of jet fuel that any Airline will receive from a shipment until after the shipment arrives at the Tampa Terminal").

[57] *Id.* P 182.

[58] *Id.* P 199 (citing *Guttman*, 161 FERC ¶ 61,180 at P 50; *Interstate Energy*, 32 FERC at 61,690).

[59] According to the Presiding Judge, operational storage was defined at the hearing as "'storage that is owned and operated by the carrier, between the two custody meters, one at the origin and one at the destination. And the carrier would be having to use those strictly for operational purposes.'" *Id.* P 199 n.484 (Citing Tr. 2450-51 (Van Hoecke Test.)).

[60] *Id.* P 199 (citing *Interstate Energy*, 32 FERC at 61,691 (storage time varies, but size of facilities indicates tanks not used for daily requirements); *Northville*, 14 FERC at 61,209 (daily for four months a year; far less frequently than the other months); *Dep't of Defense v. Inter-state Storage and Pipeline Corp.*, 353 I.C.C. 397, at 408 (1977) (*Dep't of Defense*), *aff'd Interstate Storage and Pipeline Corp.*, 28 FERC ¶ 61,120, at 61,207-08 (1984) (*Interstate Storage*)).

[61] *Id.* (citing *Interstate Energy*, 32 FERC at 61,691 (drawdowns to meet seasonal demand); *Northville*, 14 FERC at 61,209 (drawdowns from Setauket tanks made to replenish smaller storage capacity at plant site and pointing out that the "essential

(c) commingling within the tanks,[62] (d) advance arrangements for transportation beyond the storage tanks,[63] and (e) the absence or presence of through rates.[64] The Presiding Judge cited length of storage,[65] commingling,[66] advance arrangements and through rates[67] as being factors that, when examined in the available precedent, may be considered along with other of the enumerated criteria and factors.[68]

30. The Presiding Judge cited *Northville* and *Interstate Energy* as two proceedings in which the Commission examined the character of storage. The Presiding Judge stated that the Commission in *Northville* did not separately analyze the second criterion, but based its conclusions on considerations that are relevant to this criterion.[69] The Presiding Judge noted that, in *Northville*, petroleum settled for at least 24 to 48 hours and could remain in storage "for several weeks."[70] The electric utility, Long Island Lighting Co. (LILCO), used the petroleum at an inland generating station, and the other shippers used it to satisfy retail and residential customer demand.[71] Consequently, the Commission found that the essential character of these other shippers' business was "to provide local

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character" of most of the shippers' business was local distribution and that the tanks were used to maintain inventory in concluding that the trafficking of the product met the tests for intrastate commerce)).

[62] *Id.* (citing *Interstate Energy*, 32 FERC at 61,691; *Dep't of Defense*, 353 I.C.C. at 399).

[63] *Id.* (citing *Interstate Energy*, 32 FERC at 61,691-92; *Dep't of Defense*, 353 I.C.C. at 399, 401, 408).

[64] *Id.* (citing *Interstate Energy*, 32 FERC at 61,692; *Dep't of Defense*, 353 I.C.C. at 408).

[65] *Id.* PP 358-62.

[66] *Id.* PP 331-40.

[67] *Id.* PP 363-73.

[68] *Id.* P 199.

[69] *Id.* P 200.

[70] *Id.* P 201 (citing *Northville*, 14 FERC at 61,205).

[71] *Id.* (citing *Northville*, 14 FERC at 61,206).

distribution of the petroleum."[72] The Commission found that LILCO was "not a distributor," because it consume[d] the oil it shipped at its generating plant.[73]

31. The Presiding Judge cited as significant the Commission's further finding that although LILCO was an end user, "not a distributor," LILCO used the initial storage facility as a "point of inventory and storage."[74] The Commission found that LILCO's oil shipments were "covered by separate ocean bills of lading and inland documentation," and that the ocean and inland movements were "separately arranged for."[75] In assessing the nature of the storage of fuel oil in LILCO's Setauket tank, the Commission observed that shipments were made to nearby Port Jefferson "to maintain the inventory level at the Setauket storage tank" and not to meet "existing requirements" of LILCO's generating plant located ten miles inland in Holtsville, NY.[76] The Presiding Judge cited the Commission's findings that the LILCO's Setauket storage tank could hold approximately 12 days' capacity and that the Setauket tank was to replenish supply at Holtsville.[77] The Presiding Judge also noted the Commission's factual finding that the rate of LILCO's shipments from its Setauket tank to Holtsville were "'dictated by LILCO's seasonal demand for fuel oil.'"[78] During periods of peak electricity demand, LILCO would make daily withdrawals from Setauket, but would draw on its inventory "'far less frequently'" during months of lower demand, replacing its inventory "only once every three months.'"[79] The Commission in *Northville* concluded that the facts did "not show a continuous flow of interstate commerce'" and held that the transportation of LILCO's fuel oil from Setauket port-side storage to the point of use at its Holtsville generating plant was intrastate commerce.[80]

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[72] *Id.* (citing *Northville*, 14 FERC at 61,208).

[73] *Id.* (citing *Northville*, 14 FERC at 61,209).

[74] *Id.* P 202 (citing *Northville*, 14 FERC at 61,208).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* (quoting *Northville*, 14 FERC at 61,209).

[79] *Id.* (quoting *Northville*, 14 FERC at 61,209).

[80] *Id.* (quoting *Northville*, 14 FERC at 61,209).

32. The Presiding Judge characterized *Interstate Energy* as a proceeding where the Commission directly addressed the second criterion, "the character of the storage."[81] In particular, the Commission reviewed circumstances relating to the character of the storage and found that it met the second criterion, noting first that the draw-down rate varies depending on the shippers' requirements and second that the size of the facilities, being larger than local storage, failed to indicate that they are used to meet daily requirements but rather suggested they met the inventory needs of the individual shippers.[82]

33. The Presiding Judge concluded that, although the second criterion is a close call, the Hooker's Point tanks at issue in this proceeding are used for inventory and storage. The Presiding Judge applied the holdings made in *Interstate Energy* to the facts in this proceeding relating to the "character of the storage."[83] In relation to length of storage, the Presiding Judge noted that fuel is commingled and individual deliveries are not tracked when offloaded into the tanks and that the practical minimum length of time before fuel can be re-shipped is roughly one to four days.[84] The Presiding Judge noted the Airlines' targets to maintain 20 days of jet fuel supply between the Orlando Int'l Airport tanks and the Hooker's Point tanks, with approximately six to ten days of jet fuel supply at both locations.[85] According to the Presiding Judge, ASIG maintains six to ten days of fuel at Hooker's Point to prevent supply disruptions at Orlando Int'l Airport.[86] The Presiding Judge examined evidence on the rate of drawdowns at Hooker's Point, noting that the Hooker's Point tanks hold, on average, eight days of jet fuel supply.[87]

34. The Presiding Judge ultimately found that jet fuel sits on average for 9.5 to 12 days before reshipment.[88] The Presiding Judge found fluctuations in the relationship of

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[81] *Id.* P 203 (citing *Interstate Energy*, 32 FERC at 61,691).

[82] *Interstate Energy*, 32 FERC at 61,691-92.

[83] Initial Decision, 162 FERC ¶ 63,012 at P 204.

[84] *Id.* P 205-206 & n.501 (citing testimony).

[85] *Id.* P 207 & n.504 (citing testimony).

[86] *Id.* P 207.

[87] *Id.* P 207 & n.506 (citing Lipscomb Test., Ex. AIR-0001 at 11).

[88] *Id.* PP 208-12; Lipscomb Test., Ex. AIR-0001 at 29-30 (min. 9.5 days); Ruckert Test., Ex. S-0037 at 9-11, 14. The Presiding Judge found that, during individual months,

monthly inflows to outflows for ASIG and individual airlines, with no clear pattern for outflows as percentage of inflows.[89] The Presiding Judge also found that volumes received at Hooker's Point often did not match volumes shipped on the next jet fuel shipping cycle on the Central Florida Pipeline and are often quite different.[90]

35. The Presiding Judge noted certain seasonal patterns in ASIG's fuel purchases, finding peak periods during spring break, the summer season, and winter holidays. The Presiding Judge also found that the Airlines' jet fuel demand appears higher during these periods.[91] The Presiding Judge likewise found that Hooker's Point inventory levels vary by season, with higher inventory during February, May, and September and lower levels in January through March and in July and November,[92] coincident with spring break and holiday peak travel seasons.[93]

36. The Presiding Judge examined the reasons for Hooker's Point withdrawals and determined that storage capacity at Orlando Int'l Airport limits Hooker's Point drawdowns, because the capacity of the Orlando tanks is smaller than the available Hooker's Point capacity.[94] Therefore, the Presiding Judge found that the rate at which jet fuel is withdrawn from Hooker's Point is tied to the Orlando demand and consumption (along with the regional airports).[95]

Hooker's Point deliveries often did not match the amount taken from the tanks by up to 20 to 30 percent. *Id.* P 214 (citing Ruckert Test., Ex. S-0037 at 47).

[89] Initial Decision, 162 FERC ¶ 63,012 at P 215 (citing Ruckert Test, Ex. S-0037 at 56, 59; Ex. S-0048 at 1-21).

[90] *Id.* P 216 (citing exhibits and hearing testimony).

[91] *Id.* P 217.

[92] *Id.* P 218 (citing Ruckert Test., Ex. S-0037 at 41-42 (reporting low daily average inventory January through March), 44 (daily average inventory levels peak in February, May and September, averaging 10 to 20 percent higher than typical)).

[93] *Id.* (citing Ruckert Test., Ex. S-0037 at 42-43).

[94] *Id.* PP 222-24.

[95] *Id.* P 224.

37. The Presiding Judge declined to rely upon the supply chain model proposed by complainant witness Dr. Arthur.[96] The judge noted that, on cross-examination, the model assumptions were shown to be inconsistent with real world conditions.[97] The Presiding Judge found that the transportation capacity of the Central Florida Pipeline does not limit the flow of jet fuel through Hooker's Point because the pipeline is usually not run at the maximum pumping rate.[98]

38. The Presiding Judge made several findings related to whether advance arrangements or instructions exist before fuel is shipped to Hooker's Point. The Presiding Judge found that neither ASIG nor the Airlines make advance arrangements for transportation beyond the Tampa terminal prior to delivery. Truck shipments to regional airports are independently scheduled and arranged by the Airlines, and neither the Airlines nor ASIG are aware of the timing or volume of such shipments in advance.[99] As noted elsewhere, ASIG submits weekly pipeline nominations one to two days before the pumping cycle.[100]

39. The Presiding Judge found that there is no through rate or joint tariff for the deliveries to Hooker's Point and shipments to Orlando.[101] The judge also noted that waterborne and pipeline movements have separate shipping documents and bills of lading.

40. The Presiding Judge identified additional facts in the record, though not present in *Northville* or *Interstate Energy*, that bear upon the "character of the storage" of jet fuel at the Tampa Terminal and whether that Terminal is used as a distribution point from which specific amounts of jet fuel are sold or allocated, including negative inventory, time swaps, spot sales and shipment to the regional airports by truck. The Presiding Judge noted Chevron's practice to make bulk deliveries, lacking specific quantities

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[96] *Id.* PP 228-32; Arthur Test., Ex. AIR-0120.

[97] Initial Decision, 162 FERC ¶ 63,012 at PP 229-32 (citing Arthur Test.).

[98] *Id.* PP 233-40.

[99] *Id.* P 241.

[100] *Id.*

[101] *Id.* PP 365, 242.

assigned to particular airlines, and ASIG's practice to ascertain the volume to be delivered and to allocate the fuel among the Airlines upon delivery.[102]

41. The Presiding Judge noted that jet fuel is treated as a shared, fungible "pool" available to the Airlines and ASIG once it is delivered.[103] To support this finding the Presiding Judge cited evidence that ASIG permits the Airlines to maintain "negative inventory" and the Airlines exchange fuel through so-called "time swaps." The Presiding Judge explained that an Airline may have a negative inventory balance when it exhausts its inventory at Hooker's Point but additional volumes are withdrawn and shipped on the Airline's behalf.[104]

42. The Presiding Judge explained that the deficient airline must remedy the negative balance, and ASIG only permits an Airline to incur a negative inventory when a marine shipment is in transit to cover the deficiency.[105] The Presiding Judge reviewed evidence on the prevalence of the practice, including testimony that individual Airlines relied on negative inventory on occasions numbering from 4 to 185 times in the five years under review, with discrepancies resolved in 2 to 11 days.[106]

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[102] *Id.* P 244; *see also id.* PP 291-93.

[103] *Id.* PP 245, 284 (citing Van Hoecke Test., Ex. KIN-0057 at 101:6-10 as noting that commingling of fungible products in a single tank, "standing alone, is likely not sufficient to indicate a lack of fixed and persisting intent on the part of the initial interstate shipper"); *see also Carson Petroleum Co. v. Vial*, 279 U.S. 95, 98-101, 108-09 (1929) (*Carson Petroleum*) (holding that storage of oil in seaside tanks prior to transportation by marine vessel to foreign destinations did not break continuity of interstate transportation, notwithstanding the fact that oil was commingled while in transit to seaside storage and "there was no separation of the various shipments of oil")).

[104] Initial Decision, 162 FERC ¶ 63,012 at P 246.

[105] *Id.* P 247.

[106] *Id.* P 249, 252; *see also id.* P 287 ("Moreover, if a negative balance went unresolved, Hooker's Point LLC would have to acquire sufficient jet fuel to resolve the negative balance and allocate that amount among the Airlines. Thus, although shipping jet fuel on behalf of Airlines with negative inventory balances at Hooker's Point avoids the need for money to change hands between the Airlines (and may be efficient for ASIG to perform its duties on behalf of the Airlines), the activity is certainly a transaction that is tantamount to a sale and distribution between the exchanging airlines.").

43. The Presiding Judge noted that if one of the Airlines is not expecting a fuel shipment before the end of the month, that airline may purchase or borrow jet fuel from another airline, where no fuel is physically transferred and transfers are performed entirely on paper, called a "time swap."[107] The Presiding Judge described this practice as "relatively rare," occurring two to three times per year. The Presiding Judge noted four incidences of spot sales at Hooker's Point.[108] In addition, the Presiding Judge noted that three of the Airlines—American, Delta, and UPS—regularly ship jet fuel from the Hooker's Point tanks to regional airports by truck, while other airlines may intermittently use the truck racks.[109]

44. Based on all of these facts, the Presiding Judge concluded that the Hooker's Point tanks are being used for "more than a temporary pause" in an interstate supply chain.[110] The Presiding Judge noted occasional spot sales which, though rare, establish that jet fuel may be sold at Hooker's Point and that sales, allocations, and distributions occur at the Tampa terminal.[111]

45. The Presiding Judge concluded that the Airlines and ASIG use the Hooker's Point tanks for storage for a length of time that is suggestive of inventory usage and is within the range that supported the intrastate finding in *Northville*.[112] Finally, the Presiding Judge found that Hooker's Point is a distribution point where fuel is allocated upon arrival, and later for distribution, to the Orlando Int'l Airport and regional airports, defining its character as a sufficient break in the continuity of transportation to support a finding that the Central Florida Pipeline operates in intrastate commerce.[113]

46. The Presiding Judge found that, contrary to Complainants' suggestion, the fact that the Airlines are end users, not marketers or distributors, is not determinative with respect to the second criterion (character of the storage), noting that this distinction has

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[107] *Id.* PP 254-55.

[108] *Id.* P 258.

[109] *Id.* P 259. Ninety percent of the fuel is shipped over the pipeline. *See* Joint Stipulation 42.

[110] Initial Decision, 162 FERC ¶ 63,012 at P 290.

[111] *Id.*

[112] *Id.* P 265.

[113] *Id.*

been addressed and rejected elsewhere, as both LILCO, in *Northville*, and the *Interstate Energy* shippers were end users but the Commission nevertheless found the transportation to those entities to be intrastate in character.[114]

47. The Presiding Judge found that Hooker's Point is "a point of distribution and allocation, although perhaps not in the most traditional sense," because Chevron makes delivery to Hooker's Point, where ASIG "allocates specific amounts of the delivered jet fuel among Chevron's Airline customers (Southwest, United, and UPS), and these amounts are booked to the Airlines' accounts."[115] Once the delivery occurs, the Presiding Judge noted that ASIG and the Airlines consider the allocated amounts of jet fuel to be owned by the Airlines.[116]

48. Importantly, the Presiding Judge found that jet fuel is "allocated and distributed" from the Hooker's Point inventory among the Airlines and to several airports, specifically to regional airports by truck and to Orlando on the Central Florida Pipeline.[117] The Presiding Judge found that ASIG's allocations are based on the Airlines' demand and inventory at the airports supplied from Hooker's Point, with ASIG and regional airport base operators determining how much fuel to allocate to each airport and airline.

49. Highlighting use of the pipeline and truck racks, the Presiding Judge stated:

> By utilizing such a system, these Airlines (in coordination with the FBOs [regional airport base operators] and ASIG) are essentially using the Hooker's Point Tanks as a location from which specific amounts of jet fuel can be allocated to various airports, including the Orlando Airport. Therefore, even if these Airlines are not marketing or distributing jet fuel in the usual commercial sense, I conclude that these three Airlines distribute jet fuel from the Hooker's Point Tanks to

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[114] *Id.* P 266. *Northville*, 14 FERC at 61,208-09 (reversing ICC finding of jurisdiction over shipments of fuel oil from port-side terminal storage to LILCO for consumption in its inland generating station).

[115] Initial Decision, 162 FERC ¶ 63,012 at P 291 (citing discussion at PP 102-70).

[116] *Id.* (citing discussion at PP 374-85).

[117] *Id.* P 292.

> the various Regional Airports they supply, in addition to the Orlando Airport.[118]

50. In sum, the Presiding Judge concluded, based on the facts, that ASIG and the Airlines use Hooker's Point as a point of inventory and non-operational storage, as did the shippers in *Northville* and *Interstate Energy*.[119] Accordingly, the Presiding Judge found with respect to criterion two that the facts weigh in favor of finding that continuity of transportation is sufficiently broken when jet fuel is delivered at Tampa and that the transportation on the Central Florida Pipeline is in intrastate commerce.[120]

3. Criterion 3: Transportation in Furtherance of Distribution

51. The Presiding Judge stated that the third criterion addressing whether a sufficient break in the continuity of transportation occurs at the point of interruption is whether "transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation from storage."[121] The Presiding Judge stated:

> In essence, the underlying purpose of this criterion is to determine *when* a shipper has made the arrangements for each transportation segment (or "leg") for a particular shipment of product. If the shipper makes arrangements for the shipment of its product out of the terminal tanks and through the second leg before the product arrives at the terminal, this indicates an intent to move the particular shipment continuously in interstate commerce rather than to store it for a later shipment that is disconnected from the first leg of transportation.[122]

52. The Presiding Judge characterized the cases addressing the third criterion as focusing on "whether transportation for the second leg of the movement was specifically

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[118] *Id.* (noting Southwest's occasional use of the truck racks).

[119] *Id.* P 294.

[120] *Id.* PP 294-98.

[121] *Id.* P 299 (citing *Guttman*, 161 FERC ¶ 61,180 at P 50; *Interstate Energy*, 32 FERC at 61,690; *Texaco Ref. & Mktg., Inc. v. SFPP, L.P.*, 80 FERC ¶ 61,200, at 61,804 (1997) (*Texaco*) and identifying the "distribution" to be examined as the activities discussed in the second criterion).

[122] *Id.* (emphasis in original).

arranged before or after the product reached the point of interruption."[123] For instance, the Presiding Judge cited the ICC's finding in *Dep't of Defense* that it is significant that "arrangements for through shipments to McGuire Air Force Base are at times made prior to the arrival of fuel at defendant's Burlington receiving dock" to conclude that within-state pipeline transportation was a continuation of interstate cross-border movement.[124]

53. The Presiding Judge also discussed the Commission's evaluation of the third criterion in *Interstate Energy*, where oil was shipped to storage by marine vessel from international and/or domestic suppliers, and shippers provided the pipeline operator with their requirements every month, "in separate transactions," on which the operator prepared a pipeline delivery schedule.[125] The Presiding Judge noted the Commission's findings of no through bill of lading covering the marine and pipeline transportation, with the within-state pipeline movements being arranged only after oil was delivered to storage.[126] The Presiding Judge cited the Commission's conclusion that the continuity of the interstate transportation was broken at the tanks, under criterion three (and criterion one).

54. The Presiding Judge made additional findings of fact relevant to the third criterion. The Presiding Judge noted that jet fuel is allocated and distributed out of the tanks in two ways: through the Central Florida Pipeline and by truck.[127] The Presiding Judge discussed findings made in relation to the first criterion,[128] that ASIG arranges jet fuel shipments on the Central Florida Pipeline on behalf of the Airlines, submitting monthly nominations (consisting of estimates) and weekly nominations.[129] In response, CFPL creates a tentative pipeline schedule, which it adjusts throughout the month.[130] Thereafter, typically a day or two prior to a jet fuel pumping cycle, ASIG decides, according to the Presiding Judge, "precisely" how much jet fuel to ship from Hooker's

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[123] *Id.* P 302.

[124] *Id.* (citing *Dep't of Defense*, 353 I.C.C. at 408, 409).

[125] *Id.* P 301 (citing *Interstate Energy*, 32 FERC at 61,691).

[126] *Id.*

[127] *Id.* P 303.

[128] *Id.* PP 102-70.

[129] *Id.* P 304 (citing relevant Kinder Morgan testimony).

[130] *Id.*

Point based on seasonal and previous week demand at Orlando.[131] The Presiding Judge noted that ASIG's resulting nomination is not broken down by Airline, except for free-trade zone barrels, and the nomination may also specify volumes for World Fuel to be shipped.[132] According to the Presiding Judge, the pipeline's schedules do not list volumes by airline.

55. The Presiding Judge described the transportation of the jet fuel on the pipeline, noting that shipments are made in bulk, potentially for multiple airlines.[133] ASIG allocates the shipment among the Airlines and issues invoices.[134]

56. The Presiding Judge also noted that jet fuel bound for regional airports is withdrawn from Hooker's Point by truck, in shipments arranged by operators at those airports (called "fixed base operators" or FBOs). These regional airport base operators monitor the Airlines' demand at the regional airport and ensure that sufficient jet fuel supply is on hand.[135]

57. The Presiding Judge concluded that transportation in the furtherance of distribution within the single state (from Hooker's Point) is "specifically arranged" only after allocation from storage.[136] The Presiding Judge found it significant that the Airlines' jet fuel is commingled in the Hooker's Point tanks, though each airline has title to and is assigned specific jet fuel volumes at the tanks.[137] The Presiding Judge noted that ASIG's pipeline shipments often include fuel for World Fuel, a separate entity not served by ASIG. Because jet fuel from the bulk shipment is reallocated at the Orlando Int'l Airport, the Presiding Judge concluded that Hooker's Point is a point of allocation and distribution for the Airlines.

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[131] *Id.* P 305.

[132] *Id.* (discussing testimony).

[133] *Id.* PP 306-07.

[134] *Id.* P 307.

[135] *Id.* PP 309-10.

[136] *Id.* P 315.

[137] *Id.* P 316.

58. The Presiding Judge noted that ASIG decides the specific jet fuel volumes to ship on the Central Florida Pipeline only a few days before transportation on the pipeline.[138] The Presiding Judge found that, once a marine supplier arrives at Hooker's Point, the earliest that the fuel is likely to be available for shipment is approximately one to two days.[139] The Presiding Judge concluded that "where ASIG submits or revises a nomination for transportation on the [Central Florida Pipeline] less than one to two days before the jet fuel pumping cycle begins, the jet fuel that is shipped during the cycle was almost certainly already in the Hooker's Point Tanks when the shipment was specifically arranged."[140] Citing record evidence, the Presiding Judge noted that, in most cases, fuel sits in storage for more than one to two days, resting in the Hooker's Point tanks for several days before it is withdrawn for reshipment to an inland destination.[141]

59. The Presiding Judge noted that, pursuant to ASIG's nomination and allocation process, determinations of specific volumes of domestic jet fuel to be reallocated to each Airline from a pipeline shipment is not made until after the fuel is shipped to Orlando.[142] On that basis, the Presiding Judge found it impossible that arrangements for through shipments of a particular quantity of domestic jet fuel to Orlando are made prior to fuel arriving at Tampa. The Presiding Judge noted that the quantities to be delivered to the Airlines at Orlando are not determined until the fuel comes to rest.

60. As for fuel allocated and distributed by truck, the Presiding Judge found that, with the exception of American, which has standing instructions for 24 shipments to the Tampa Airport every month, third parties schedule and arrange fuel trucks to ship from Tampa to the regional Airports shortly before the shipment.[143] Thus, the Presiding Judge concluded, the truck shipments are typically allocated and transported after the fuel has been delivered at Hooker's Point.[144]

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[138] *Id.* P 317.

[139] *Id.*

[140] *Id.*

[141] *Id.* P 318 (citing inventory analysis and flow reports).

[142] *Id.* P 320.

[143] *Id.* P 322.

[144] *Id.*

61. The Presiding Judge found the process for shipping fuel on the Central Florida Pipeline comparable to that in *Interstate Energy*, because ASIG (on behalf of the Airlines) provides the pipeline with monthly and weekly nominations estimating the amount of fuel to be transported, and CFPL, like the pipeline operator in *Interstate Energy*, uses ASIG's nominations to create a pipeline schedule, which the tank operator follows.[145]

62. Overall, the Presiding Judge concluded that transportation in the furtherance of distribution of the jet fuel from Hooker's Point is specifically arranged only after the jet fuel has come to rest and after an allocation process has taken place to determine the batching onto the pipeline.[146] With that, the Presiding Judge found that criterion three weighs in favor of concluding that the continuity of transportation is sufficiently broken once the jet fuel arrives at the Tampa terminal and that the transportation of jet fuel on the Central Florida Pipeline is in intrastate commerce.

B. Other Factors and Findings

63. The Presiding Judge described the three *Northville* criteria as "basically sufficient to establish that the continuity of transportation has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased."[147] Nevertheless, the Presiding Judge also examined 12 additional factors the Commission enumerated in *Northville* and *Guttman*: (1) commingling in transit and in storage; (2) processing before shipment; (3) bills of lading; (4) the specific rate of turnover in the storage facility; (5) the character of the billing, that is, whether it is local or through; (6) change of ownership during the course of transportation; (7) knowledge or lack of it on the part of the consignor of the ultimate destination or consignees; (8) the character and length of the transaction taking place at the point of interruption; (9) the intent on the part of the consignor with reference to the final destination; (10) breaking of bulk and commingling of the product shipped with other shipments of the same commodity; (11) power of the owner of the property to divert shipments after the initial movement has begun; and (12) the general practices and customs prevailing in a particular industry or trade.[148]

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[145] *Id.* P 323 (citing *Interstate Energy*, 32 FERC at 61,691).

[146] *Id.* P 330.

[147] *Id.* P 91 (quoting *Interstate Energy*, 32 FERC at 61,690).

[148] *Id.* P 77 (citing *Guttman*, 161 FERC ¶ 61,180 at P 52; *Northville*, 14 FERC at 61,207-08).

64. The Presiding Judge found that at least nine of the additional factors, and for some of the airlines ten factors, weigh to the continuity of transportation being sufficiently broken when the jet fuel comes to rest at the Tampa terminal.[149] The Presiding Judge reviewed facts relating to factors 1 and 10 in tandem (commingling and breaking of bulk), finding that separate shipments of jet fuel are commingled at Hooker's Point and bulk is broken when ASIG allocates Chevron's bulk shipments among Chevron's customers at the Tampa terminal and when ASIG allocates batches of jet fuel shipped on the Central Florida Pipeline in bulk among the Airlines at Orlando Int'l Airport. For factor 3, the Presiding Judge found that no single bill of lading covers jet fuel transportation from the ports of origin to inland destinations and the marine bills do not provide evidence of a fixed and persisting intent to ship jet fuel to its ultimate destination. For factor 4, the Presiding Judge found that, although the turnover rate and time of storage indicate that jet fuel comes to rest in the tanks, this factor did not weigh as heavily because the rate of turnover is on the lower end of the range of storage times found to be intrastate (or interstate).[150] On factor 5, the Presiding Judge reported that the marine shipments are billed separately from the pipeline transportation and with no through rate or joint tariff.[151] As to factor 6, the Presiding Judge noted a change of ownership occurring within Florida, with title transferring to the Airlines at the Tampa terminal.[152] For factor 7, the Presiding Judge found that neither tanker operator knows the ultimate destination or consignees of the jet fuel they ship at the time the initial movement of jet fuel begins.

65. The Presiding Judge characterized factor 8 as being a closer call but that the character and length of the transactions at the Tampa terminal generally weigh in favor of finding a break in continuity when the jet fuel comes to rest at Hooker's Point.[153] Nevertheless, the Presiding Judge found that the character and length of the transactions at the Tampa terminal do not weigh as strongly for a finding of a break in the continuity for two airlines, and even less strongly for another. As to factor 9, the Presiding Judge found that the fuel suppliers only intend to ship jet fuel to the Tampa terminal and not to the final destination.[154] Finally, with respect to factor 11, the Presiding Judge noted that

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[149] *Id.* P 458.

[150] *Id.* P 460 (discussing factor 4).

[151] *Id.* P 458.

[152] *Id.* P 459.

[153] *Id.* P 461.

[154] *Id.* P 459.

the owners of the jet fuel, both the marine suppliers and the Airlines, have the power to divert shipments of jet fuel during all phases of the transportation after the initial movement has begun.

66. The Presiding Judge then discussed the remaining additional factors that supported a finding of a lack of a sufficient break (or at least failed to support the contrary finding). The Presiding Judge mentioned factor 2, the absence of processing activities at the Tampa terminal, as suggesting that "the continuity of transportation is not sufficiently broken."[155] With respect to factor 12, the Presiding Judge identified several practices at Hooker's Point as common practice in the industry.[156] However, the Presiding Judge found that the three main criteria and most of the other factors support a break in the jet fuel transportation continuity, as the jet fuel comes to rest at Hooker's Point. By contrast, the Presiding Judge found that only one additional factor clearly weighs to find no sufficient break in continuity.

67. The Presiding Judge therefore concluded, upon "consideration of all these criteria and factors together, and in light of all of the relevant facts, . . . there is a sufficient break in the continuity of transportation such that the shippers lack a fixed intent to move product interstate."[157]

III. Briefs On and Opposing Exceptions

68. Complainants except to the Presiding Judge's finding that the Airlines' movement of jet fuel over the Central Florida Pipeline is not in interstate commerce. Specifically, Complainants claim that the Initial Decision erred by (1) applying an improper legal standard, restricting its analysis to the *Northville* criteria and factors, thereby reaching a decision inconsistent with precedent; (2) rejecting analysis of Complainants' witness; (3) ignoring evidence of Complainants' fixed and persisting intent to transport fuel in interstate commerce over the Central Florida Pipeline to the Orlando Int'l Airport; (4) concluding that the evidence indicates that there is a break in the continuity of transportation when fuel is delivered; (5) concluding there is no specific order being fulfilled for a specific quantity of fuel to be moved through to a specific destination beyond terminal storage (criterion 1); (6) concluding that Hooker's Point is a distribution point or local marketing facility (criterion 2); (7) finding that transportation of fuel within Florida is arranged only after sale or allocation from storage (criterion 3); (8) declining to

[155] *Id.* P 462.

[156] *Id.* P 463 (discussing commingling, testing before injection into the pipeline, the lack of initial shipper intent as to jet fuel destination and negative inventory balances in storage).

[157] *Id.* P 90.

follow the ICC's 1992 Policy Statement; and (9) finding moot KMLT's claim that it is exempt from jurisdiction as a lessor. Respondents except to the rejection of their motion for summary disposition regarding KMLT's claim that it is exempt from jurisdiction as a lessor because the parties stipulated that the agreement in question is a lease, and they raise one additional exception, that product must "come to rest," before the Presiding Judge can apply the rest of the jurisdictional test to determine a shipper's intent after product is delivered to a terminal, storage facility, or distribution point.

69. As discussed below, Respondents and Trial Staff oppose all of Complainants' exceptions. However, if the Commission finds that transportation of jet fuel on the Central Florida Pipeline is jurisdictional, then Trial Staff agrees with Complainants that KMLT Tampa terminal is providing jurisdictional service.[158]

A. Applicable Legal Standard

Briefs on Exceptions

70. According to Complainants, the Presiding Judge applied an improper standard to evaluate whether the fuel transported over the Central Florida Pipeline is in interstate commerce. Complainants acknowledge the test discussed in *Guttman*, but claim that the Initial Decision is so narrowly focused on whether there is a "break" in transportation at Tampa that it loses sight of the essential inquiry on the "fixed and persisting intent of the shipper" in determining the "essential character of the commerce."[159] Complainants claim that the Presiding Judge failed to explain how the facts justified the conclusion. Complainants describe the analysis as "restricted" and "formalistic," and note that the factors identified in *Northville* and affirmed in *Guttman* may not be determinative.[160]

71. Complainants state that "[t]he factors used in past cases are … only valuable for the jurisdictional inquiry insofar as they help ascertain a shipper's fixed and persisting intent."[161] Complainants cite a number of ICC, Commission, and court determinations

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[158] Trial Staff Brief Opposing Exceptions at 8.

[159] Complainants Brief on Exceptions at 10 (citing *Guttman*, 161 FERC ¶ 61,180 at P 49).

[160] *Id.* at 12-13 (citing *Guttman*, 161 FERC ¶ 61,180 at P 49; *Interstate Energy*, 32 FERC at 61,690; *Northville*, 14 FERC at 61,208; *Determination of Jurisdiction Over Transp. of Petroleum and Petroleum Products By Motor Carriers Within a Single State*, 71 M.C.C. 17, at 29 (1957) (*Petroleum Products*)).

[161] *Id.* at 14.

making a positive finding of interstate transportation, including *Settle*, *Sabine*, *Carson Petroleum*, *Erie*, *Dep't of Defense*, and *Iron & Steel Products*, in a variety of circumstances, as demonstrating that the Presiding Judge failed to properly examine the "essential character" of the commerce.[162]

72. Complainants suggest that the Commission should modernize its approach to follow a policy statement developed by the ICC[163] that addresses whether a shipment of merchandise by motor carrier is in interstate commerce and that was developed after the responsibility for regulating oil pipeline transportation was transferred from the ICC to the Commission.[164]

73. Respondents except to the Presiding Judge's determination that there must be a threshold determination that the jet fuel "comes to rest" at the break in continuity of transportation, before the *Northville* criteria may be applied to determine whether there is a sufficient break in the continuity of transportation to demonstrate that shippers lack a fixed intent to move product interstate, if petroleum products come to rest at a terminal, storage facility, or distribution point. Respondents argue that, under the *Petroleum Products* analysis, the three criteria are used to evaluate whether the product at issue "came to rest" in terminal storage and was therefore intrastate in nature.[165] Respondents acknowledge that this exception has no impact on the ultimate outcome in this case.[166]

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[162] *Id.* at 15-22. *See Baltimore & Ohio Sw. R.R. Co. v. Settle*, 260 U.S. 166 (1922) (*Settle*); *Texas & New Orleans R.R. Co. v. Sabine Tram Co.*, 227 U.S. 111 (1913) (*Sabine*); *Carson Petroleum*, 279 U.S. 95; *U.S. v. Erie R.R. Co.*, 280 U.S. 98, 101-102 (1929) (*Erie*); *Dep't of Defense*, 353 I.C.C. 397; *Iron & Steel Articles from Wilmington, N.C. to Points in North Carolina via General Motor Lines, Inc.*, 323 I.C.C. 740 (1965) (*Iron & Steel Articles*).

[163] *Motor Carrier Interstate Transportation – From Out-of-State Through Warehouses to Points in Same State*, Policy Statement, 8 I.C.C.2d 470 (1992) (1992 Policy Statement).

[164] Complainants Brief on Exceptions at 24, 92.

[165] Respondents Brief on Exceptions at 15-16 (citing *Northville*, 14 FERC ¶ 61,111 at 61,207; *Petroleum Products*, 71 M.C.C. at 29 (stating that the factors "are basically sufficient to establish that the continuity of transportation has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased")).

[166] *Id.* at 14.

Briefs Opposing Exceptions

74. Except for Respondents' contention that the Presiding Judge erred in requiring a threshold determination of the commodity coming to rest, Respondents and Trial Staff assert that the Presiding Judge's analysis is correct under the controlling legal precedent.[167] Trial Staff states that no participant disputes that a break or point of interruption in the transportation occurs at Hooker's Point, justifying an examination under the three *Northville* criteria to determine whether "the interstate journey has ceased at the interruption point such that the shipper does not have a fixed and persisting intent to move product to the ultimate destinations, and the subsequent movement beyond the point of interruption is not part of the larger interstate journey."[168] Respondents object to Complainants' proposed approach as flawed because it relies on the subjective intent of the shipper, demonstrated by the shippers' own representations and the ultimate disposition of the product, which would make consideration of all other factors moot.[169] Trial Staff characterizes Complainants' argument that the Presiding Judge's analysis was overly narrow as a straw man, because Complainants focus on the Presiding Judge's analysis of the *Northville* criteria, while ignoring the detailed analysis of 12 other relevant factors.[170]

75. Trial Staff argues that the Initial Decision's conclusion that transportation of jet fuel on the CFPL pipeline is intrastate in nature is supported by Commission precedent and that Supreme Court and ICC precedent do not require another result. Trial Staff highlights the relevant Commission precedent examining jurisdiction over within-state pipeline movements from terminal storage following an initial marine delivery in interstate or foreign commerce in *Northville*, *Interstate Storage*, and *Interstate Energy*.[171]

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[167] Respondents Brief Opposing Exceptions at 14; Trial Staff Brief Opposing Exceptions at 11-13. *See Atlantic Coast*, 275 U.S. 257, *Guttman*, 161 FERC ¶ 61,180 at P 49; *Interstate Energy*, 32 FERC at 61,690; *Northville*, 14 FERC at 61,208.

[168] Trial Staff Brief Opposing Exceptions at 12 (citing *Guttman*, 161 FERC ¶ 61,180 at PP 50-52, 59-63; *Atlantic Coast*, 275 U.S. at 269; *Northville*, 14 FERC at 61,209; *Interstate Energy*, 32 FERC at 61,691).

[169] Respondents Brief Opposing Exceptions at 18; *see also* Trial Staff Brief Opposing Exceptions at 15.

[170] Trial Staff Brief Opposing Exceptions at 17.

[171] Trial Staff Brief Opposing Exceptions at 19. *See Northville*, 14 FERC at 61,205-206; *Interstate Storage*, 28 FERC at 61,207-208, *aff'g Dep't of Defense*,

Trial Staff further reports that only one Supreme Court or ICC decision has addressed a within-state pipeline movement following foreign or interstate marine movement, namely *Dep't of Defense*.[172] Trial Staff also cites *Atlantic Coast* and *Erie* as available Supreme Court precedent reviewing transportation, by any means, following an initial foreign or interstate marine movement.[173]

76. Respondents oppose Complainants' exception that the Initial Decision is inconsistent with the outcome of certain jurisdictional determinations.[174] Trial Staff states that the cases cited as inconsistent with the Initial Decision are distinguishable in material respects, and fault Complainants for omitting the most relevant Supreme Court precedent, *Atlantic Coast*.[175] Respondents observe that both *Sabine* and *Settle* were issued prior to *Atlantic Coast*, the controlling precedent, and that the other proceedings cited by Complainants—*Erie* and *Carson Petroleum*—are generally contemporaneous with *Atlantic Coast* and demonstrate no indication that they would overrule the approach taken there.[176] Respondents characterize *Settle* as featuring shippers that lacked an intention in good faith to take local delivery at the intermediate point, prior to the within state shipment, but always intended on reshipping to try to save on the difference between the intrastate and interstate rates. Trial Staff characterizes the Supreme Court's holding in *Settle* as finding that objective indicia of intent could be safely disregarded where the shipper admitted, against interest, that the intent was, at all times, to move product through to its final destination.[177]

77. Respondents distinguish *Sabine* as relying on the fact that the goods shipped were at all times owned and controlled by the entity procuring the initial leg of the within state

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353 I.C.C. 397; *Interstate Energy*, 32 FERC at 61,689 (applying *Northville* and distinguishing *Dep't of Defense*).

[172] *Dep't of Defense*, 353 I.C.C. 397.

[173] Citing *Atlantic Coast*, 275 U.S. 257 and *Erie*, 280 U.S. 98.

[174] Respondents Brief Opposing Exceptions at 22. *See* Complainants Brief on Exceptions at 12, 15.

[175] Trial Staff Brief Opposing Exceptions at 21.

[176] Respondents Brief Opposing Exceptions at 24.

[177] Trial Staff Brief Opposing Exceptions at 16.

movement prior to foreign transportation.[178] Respondents characterize the circumstances surrounding the transportation in *Sabine* as being materially different from the movements of jet fuel from Hooker's Point to Orlando because there is no continuity in title or control from the initial transportation to the destination; also, in *Sabine*, there is a possibility of local trade or diversion.[179] Respondents note that in *Carson Petroleum*, the sole purpose of the product was for export and there was no possibility of delivery to local markets.[180] Trial Staff notes that, in *Sabine* and *Carson Petroleum*, the product was moved from the intermediate stopping point as quickly as possible to its final destination once the opportunity arose and advance arrangements strongly indicated an intent for a continuous through movement.[181]

78. Respondents note that in *Erie* either the purchaser or agent had title from the time materials were placed in initial shipment through delivery.[182] Trial Staff and Respondents further distinguish *Erie* from the instant facts, noting that all parties to the transportation in *Erie*, the broker, the mill, and the purchaser, knew the identity of the purchaser and the specific inland destination to which the specific quantity of raw materials procured would be delivered, and shipments were never diverted.[183] Trial Staff cites the findings in the Initial Decision that Valero and Chevron do not know the specific quantity to be delivered to a particular customer when fuel is loaded.[184] Trial Staff notes that the parties to the transaction have the power to divert shipments and change quantities while shipments are in transit and fuel sits at Hooker's Point for days or weeks before being moved over the Central Florida Pipeline, and shipments are not made as quickly as possible, but are dictated by the Airlines' storage constraints at Orlando.[185]

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[178] Respondents Brief Opposing Exceptions at 26.

[179] *Id.* at 28. *See also* Initial Decision at PP 426-435.

[180] Respondents Brief Opposing Exceptions at 29.

[181] Trial Staff Brief Opposing Exceptions at 21-22.

[182] Respondents Brief Opposing Exceptions at 30.

[183] *See* Trial Staff Brief Opposing Exceptions at 22 (citing *Erie*, 280 U.S. at 100-01).

[184] *Id.* at 23 (noting Valero does not designate vessels for Tampa until after they leave port).

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

79. Respondents cite distinguishing facts for *Dep't of Defense* because title at all times was with the Department of Defense, the applicable tariffs assessed a single charge for transportation over barge dock facilities through storage to the base, arrangements for through shipments were made prior to the arrival of fuel at the dock, and the pipeline was primarily designed to serve the Air Force base at the destination.[186] Trial Staff highlights that in *Dep't of Defense*, product was never commingled, so it was always readily ascertainable which batches of oil were destined for the Air Force base.[187]

80. Respondents characterize Complainants' summary of *Iron & Steel Articles*[188] as "superficial," in indicating that the shipper's "whole plan" should be reviewed, as opposed to the individual elements of the transportation from origin to destination. Respondents contest Complainants' focus on a single factor, noting that the reviewing district court upheld the determination based not on isolated factors but on multiple factors that manifest overall intent. Trial Staff adds additional distinguishing facts, noting that the goods in *Iron & Steel Articles* were generally moved "within the 5 days' free time" permitted by the receiving port, whereas the Airlines have procured storage at the delivery terminal to afford them greater flexibility.[189]

81. Respondents object to Complainants' reliance on post-1977 ICC cases and court decisions as not applicable, because jurisdiction over oil pipelines was transferred from the ICC to the Commission in 1977. Consequently, ICC determinations made after 1977 and court orders examining those decisions based on the revised statute apply to other non-pipeline modes of transportation.[190]

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[186] Respondents Brief Opposing Exceptions at 31-32.

[187] Trial Staff Brief Opposing Exceptions at 20.

[188] *Iron & Steel Articles*, 323 I.C.C. at 742, *aff'd sub nom. North Carolina Utilities Comm'n v. U.S.*, 253 F. Supp. 930 (E.D.N.C. 1966) (*NCUC*).

[189] Trial Staff Brief Opposing Exceptions at 24-25. Trial Staff notes that both *Northville*, 14 FERC ¶ 61,111 and *Interstate Energy*, 32 FERC ¶ 61,294 were issued after *Iron & Steel Articles*, lessening the precedential value of the case.

[190] Respondents Brief Opposing Exceptions at 34-35. *See also id.* at 36-38 (distinguishing cases based on factors such as storage in transit provisions, title of goods during through movement, merchandise tracking, knowledge of final destination).

82. Trial Staff notes that the Presiding Judge is bound to apply the Commission's precedent.[191] Trial Staff asserts that there is little reason to believe that the Commission did not already determine in *Northville* and *Interstate Energy* that its approach is consistent with Supreme Court precedent,[192] including the Supreme Court's seminal decision in *Atlantic Coast*.[193] Trial Staff notes that, with the exception of *Carson Petroleum*, the Commission itself, in *Guttman*, relied on the same Supreme Court cases relied on by Complainants.[194]

83. Trial Staff argues that Complainants have failed to demonstrate that the result would be different if the Commission adopted the post-1977 ICC line of cases. For instance, Trial Staff cites two proceedings, *Central Freight* and *International Brotherhood*, where the ICC and reviewing courts placed great weight on the fact that shipments were made pursuant to the carrier's storage-in-transit provision, the requirements of which ensured that shipments were part of a continuous movement.[195] In addition, Trial Staff notes that the ICC and reviewing courts continue to evaluate the intent of the supplier and shipper on the initial leg, rather than the intent of the customer in the destination state. Trial Staff distinguishes the movement in Central Florida as lacking a storage-in-transit provision or similar evidence of supplier intent.

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[191] Trial Staff Brief Opposing Exceptions at 25-26.

[192] *Id.* at 69-70.

[193] *Id.* at 70 (citing *Northville*, 14 FERC at 61,206).

[194] *Id.* (citing *Guttman*, 161 FERC ¶ 61,180 at P 65 (citing *Erie*, *Sabine*, and *Settle*)).

[195] *Id.* at 71-72 (citing *Central Freight Lines v. I.C.C.*, 899 F.2d 413, 420-23 (5th Cir. 1990) (*Central Freight*); *Int'l Brotherhood of Teamsters v. I.C.C.*, 921 F.2d 904, 908-10 (9th Cir. 1990) (*International Brotherhood*); *Armstrong World Indus., Inc., Transp. Within Texas*, 2 I.C.C. 2d 63, 69 (1986) ("The existence of a transit privilege under which the traffic moves, though not dispositive of the issue, is a strong indication of the through character of a movement, and it diminishes the significance of the above factors. … As particularly pertinent here, the Court [in *Settle*] also observed that shipments from a distribution point following an interstate movement are often deemed a separate intrastate movement if the applicable tariffs do not confer reconsignment or transit privileges."); 1992 Policy Statement, 8 I.C.C.2d at 473 (finding a factor indicating a fixed and persistent intent to move goods in interstate commerce is that the "shipments move through the warehouse pursuant to a storage in transit tariff provision")).

B. The Supply Chain Model

Briefs on Exceptions

84. Complainants argue that the Initial Decision erred in rejecting their expert's supply chain model (Arthur model) that sought to demonstrate that inventory levels at the Tampa terminal are indicative of a terminal used merely for the furtherance of transportation from one mode to another—marine to pipeline or truck—not for distribution or long-term storage. Complainants claim that because their supply chain model results are similar to actual inventory levels at the Tampa terminal, this shows that the Airlines transport jet fuel from the Tampa terminal to Orlando Int'l Airport as efficiently as possible.[196]

85. Complainants cite the supply chain model and other evidence in the proceeding and claim that the Presiding Judge ignored or misinterpreted the evidence in reaching her conclusion that transportation over the pipeline is not interstate. Complainants cite the RFP process for seeking offers to supply fuel, the creation of the limited liability company Hooker's Point LLC to provide logistical services for fuel supply to Orlando, and the Storage Agreement as evidence of a corporate structure created and executed to transport fuel from Tampa to Orlando on a continual and consistent basis.[197]

Briefs Opposing Exceptions

86. Trial Staff and Respondents support the Presiding Judge's decision to decline to rely on Dr. Arthur's inter-modal supply chain model. Respondents counter Complainants' suggestion that the Presiding Judge failed to consider it, noting substantial discussion on the model in the Initial Decision and the Presiding Judge's finding that Dr. Arthur failed to provide a convincing explanation for why his oral testimony appeared to contradict written testimony.[198] Respondents also cite the Presiding Judge's findings that the model assumptions are inconsistent with real world facts by failing to account for "seasonal variations, uncertainty in pipeline flows, truck rack withdrawals,

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[196] Complainants Brief on Exceptions at 29.

[197] *Id.* at 47-49.

[198] Initial Decision, 162 FERC ¶ 63,012 at P 231 (comparing statement that uncertainties would add variability at both Hooker's Point and Orlando Int'l Airport storage, with written testimony reporting that, as nominations are adjusted in response to changes in consumption, inflows and outflows from Hooker's Point "would be expected to smooth out").

and variation in consumption" at Orlando.[199] Respondents report other concerns identified by the Presiding Judge, including the fact that the model appears to suggest that the "supply needed" at Hooker's Point was only 1.3 days, rather than the 6-10 day targets supported by witnesses.[200]

87. Trial Staff objects to the model as failing to support Complainants' contention that expanding Orlando storage would not affect Hooker's Point operations.[201] Trial Staff asserts that, if more jet fuel was stored at Orlando, then lower inventory and fewer deliveries would be needed at Tampa.[202] Trial Staff contests Dr. Arthur's conclusion that his model demonstrates that inventory levels at Hooker's Point are the result of the inter-modal supply chain. Trial Staff notes that ASIG recommends to each Airline that it maintain approximately 20 days of fuel, divided between Orlando Int'l Airport and Hooker's Point, including a 6-10 day supply at Hooker's Point, and that the Airlines in fact seek to maintain such supply.[203] Trial Staff states that the fact that the Airlines have chosen to secure most of their storage at Hooker's Point, instead of Orlando Int'l Airport, demonstrates that they maintain inventory there.[204] Trial Staff notes that its witness Mr. Ruckert provided a contrary analysis demonstrating that the Airlines' inventory levels at Hooker's Point are related to insufficient storage at Orlando.[205]

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[199] Respondents Brief Opposing Exceptions at 44; *see also* Initial Decision, 162 FERC ¶ 63,012 at P 239 (footnote referents omitted).

[200] Respondents Brief Opposing Exceptions at 45-47.

[201] Trial Staff Brief Opposing Exceptions at 27 (citing Initial Decision, 162 FERC ¶ 63,012 at PP 229-32).

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

[203] *Id.* at 28 (citing Initial Decision, 162 FERC ¶ 63,012 at PP 166, 207; Ex. S-0027 at 2, 4, 7, 10, 12 (Airline Data Responses)). *See also* Complainants Brief on Exceptions at 40 (noting the tanks only hold, on average less than ten days supply for Orlando Int'l Airport).

[204] *Id.* at 28-29 (citing Initial Decision, 162 FERC ¶ 63,012 at PP 223-24 and noting testimony that Airlines are satisfied with the storage at Orlando). *See id.* at 34 (noting throughput of approximately twice Hooker's Point capacity).

[205] *See* Initial Decision, 162 FERC ¶ 63,012 at PP 236-40; Ex. S-0037 at 65, 71.

C. Intent

Briefs on Exceptions

88. Complainants argue that the Airlines' fixed and persisting intent to transport jet fuel in interstate commerce establishes that the essential character of transportation on the Central Florida Pipeline is interstate.[206] Complainants cite various facts to support their position that the sole purpose in shipping jet fuel to Hooker's Point is to have that jet fuel transported "as efficiently as possible" to Orlando, including the formation of Hooker's Point LLC to provide jet fuel supply services[207] and the negotiation of the Storage Agreement.

89. Complainants note that the average monthly fuel volume flowing through Hooker's Point to the Airlines exceeds the storage capacity of the Hooker's Point tanks.[208] Complainants note minimum shipping volumes and penalties for the pipeline and the efficiencies from ASIG's coordination of the Airlines' shipments as evidence of the Airlines' intent to transport rather than store fuel.[209] Complainants rely on their commercial arrangements, including logistics services from Hooker's Point LLC, the Storage Agreement, ASIG's supply management, pooling and allocation, as evincing a "corporate structure" to transport fuel on a continual and consistent basis to Orlando[210] and that these processes indicate that the Airlines always intend to move particular amounts of jet fuel through Hooker's Point in interstate commerce.[211]

Briefs Opposing Exceptions

90. Trial Staff questions what it claims is a central tenet of Complainants' case, that each individual Airline has the fixed and persisting intent to move jet fuel through Tampa to Orlando over the pipeline in a continuous flow in interstate commerce. Trial Staff notes that Complainants rely on the fuel procurement process for each individual airline

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[206] Complainants Brief on Exceptions at 39.

[207] *Id.*

[208] *Id.* at 40.

[209] *Id.* at 41-42.

[210] *Id.* at 49.

[211] *Id.* at 51. Complainants also cite this evidence as demonstrating a specific order.

as evidence of intent but use total flows for all the Airlines when discussing inventory at Hooker's Point. Trial Staff cites a witness breakdown that shows that individual airline inventory averages vary from 6.5 to 24.6 days, with maximum inventory ranging from 18 to 226 days of supply.[212]

91. According to Trial Staff, the Airlines' use of Hooker's Point as an inventory and distribution point is evidence that the Airlines have no fixed and persisting intent to move jet fuel interstate on the Central Florida Pipeline.[213] Trial Staff expresses skepticism that the agreement forming Hooker's Point LLC to lease storage capacity, or the operations and maintenance agreement providing inventory management services, demonstrate evidence of intent to move product through to Orlando.[214] Trial Staff discounts reliance on the Storage Agreement, despite the throughput and deficiency provisions, as offering little support of intent to move product. Trial Staff characterizes the throughput and deficiency provision as a nullity that has little or no influence on the amount of jet fuel shipped on the pipeline. Trial Staff likewise questions reliance on the Airlines' procurement process because the RFPs are only solicitations and the supply contracts ensure that the supplier has no interest in the ultimate destination of the fuel, beyond delivery at Hooker's Point. Trial Staff states that the Supreme Court in *Atlantic Coast* found fuel transportation intrastate despite the presence of similar supply contracts.[215]

92. Trial Staff claims that Complainants make a number of factual errors and employ disjointed reasoning in their representations concerning inventory levels at Hooker's Point. According to Trial Staff, Complainants' claim that the "Hooker's Point tanks are rarely more than half full"[216] is contradicted by Mr. Ruckert's analysis, which Trial Staff claims is uncontroverted, showing that from January 2012 to February 2017, the daily average inventory at Hooker's Point exceeded 50 percent of useable capacity approximately 67 percent of the time.[217]

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[212] Trial Staff Brief Opposing Exceptions at 35-36; Initial Decision, 162 FERC ¶ 63,012 at P 210; Ruckert Test., Ex. S-0037 at 16, Ex. S-0040.

[213] Trial Staff Brief Opposing Exceptions at 30-36.

[214] *Id.* at 31.

[215] *Id.* at 33 (citing *Atlantic Coast*, 275 U.S. at 267).

[216] *See* Complainants Brief on Exceptions at 40.

[217] Ruckert Test., Ex. S-0037 at 33.

D. Hooker's Point Storage Represents a Break in Continuity

Briefs on Exceptions

93. Complainants contest the Initial Decision's findings that the three *Northville* criteria demonstrate a break in continuity of transportation at the Tampa terminal that is sufficient to establish that the interstate journey has ceased for the marine deliveries of jet fuel.[218] Complainants reason that if the Initial Decision had found differently regarding the three *Northville* criteria, then it should have found that the interstate journey continues.

Briefs Opposing Exceptions

94. Respondents argue that the Commission should reject Complainants' assertion that the Initial Decision erred, both legally and factually, in concluding that there is a break in the continuity of transportation at the Hooker's Point lease tanks.[219] Respondents defend the application of the *Northville* criteria to the facts in the Initial Decision, stating that "the [Initial Decision] appropriately and meticulously applied each of the three factors of [*Northville*] to the facts of this case, many of which are uncontested, and reasonably found that those facts, as a whole, supported a conclusion that there is a break in the interstate movement of jet fuel at the Hooker's Point Leased Tanks sufficient to render any subsequent movements on the CFPL Pipeline intrastate in nature."[220] Respondents fault Complainants' position that they have demonstrated a through movement based on their intention to obtain jet fuel at Orlando, noting that a similar scenario failed to justify a finding of interstate transportation in *Northville*.[221] Trial Staff states that no participant disputes that a break or point of interruption in the transportation occurs at Hooker's Point.[222]

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[218] Complainants Brief on Exceptions at 54.

[219] Respondents Brief Opposing Exceptions at 47.

[220] *Id.*

[221] *Id.* at 49.

[222] *Id.* at 12 (citing *Guttman*, 161 FERC ¶ 61,180 at PP 50-52, 59-63; *Atlantic Coast*, 275 U.S. at 269; *Northville*, 14 FERC at 61,209; *Interstate Energy*, 32 FERC at 61,691).

E. Criterion 1: Through Movement

Briefs on Exceptions

95. Complainants argue that the Initial Decision improperly held that the relevant focus is the supplier's intent at the time the initial movement is made.[223] Complainants argue that the Initial Decision improperly held that the relevant time period for analysis is when jet fuel is loaded onto a vessel, instead of a later time, such as when a ship is directed to Tampa.[224] Complainants contest the Presiding Judge's finding that there is no specific order for a specific quantify of fuel, noting that outside the context of shipping petroleum products from terminal storage, courts have held that it is immaterial whether the initial carrier knew of the disposition of the product or whether delivery volumes matched the contract.[225]

Briefs Opposing Exceptions

96. Respondents assert that the Initial Decision correctly determined that the first factor, that there was no through movement, was met, citing the similarity with the facts in *Atlantic Coast*, where the lack of any subsequent destination fixed in the minds of the sellers was discussed as a significant factor in the analysis.[226] Respondents question Complainants' reliance on the fact that suppliers have some knowledge of the ultimate destination (through the RFP process), arguing that the suppliers are indifferent, do not track the transportation after delivery, do not know what volumes are routed to the pipeline, and do not arrange, invoice or pay for the through movement. Respondents and Trial Staff state that the Initial Decision correctly found that the relevant time of shipment is the time that the vessels are loaded, noting that in *Interstate Energy*, the Commission found that such focus should be "at the time the shipment commences its journey."[227] According to Trial Staff, a fixed and persisting intent is determined from

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[223] *Id.* at 56.

[224] *Id.* at 56-58.

[225] *Id.*

[226] Respondents Brief Opposing Exceptions at 49.

[227] Respondents Brief Opposing Exceptions at 54; Trial Staff Brief Opposing Exceptions at 37-38; *Interstate Energy* at 61,690. *See also Atlantic Coast*, 275 U.S. 257, 267, 269; *Guttman*, 161 FERC ¶ 61,189 at P 56 (finding knowledge of shippers and suppliers relevant).

the time the initial shipment commences, and ample Supreme Court precedent supports this standard.[228]

97. Respondents challenge Complainants' arguments that the Airlines' commercial arrangements establish a through movement. Respondents note that the Initial Decision relied not only, as Complainants acknowledge, upon the fact that the RFPs are not binding agreements but also upon additional facts about the RFPs, which Complainants ignore in their exception, including that the RFPs do not initiate movement of fuel, do not control the amount of fuel loaded on vessel for delivery, and are silent as to when shipments must take place.[229] Respondents cite additional facts supporting a finding that the Airlines' supply contracts are not specific orders, including the fact that the supply contracts reflect only estimates and the fact that deliveries need not match the amount of fuel identified in the contract. Trial Staff objects to Complainants' interpretation of the specific-order requirement as contrary to any reasonable reading of the first *Northville* criteria, claiming that defining *specific order* by reference to the Airlines' supply practices would be spurious.[230]

F. Criterion 2: Character of Storage

Briefs on Exceptions

98. As to the character of storage, Complainants argue that the Initial Decision ignored evidence showing that Hooker's Point is not a storage facility and cannot function as a storage facility, based on evidence of supply levels at the Tampa terminal.[231] Complainants argue that the Initial Decision gave undue weight to and misinterprets the significance of negative inventory levels, suggesting that the Airlines do not borrow or pool jet fuel, but that the practice "works like a bank."[232] Complainants aver that the Presiding Judge placed outsize importance on aberrant events, citing spot sales, swaps, and regular truck deliveries of jet fuel from the Hooker's Point tanks to the regional airports.[233] Complainants argue that the Initial Decision incorrectly concluded

[228] Trial Staff Brief Opposing Exceptions at 41.

[229] Respondents Brief Opposing Exceptions at 55.

[230] Trial Staff Brief Opposing Exceptions at 42.

[231] Complainants Brief on Exceptions at 70.

[232] *Id.* at 78-80.

[233] *Id.*

that the storage capacity at the Tampa terminal is needed to make up for limited capacity at Orlando Int'l Airport, or other constraints.[234]

Briefs Opposing Exceptions

99. Trial Staff and Respondents argue that Complainants' challenge to the Presiding Judge's findings that Hooker's Point is a distribution point or local marketing facility has no merit. Respondents cite largely uncontested facts, including that the tanks were used for inventory and storage, citing testimony to the effect that the tanks are used because they are convenient for providing fuel to Orlando Int'l Airport and the regional airports. Respondents also cite the fact that, although fuel is delivered to Hooker's Point several times a month, it is moved to Orlando as needed to maintain an optimal level there and also as needed to the regional airports.[235] Respondents argue that Complainants failed to distinguish seasonal movements in *Northville* from the facts in this case, which demonstrate that "seasonal buildup and depletion of jet fuel in the Hooker's Point Leased Tanks illustrates that the tanks are used to hold jet fuel in storage until it is needed to meet demand, both current and anticipated, and therefore that such tanks are not used merely as a 'temporary' stopping point."[236]

100. Trial Staff and Respondents assert that the Airlines' reliance on negative fuel balances demonstrates that the Airlines use the tanks as a fuel depot from which the needs of all the Airlines are met[237] and respond to other claims concerning the character of storage in Complainants' exceptions.[238] Trial Staff supports the Presiding Judge's finding that it is obvious that when jet fuel is drawn down from the tanks for an airline that has no physical fuel supply, that airline is clearly borrowing against the inventory pool.[239] Respondents dispute Complainants' concern over the finding that ASIG

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[234] *Id.* at 82, 86.

[235] Respondents Brief Opposing Exceptions at 62; *see also* Trial Staff Brief Opposing Exceptions at 44-49.

[236] Respondents Brief Opposing Exceptions at 69 (citing Initial Decision, 162 FERC ¶ 63,012 PP 219-21 and testimony); *see also* Trial Staff Brief Opposing Exceptions at 54.

[237] Respondents Brief Opposing Exceptions at 70-71; Trial Staff Brief Opposing Exceptions at 58.

[238] Trial Staff Brief Opposing Exceptions at 49-66.

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

allocates the fuel in a given delivery among the Airlines when received, citing Chevron's claim that it delivers jet fuel in bulk to Tampa and that no portion of the delivery is destined for a particular Airline at the time of shipment.[240]

G. Criterion 3: Transportation in Furtherance of Distribution

Briefs on Exceptions

101. As to the third criterion, Complainants claim that transportation is specifically arranged through to its ultimate destination prior to terminal storage, citing the Airlines' nominations for shipments on the pipeline through ASIG.[241]

Briefs Opposing Exceptions

102. Trial Staff contests Complainants' argument that their supply and shipping nominations process shows that transportation of jet fuel on the pipeline is "specifically arranged" before the jet fuel enters Hooker's Point, because the RFPs do not provide for delivery beyond Hooker's Point and the ASIG nominations are not binding.[242] Trial Staff argues that the Presiding Judge's finding that transportation beyond Hooker's Point is only specifically arranged when ASIG submits a final pipeline nomination is supported and consistent with precedent.[243]

103. Respondents likewise argue that the Airlines cannot rely on their procurement process as an allocation through to the airports, because the monthly nominations are based on estimates and receipts vary from the nominations.[244] Respondents contest the position that the RFP documents provide evidence of an intent to move fuel to Orlando because these arrangements are not specific orders for delivery of a specific quantity of fuel to Hooker's Point, much less to any airport. Respondents dispute whether the pipeline nominations constitute a specific order for downstream transportation, noting

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[240] Respondents Brief Opposing Exceptions at 79 (citing deposition); *see also* Trial Staff Brief Opposing Exceptions at 56-57.

[241] Complainants Brief on Exceptions at 89.

[242] Trial Staff Brief Opposing Exceptions at 67.

[243] *Id.* at 68 (discussing *Atlantic Coast*, 275 U.S. at 267, 269; *Carson Petroleum*, 279 U.S. 95, 99; *Interstate Energy*, 32 FERC ¶ 61,294). *See also* Initial Decision, 162 FERC ¶ 63,012 at P 328.

[244] Respondents Brief Opposing Exceptions at 82.

that the nominations are for fuel currently in the tanks; they are not connected to the RFP or supply contracts.[245] In particular, Respondents cite the arrangements for truck deliveries to the regional airports, which are made by regional airport fixed-base operators, noting that the Airlines are not involved in those decisions.

H. Whether Subsidiary Issue is Moot

Briefs on Exceptions

104. Complainants argue that the Initial Decision erred in finding the question of jurisdiction for KMLT's terminaling services moot, stating that if the pipeline transportation is jurisdictional then the Tampa terminal is as well.[246]

105. Respondents except to the Presiding Judge's findings that there are disputed issues of material fact that precluded summary disposition on the issue whether the Storage Agreement was a lease.[247] Respondents claim that the issue of whether the Storage Agreement is a lease is not in dispute because Complainants have "stipulated to numerous facts that are predicated on the agreement being a lease" and referred to the agreement as a lease in pleadings and testimony.

Briefs Opposing Exceptions

106. Respondents reassert their position on exceptions that the Commission should find that the Hooker's Point tanks are not jurisdictional because they are leased to the Airlines through the Storage Agreement.[248]

107. Trial Staff supports the Presiding Judge's determination that the issue is moot, but states that if the Commission finds that service on the Central Florida Pipeline is interstate, it should also find that the KMLT Tampa terminal is providing service subject to the Commission's jurisdiction, citing the use of the tanks as inventory and distribution to several airports and stating that the tanks serve a breakout function and are therefore necessary and integral to the transportation service.[249] Trial Staff asserts that the Commission should find that the Hooker's Point lease is a lease and, if service is

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[245] *Id.* at 83.

[246] Complainants Brief on Exceptions at 98.

[247] Respondents Brief on Exceptions at 6.

[248] Respondents Brief Opposing Exceptions at 85.

[249] Trial Staff Brief Opposing Exceptions at 72-73.

jurisdictional, that the relationship between KMLT and Complainants is as lessor-lessee, not carrier-shipper.

IV. Discussion

108. As discussed below, the Commission affirms the Presiding Judge's determinations as to the jurisdictional issue and dismisses the Complaint. The Commission affirms the Presiding Judge's finding that the facts reflect a sufficient break in the continuity of transportation such that the service provided over the Central Florida Pipeline is intrastate in nature. On that basis, as elaborated more fully in the Initial Decision, the Commission denies the Complaint and finds no need to direct Respondents to file a tariff or cost-of-service rates; the Commission likewise rejects Complainants' remaining requests for remedies under the ICA.

A. The *Northville* Test

109. The Commission affirms the Presiding Judge's application of the methodology the Commission recently affirmed in *Guttman* for review of jurisdictional issues. Under that methodology, the Commission presumes that "all interstate movements are jurisdictional" unless the facts show a "sufficient break" in the continuity of transportation to demonstrate that shippers lack a fixed and persisting intent to transport product interstate.[250] We find the Presiding Judge's review and analysis of the facts presented at hearing and her application of the Commission's methodology to be thorough and adequately supported on the record.[251]

110. As the Commission explained in *Guttman*, the *Northville* criteria "look to the factual nature of the break in transportation as indicia of a shipper's [lack of intent] to continue the movement beyond storage as part of a larger, interstate movement."[252] We affirm the centrality of the *Northville* criteria as set forth in *Guttman*, stating:

> A sufficient break in interstate transportation may be shown if the product comes to rest at a terminal, storage facility, or distribution point, and –
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> (1) [a]t the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved

[250] *Guttman*, 161 FERC ¶ 61,180 at P 49 (citing *Texaco*, 80 FERC at 61,805).

[251] *Id.* P 50; *Northville*, 14 FERC at 61,207; *Interstate Energy*, 32 FERC at 61,690.

[252] *Guttman*, 161 FERC ¶ 61,180 at P 50.

> through to a specific destination beyond the terminal storage, (2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (3) transportation in the furtherance of this distribution within the single state is specifically arranged only after sale or allocation from storage.[253]

111. We affirm again, as the Commission did in *Guttman* and *Interstate Energy,* that these three criteria "are basically sufficient to establish that the continuity of transportation has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased."[254]

112. In the Initial Decision, the Presiding Judge correctly applied the Commission's precedent and correctly found a "sufficient break" in the continuity of transportation.[255] The Presiding Judge correctly found that not only does the jet fuel come to rest, within the meaning of the test, but also the circumstances relating to the jet fuel movements following storage satisfy the three criteria and thus demonstrate a sufficient break in continuity to establish that the movements out of storage were intrastate transportation.

113. In doing so, the Presiding Judge correctly found that no marine supplier is filling specific orders for specific quantities of jet fuel to be moved to any through destination (criterion 1),[256] the Hooker's Point tanks serve as a point of distribution from which

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[253] *Id.* (citing *Interstate Energy*, 32 FERC at 61,690 and *Petroleum Products*, 71 M.C.C. at 29). The Commission found the shipment in *Guttman* to be interstate transportation based on the lack of "non-operational storage," tankage or marketing activities at the place where interstate transportation was alleged to have ceased. *See id.* PP 59-60.

[254] *Id.* P 50 n.111 (citing *Interstate Energy*, 32 FERC at 61,690 and *Petroleum Products*, 71 M.C.C. at 29; also citing *Texaco*, 80 FERC at 61,804 as noting that "the courts, the [ICC], and this Commission have held that jurisdiction may not attach when the continuity of interstate transportation ends at a terminal or storage facility so that some portion of the transportation can be considered intrastate").

[255] *Guttman*, 161 FERC ¶ 61,180 at P 49 (citing *Texaco*, 80 FERC at 61,805).

[256] Initial Decision, 162 FERC ¶ 63,012 at P 450; *see also Interstate Energy*, 32 FERC at 61,291: "Since the oil is commingled, there is no designation of any particular oil for any particular place within the State beyond the storage facilities into which the oil is first delivered by the ocean-going vessels and barges," (citing *Atlantic Coast*, 275 U.S. at 269).

specific amounts of jet fuel are allocated for transportation to Orlando and the regional airports (criterion 2), and that transportation on the Central Florida Pipeline is not specifically arranged until after marine shipments are delivered to the Tampa terminal and after ASIG has allocated the jet fuel to be shipped from storage (criterion 3).[257] The Presiding Judge correctly determined that each of these findings weighs towards the conclusion that the continuity of foreign or interstate fuel transportation is sufficiently broken when the fuel comes to rest at Hooker's Point to negate the presumption that the subsequent pipeline movement is interstate transportation.[258]

114. Satisfying the three *Northville* criteria is sufficient to establish that the interstate transportation has ended.[259] Nevertheless, the Presiding Judge examined the 12 other factors discussed in *Guttman*.[260] Overall, these other factors support our finding that the continuity of transportation is sufficiently broken to support a finding that the movements over the Central Florida Pipeline are in intrastate commerce, and thus not jurisdictional.

115. As for factors that the Presiding Judge cited as weighing against a finding that the continuity of transportation is broken, such as the fact that jet fuel is not processed in storage[261] at the Hooker's Point tanks and the handling of the jet fuel at Hooker's Point as a single pool, the Presiding Judge noted that these are consistent with general practices and customs prevailing in the industry, such as commingling, testing in the tanks, lack of intent of the marine shippers to deliver to the ultimate destination, and permitting

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[257] Initial Decision, 162 FERC ¶ 63,012 at P 455.

[258] *Id.* PP 450, 454, 455.

[259] *Id.* P 456; *Northville*, 14 FERC at 61,207; *Petroleum Products*, 71 M.C.C. at 29; *Hydrocarbon Trading and Transp. Co., Inc. v. Texas Eastern Transmission Corp.*, 26 FERC ¶ 61,201, at 61,471 (1984) (*Hydrocarbon Trading*); *Interstate Energy*, 32 FERC at 61,690.

[260] Initial Decision, 162 FERC ¶ 63,012 at PP 457-67 (citing *Guttman*, 161 FERC ¶ 61,180 at P 52).

[261] The existence of processing at a potential point of a break in the chain of transportation may support finding a break in transportation. *Jet Fuel by Pipeline Within the State of Idaho,* 311 I.C.C. 439 (1960) (finding lateral pipeline connected to terminal storage facility for the storage and processing of jet fuel to be intrastate fuel which had to be filtered and processed and stored for testing before it was accepted and shipped) (*Jet Fuel*). *But cf. Atlantic Coast*, 275 U.S. at 262 (finding transportation subsequent to terminal storage delivery from foreign and interstate supply to be intrastate and noting that shipper does not does not produce or refine petroleum products).

negative inventory.[262] The Presiding Judge found that the jurisdictional analysis would not fail to consider a factor simply because the factor results from prevailing industry practice rather than a shipper's individual choice. The Presiding Judge also provided a hypothetical counter-example, noting that if processing of the jet fuel were a significant factor in finding a break in transportation, the fact that processing was a common industry practice in the area would not negate the significance given to this fact in holdings relying on that factor.[263] We affirm the Initial Decision on these points.

116. Thus, the Presiding Judge's findings that CFPL's pipeline shipments are properly classified as intrastate are supported by a thorough and comprehensive examination of the issues identified by the Commission as relating to the jurisdictional question and a thoughtful weighing of the factual findings relating to those issues.[264]

B. Issues Raised on Exceptions

117. On exceptions, Complainants argue that the Presiding Judge erred in finding that in-state transportation by CFPL of products delivered to the Airlines at Hooker's Point is intrastate in character. As discussed below, we affirm the Presiding Judge's findings supporting the determination that the shipments are intrastate, finding that Complainants have failed to raise any issue that would call into question the Presiding Judge's determination.

1. The *Northville* Criteria

118. On exceptions, Complainants object to what they characterize as analysis improperly restricted to the "formulaic" three *Northville* criteria. Complainants assert that *Guttman* and Supreme Court precedent indicate that the decision-maker should focus on the intent of the shipper. Complainants raise a "forest for the trees" argument and object to the Presiding Judge's analysis as "attempting to fit the facts" into the three

[262] Initial Decision, 162 FERC ¶ 63,012at PP 462-63.

[263] *Id.* P 467 n.987 (citing *Jet Fuel*, 311 I.C.C. at 442-43 as a proceeding relying on the presence of processing as a "primary reason" for finding a break in transportation). The U.S. Energy Information Administration reports no refining activity in Florida. https://www.eia.gov/dnav/pet/pet_pnp_cap1_dcu_SFL_a.htm.

[264] *Id.* P 470.

Northville criteria originally described in *Petroleum Products*,[265] and the 12 other factors identified in *Northville*.[266]

119. According to Complainants, the analysis should revolve around the "fixed and persisting intent" of the shippers, arguing that "[t]he factors used in past cases are therefore only valuable for the jurisdictional inquiry insofar as they help ascertain a shipper's fixed and persisting intent."[267] Complainants acknowledge however that "[t]he fixed and persisting intent" can only be "'ascertained from all the facts and circumstances surrounding the transportation.'"[268]

120. According to Complainants, the Presiding Judge refused to look at the totality of facts by "focusing unduly on the form of transaction and accidents of transportation."[269] Complainants claim that the Presiding Judge misunderstood the test in *Guttman* and should have especially considered "evidence indicating the fixed and persisting intent of the parties directing the transportation."[270]

Commission Determination

121. With respect to Complainants' assertion that the Presiding Judge applied the wrong legal standard by failing to focus on the "fixed and persisting intent" of the shipper in determining the "essential character of the commerce," we disagree and find that the Presiding Judge applied the correct legal standard as identified in the applicable precedent. We further find that focusing on the fixed and persisting intent of the shipper and the essential character of the commerce is precisely what is accomplished by applying the *Northville* criteria. Essentially, Complainants are arguing that the Presiding Judge should have weighed all the relevant factors as Complainants would and, moreover, should have used factors in the ICC 1992 Policy Statement as precedent rather than this Commission's precedent in assessing the relevant criteria to determine the

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[265] Complainants Brief on Exceptions at 12 (citing *Petroleum Products*, 71 M.C.C. at 29; *Interstate Energy*, 32 FERC at 61,690). *See* Initial Decision, 162 FERC ¶ 63,012 at PP 90-330.

[266] Complainants Brief on Exceptions at 12 (citing *Northville*, 14 FERC at 61,207).

[267] *Id.* at 14.

[268] *Id.* (citing *Hydrocarbon Trading,* 26 FERC at 61,471; *Petroleum Products*, 71 M.C.C. at 29)).

[269] *Id.* at 14-15.

[270] *Id.* at 15.

nature of the Hooker's Point storage and the intent of the parties. Lacking that, Complainants argue that the Presiding Judge misapplied this Commission's jurisdictional assessment factors, as recently affirmed in *Guttman*.

122. We disagree with Complainants' further contentions that the Presiding Judge's conclusions are inconsistent with her acknowledgement of (1) the Airlines' "overarching intent to ship jet fuel from [out-of-state locations] to the Orlando Airport and other Regional Airports" and (2) the supply chain having been "developed to effectuate the movement of jet fuel in the most efficient and economically practical way to the airports they service." These are not points of factual contention and they do not address jurisdiction of the transportation service provided by the Pipeline. The Airlines accomplish their overarching intent to supply their planes at Orlando Int'l Airport and the Regional Airports through two distinct movements: a foreign or interstate marine movement to the Tampa terminal and an intrastate movement from the Tampa terminal by pipeline or truck. There is no inconsistency in the Presiding Judge's acknowledgement of the shippers' overarching intent of supplying planes at Orlando Int'l Airport from out-of-state sources moving through the Tampa terminal with her finding that the facts show a sufficient break in transportation at the Tampa terminal to demonstrate that shippers on CFPL lack a fixed and persisting intent to transport product interstate. The satisfaction of the *Northville* criteria establishes that the overall movement from distant origins to Orlando is accomplished in two physically distinct movements of different legal characters.

123. As reflected in the Initial Decision, under the ICA, the Commission has jurisdiction over common carriers engaged in transportation of oil by pipeline in interstate commerce.[271] On exceptions, Complainants acknowledge that, under our applicable precedent, *Guttman*, *Interstate Energy*, and *Northville,* the issue of whether a movement is interstate or intrastate for purposes of ICA jurisdiction "depends upon the essential character of the movement."[272] This issue is to be determined based on a

[271] 49 U.S.C. app. § 1(1).

[272] *Guttman*, 161 FERC ¶ 61,180 at P 49 (citing *Settle*, 260 U.S. at 170; *see also Atlantic Coast*, 275 U.S. at 268 ("The question of whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character."); *Erie*, 280 U.S. at 101-02 ("the nature of the shipment is not dependent upon the question when or to whom the title passes. It is determined by the essential character of the commerce.") (citations omitted)); *see* Complainants Brief on Exceptions at 13; Trial Staff Brief Opposing Exceptions at 11.

fact-specific analysis.[273] We find that the Presiding Judge ably performed this difficult analysis and reached the correct conclusion. The Commission's approach has been developed and applied in a number of cases, and is consistent with the regulatory framework of both the ICA and the Energy Policy Act of 1992. The Presiding Judge correctly chose and carefully applied the Commission's own methodology in this case in reaching her conclusions. Complainants have failed to justify why the Commission should disregard its applicable precedent and adopt another agency's tests.

124. Complainants suggest that, if the Presiding Judge gave proper consideration to the persisting intent of the shipper, the result of the inquiry would go the other way. We disagree. The Presiding Judge not only applied the Commission's precedent by making an exhaustive review of the three *Northville* criteria and twelve other factors but also compared the facts in this proceeding to prior determinations of whether within-state movements that follow marine transportation to port terminal storage are interstate or intrastate, chiefly, *Atlantic Coast*, *Interstate Energy* and *Northville*, finding within-state movements following port-side terminal delivery to be intrastate transportation, and *Dep't of Defense*, finding movement after delivery to port-side terminal to be interstate transportation.[274] Thus, although the Initial Decision reflects an issue-by-issue discussion of the facts as developed at hearing, as is consistent with the Presiding Judge's function to weigh exhibits and testimony in order to engage in the fact-finding function, we do not agree that the Presiding Judge thereby lost sight of the big picture or the overall intent of the shippers. Clearly, the airline shippers intend to use jet fuel in their planes; however they also use the Tampa terminal from time to time as a distribution point for purposes other than immediate transport to Orlando Int'l Airport. These other intents are also present here. By comparing the facts in this proceeding to those supporting the determinations in the applicable precedent, the Presiding Judge thoroughly considered all the various facts bearing on the intent of the shippers. We therefore disagree with Complainants that the Presiding Judge's fact intensive approach was improper.

125. The issue in this proceeding is whether there has been a "sufficient break" in the continuity of transportation to demonstrate that shippers moving product through these

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[273] *Guttman*, 161 FERC ¶ 61,180 at P 49 (citing *Texaco*, 80 FERC at 61,804 ("The determination of jurisdiction under the ICA depends on the specific facts of the individual case."); *see also Atlantic Coast*, 275 U.S. at 268-69 ("the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it.")) *See also* Complainants Brief on Exceptions at 16 ("Complainants do not argue that the Presiding Judge should not have considered the specifics of transportation.").

[274] *Dep't of Defense*, 353 I.C.C. at 408-09.

lines do not have a fixed intent to move product interstate.[275] The Presiding Judge's analysis confirms that delivery at the Hooker's Point tanks represents "a break in the interstate transportation . . ., such as at a terminal, storage facility, or distribution point" as required by the Commission in *Guttman*.[276] Applying the analysis recently affirmed by the Commission and reviewing the facts according to the *Northville* criteria, the Presiding Judge determined that the shippers, ASIG and the Airlines use the Hooker's Point facilities as a point of inventory and non-operational storage, as did the shippers in *Northville*[277] and *Interstate Energy*.[278] Thus, the Presiding Judge did not review the *Northville* criteria and other factors in a vacuum. Complainants' suggestion that the fixed and persisting intent of the shippers should prevail is not a successful challenge to the Presiding Judge's holdings, because determining the persisting intent of the shippers is the focus of the *Northville* analysis itself. In applying this analysis, the Presiding Judge found that the shippers have an intent to take delivery of the jet fuel at port-side terminal storage in order to commence intrastate distribution type activities, including the allocation, trading activity, distribution maintaining inventory and accommodating

[275] *Guttman*, 161 FERC ¶ 61,180 at P 49; *Texaco*, 80 FERC at 61,805.

[276] *Guttman*, 161 FERC ¶ 61,180 at P 60. In relying on the Commission's subsequent clarification in *Guttman* of what is needed to establish a break in the transportation, we recognize that this factual finding does not require a determination that the oil "comes to rest," or ceases moving, as suggested by some participants in this proceeding. *See Atlantic Coast*, 275 U.S. at 271 (finding the fact that oil may be discharged into terminal storage "at the same time" as it is delivered into cars for distribution "not at all inconsistent with its being a closing of an interstate or foreign transportation and a beginning of intrastate distribution for the purposes and business of the plaintiff"); *Texaco*, 80 FERC at 61,804 (citing holdings that interstate transportation may end "at a terminal or storage facility so that some portion of the transportation can be considered intrastate"). As noted elsewhere, the three criteria themselves are the test for whether a product comes to rest sufficient to demonstrate a break in transportation. *See* Trial Staff Brief Opposing Exceptions at 14; Respondents Brief Opposing Exceptions at 4, 13-20.

[277] Initial Decision, 162 FERC ¶ 63,012 at P 202 (citing *Northville*, 14 FERC at 61,208 as finding that LILCO used the port storage terminal as a "point of inventory and storage," used to maintain inventory and not to meet existing requirements).

[278] *Id.* P 294.

seasonal demand at the Orlando Int'l Airport. Consequently, as in *Atlantic Coast*,[279] the shippers' intent to take delivery and commence intrastate operations represents a break in the continuity with the prior interstate or foreign marine transportation sufficient to establish that the interstate transportation leg has ended.

126. The Commission's approach in *Interstate Energy* is illustrative.[280] There, applying the *Northville*[281] criteria from *Petroleum Products*,[282] the Commission compared and contrasted its precedent in *Northville* and *Dep't of Defense*. For *Northville*, the Commission cited the facts in *Northville*, with deliveries to a port storage terminal from marine transportation to tenants who had the option to ship the oil by pipeline, truck, or subsequent marine shipment in furtherance of a distribution system or, in the case of LILCO, delivery by pipeline for consumption at its inland generation station.[283] The Commission noted the finding in *Northville* that certain shippers' business was local distribution of oil and the port-side storage tanks were used to maintain inventory, while the LILCO situation was more difficult because LILCO consumed the oil for its generator operations. Nevertheless, the Commission was persuaded that LILCO used the port-side terminal tanks as a point of inventory and storage, with separate arrangements for terminal and inland delivery, and the withdrawals were characterized as being made to accommodate LILCO's seasonal demand.[284]

127. The Commission in *Interstate Energy* noted the similarities in that proceeding to the facts in *Northville*. In *Interstate Energy* the local utility arranged for oil to be brought into port-side storage on a commingled basis, and the pipeline operator scheduled terminal storage withdrawals based on the local utilities' monthly oil requirements, with no through billing linked to the original deliveries. Based on these facts, the Commission

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[279] *Atlantic Coast*, 275 U.S. at271 (describing delivery of oil at port terminal for distribution within state "a closing of an interstate or foreign transportation and a beginning of intrastate distribution for the purposes and business of the plaintiff").

[280] *Interstate Energy*, 32 FERC ¶ 61,694. *See* Initial Decision, 162 FERC ¶ 63,012 at P 294.

[281] Initial Decision, 162 FERC ¶ 63,012 at P 202 (citing *Northville*, 14 FERC at 61,208).

[282] *Petroleum Products*, 71 M.C.C. 17.

[283] *See Interstate Energy*, 32 FERC ¶ 61,294 at 61,690-91 (noting lack of through arrangements).

[284] *Id.*

found that the continuity of interstate transportation appeared to be broken at the port-side terminal storage according to the first and third of the *Northville* criteria.[285] The Commission distinguished *Dep't of Defense* on its facts, including that storage was not port-side but midway between the dock and the inland destination and that the pipeline in that case was designed mainly to serve a single shipper, the McGuire Air Force Base, fuel was never commingled, and it was always readily ascertainable which fuel batches were destined for the shipper.[286] Furthermore, through movements appear to have been arranged prior to the delivery at terminal storage and both movements were made under a single charge.

128. In the current proceeding, the movements of jet fuel through Hooker's Point share many of the essential characteristics of the movements in *Interstate Energy* and *Northville* and are more similar to the intrastate movements than to the essential features that were found significant in *Dep't of Defense*. The movements here do not reflect a coordinated scheme to supply oil to a single shipper, and they lack through billing or advance arrangements to move the jet fuel past its initial delivery at the Hooker's Point terminal storage. Furthermore, the initial port terminal storage at Hooker's Point is used as a point of allocation, inventory, and storage from which drawdowns are made to meet seasonal demand. Thus, as in *Interstate Energy*, all the common factors, except length of storage, point to a finding that the movement is intrastate in character.

2. Comparison to Other Determinations

129. In keeping with their argument that the Presiding Judge should have focused on the general scheme, rather than "the specific process by which a pipeline is nominated," Complainants cite a number of cases that they claim "cannot be reconciled" with the Initial Decision, or that would come out differently if the Presiding Judge's analysis were applied to the facts in those proceedings.[287] Complainants cite *Settle*,[288] *Sabine*,[289]

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[285] *Id.*

[286] *Id.* at 61,691-92.

[287] Complainants Brief on Exceptions at 16-18.

[288] *Settle*, 260 U.S. 166.

[289] *Sabine*, 227 U.S. 111.

Carson Petroleum,[290] *Erie*,[291] *Dep't of Defense*[292] and *Iron and Steel Articles*[293] as being inconsistent with the Initial Decision.

130. According to Complainants, Supreme Court precedent, beginning with *Settle* in 1922, made plain a tendency to broaden the scope of transportation as it respects the interstate jurisdictional character. Complainants object to the Presiding Judge's failure to consider the 1992 Policy Statement created by the ICC's Surface Transportation Board, developed to address whether shipment of merchandise by for-hire motor traffic is jurisdictional considering the "fixed and persisting intent" of the shipper.[294] Complainants note the Presiding Judge's finding that the approach taken in the Initial Decision is not consistent with that taken in the ICC's 1992 Policy Statement and admonish the Commission to "modernize" its approach and adopt the analysis in the 1992 Policy Statement.[295] Complainants acknowledge that ICC decisions and related court cases issued after the Commission was established in 1977 are not binding precedent, but state that such precedent can inform the Presiding Judge and assist in the analysis of the facts and law. Complainants characterize the Presiding Judge's failure to follow them as "egregious," because the Presiding Judge recognized the split in precedent and allowed that applying the other analysis may have changed the outcome of this proceeding.[296]

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[290] *Carson Petroleum*, 279 U.S. 95.

[291] *Erie*, 280 U.S. 98.

[292] *Dep't of Defense*, 353 I.C.C. 397, *aff'd Interstate Storage*, 28 FERC at 61,207-08.

[293] *Iron & Steel Articles*, 323 ICC 740.

[294] Complainants Brief on Exceptions at 24. *See* 1992 Policy Statement, 8 I.C.C.2d 470.

[295] Initial Decision, 162 FERC ¶ 63,012 at P 474 (citing 1992 Policy Statement, 8 I.C.C. 2d 470).

[296] Complainants Brief on Exceptions at 26 (citing Initial Decision, 162 FERC ¶ 63,012 at P 501, referencing *Advantage Tank Lines, Inc.*, 10 I.C.C.2d 64 (1994) (finding movements interstate based on bills of lading stating "Continuous Interstate Shipment," refiners' knowledge of specific subsequent destinations to affiliated service stations, competitors' stations and the facilities of non-affiliated retailers, and fact that gasoline only rested for a relatively short time)).

Commission Determination

131. The Commission disagrees with Complainants that, in light of the cited precedent, the Presiding Judge's conclusions were in error or that precedent requires a different result. Below, we analyze Complainants' interpretation of the cited precedent and harmonize or distinguish the current proceeding from those cases.

132. Trial Staff notes that this Commission has examined the jurisdictional status of within-state pipeline movements from terminal storage following an initial marine delivery in interstate or foreign commerce on only three prior occasions, *Northville*, *Interstate Storage,* and *Interstate Energy*.[297] Trial Staff further reports that it is aware of only one Supreme Court or ICC decision involving a pipeline movement within a single state following an initial foreign or interstate marine movement, namely *Dep't of Defense*.[298] Trial Staff highlights the limited scope of Supreme Court precedent regarding transportation, by any means, following an initial foreign or interstate marine movement, citing only *Atlantic Coast* and *Erie*.[299]

133. The factual circumstances in this proceeding closely match the facts in the precedent cited by Trial Staff and discussed in the preceding paragraph and the facts in the inquiry resulting in the ICC's *Petroleum Products* determination. Those proceedings are concerned with or relevant to transportation entirely within one state following an initial marine shipment to port terminal storage. Of the cases cited by Trial Staff that most closely match the facts at hand, Complainants cite only *Erie* and *Dep't of Defense* to support their claim that the Presiding Judge failed to address the relevant precedent regarding whether movements over the Central Florida Pipeline are a continuation of the interstate and foreign transportation occurring to deliver jet fuel to the Hooker's Point terminal.

134. The fact that Complainants cite precedent from other fact patterns is significant, because determinations of intrastate and interstate transportation under different statutes and using different means of transportation may reflect differing policies and priorities in

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[297] Trial Staff Brief Opposing Exceptions at 19. *See Northville*, 14 FERC at 61,205-206; *Interstate Storage*, 28 FERC ¶ 61,120 at 61,207-08, *aff'g Dep't of Defense*, 353 I.C.C. 397; and *Interstate Energy*, 32 FERC at 61,689 (applying *Northville* and distinguishing *Dep't of Defense*).

[298] *Dep't of Defense*, 353 I.C.C. 397.

[299] Trial Staff Opposing Brief at 19 (citing *Atlantic Coast*, 275 U.S. 257 and *Erie*, 280 U.S. 98).

regulating the particular activity under consideration.[300] We note that the Court in *Atlantic Coast* cited *Sabine* and *Settle*—which Complainants relied upon—in its decision to find transportation within Florida to be intrastate, when various petroleum products were delivered by tank and rail car following delivery to terminal storage near the port of delivery.

135. In *Atlantic Coast*, the Supreme Court examined a factual scenario that also closely resembles the facts in this case. In that case, Standard Oil Co. sought a judgment against the Atlantic Coast Line Railroad Company finding that the transportation of gasoline, refined oil, lubricating oil, and fuel oil from Port of Tampa, Tampa, and Jacksonville to other points in Florida should be made at intrastate rates. The Court agreed, citing the additional facts that oil products were received from marine shipments and delivered into local storage located near the point of delivery, where title was transferred. Thereafter, Standard Oil's products were distributed to 123 local "bulk stations" located throughout Florida, from which the oil products were further distributed to service stations and Standard Oil's customers by tank wagon.[301]

136. Based on these circumstances, the Court held that the subsequent movements of the oil products from storage near the ports of delivery at Tampa, Port of Tampa and Jacksonville were *intra*state, stating:

> It seems very clear to us on a broad view of the facts that the interstate or foreign commerce in all this oil ends upon its delivery to the plaintiff into the storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars, bulk stations, and drive in stations, or directly by tank wagons to customers, is all intrastate commerce. This distribution is the whole business of the plaintiff in Florida. There is no destination intended and arranged for with the ship carriers in Florida at any point beyond the deliveries from the vessels to the storage tanks or tank cars of the plaintiff. There is no designation of any particular oil for any particular place within Florida beyond the storage receptacles or storage tank cars into which the oil is first delivered by the ships. The title to the oil in bulk

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[300] *See Dep't of Defense*, 353 I.C.C. at 404: "Motor, railroad and other modal regulation often differ in character and degree, not only because they are frequently administered under different provisions of the act, but also because of differences in their operations and in regulator objectives."

[301] *Atlantic Coast*, 275 U.S. at 263-64.

> passes to the plaintiff as it is thus delivered. When the oil reaches these storage places along the Florida seaboard, it is within the control and ownership of the plaintiff for use for its particular purposes in Florida. The plaintiff is free to distribute the oil according to the demands of its business, and it arranges its storage capacity to meet the future variation in its business needs at [portside delivery points].[302]

137. While not identical in all regards, these facts are indeed surprisingly similar to the facts in the instant proceeding, in which a petroleum product, in this case jet fuel, is delivered by marine vessel to portside storage, where it is allocated (in this case among several owners), for distribution, generally to operational storage. In this proceeding, the operational storage supported airline operations at the Orlando Int'l Airport, whereas in *Atlantic Coast* the storage supported supply of service stations and other retail sales.

138. The Court in *Atlantic Coast* did not find that its determination was inconsistent with the earlier cases *Sabine* and *Settle*, as Complainants' argument would suggest, but instead stated: "These cases are illustrations to show that the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it."[303] Likewise, we agree with the observation by Respondents that the other proceedings cited by Complainants—*Erie* and *Carson Petroleum*—demonstrate no indication that they would overrule the approach taken in *Atlantic Coast*.[304]

139. Keeping in mind that each proceeding is to be examined on its specific facts, we find that the cases cited by Complainants as supporting a finding of a continuation of interstate transportation are distinguishable.

140. Complainants point to *Sabine* as an instance in which the Court held that the transportation was interstate, citing the Court's justification that "[i]t was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and [therefore] to give it a various character by the steps in its transportation would be extremely artificial."[305] Complainants claim that the Court reached its decision even though the initial carrier did not know the ultimate destination of the lumber at issue in that case and there were separate bills of lading for the initial intrastate movement and

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[302] *Id.* at 267-68.

[303] *Id.* at 268-69.

[304] Respondents Brief Opposing Exceptions at 24.

[305] *Sabine*, 227 U.S. at 126.

subsequent foreign transportation.[306] Complainants contrast this holding with the Presiding Judge's holding in the Initial Decision, claiming the Presiding Judge "places significant weight on the level of supplier knowledge regarding ultimate destination of product and the fact that the legs of the journey are separately billed."[307]

141. Complainants cite another case, *Carson Petroleum*, where an initial transportation prior to foreign shipment was held to be an interstate movement (with the consequence that the goods were exempt from local taxes).[308] Complainants state that the case featured oil that was "not segregated or assigned or destined to any particular cargo or shipment abroad," but was "pumped into the large storage tanks . . . [and] held in the tanks until a ship arrives, or until a sufficient quantity of oil is accumulated to make up a cargo."[309] Complainants highlight that, in *Carson Petroleum*, there were "times when an accumulation of oil in the tanks [was] awaiting the arrival of a ship, and at other times a ship [was] awaiting the accumulation of a sufficient quantity of oil to make up a cargo."[310] Complainants cite the Court's reliance on the facts in *Sabine*, stating that "[i]n both cases the delay in transshipment was due to nothing but the failure of the arrival of the subject to be shipped at the same time as the arrival of the ships at the port of transshipment."[311] Complainants quote the Court's further statement that "[i]n both cases the selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad and for no other purpose" and the Court's finding that in neither case was any lumber or oil sold at the interchange point "but that to be exported" and "[t]here was no possibility of any other business there."[312] Complainants claim that the Court in *Carson Petroleum* "allowed the overall scheme of transportation to control," noting the fact that the realities of transportation might cause some delay in shipment.[313] Complainants characterize the Presiding Judge's analysis as

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[306] *Id.* at 123-24, 126.

[307] Complainants Brief on Exceptions at 18 (citing Initial Decision, 162 FERC ¶ 63,012 at PP 391, 357).

[308] *Carson Petroleum*, 279 U.S. 95.

[309] *Id.* at 100.

[310] *Id.*

[311] *Id.* at 108-09.

[312] *Id.* at 109.

[313] Complainants Brief on Exceptions at 19.

taking "the opposite approach," stating that the Presiding Judge "views commingling of product, delay in transshipment, and the failure to assign particular barrels of jet fuel in storage to particular destinations as 'disconnects' in the transportation."[314]

142. Initially, we note that both *Sabine* and *Carson Petroleum* address whether an interstate or foreign movement has begun, given the existence of intermediate storage or transfer from one mode of transportation to another. In contrast, in this proceeding, the issue is whether a subsequent, within state movement is a continuation of the initial movement.

143. In *Sabine*, the issue before the Court involved a statute applying to the transportation "of property shipped from any place in the United States to a foreign country, and carried from such place to a port of transshipment."[315] It is true that in *Sabine* the lumber was shipped under separate bills of lading and the initial shipper lacked knowledge of the ultimate destination. Nevertheless, in *Sabine*, the Court found that "[t]here is not now and was not, at the time these shipments moved, any local market for lumber at [the port of] Sabine, the population of which place does not exceed fifty in number. Appellees have never done any local business at that point."[316] The Court also noted that there was only such delay as was needed to effectuate the transition from rail carriage to water carriage. The Court found the movement to be in foreign commerce, citing an additional finding of law, that "the shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine."[317]

144. In *Carson Petroleum*, the Court applied the holding in *Sabine* and found a continued movement in foreign commerce despite the fact that transportation was temporarily interrupted at a storage facility pending the arrival of ships to export the oil to foreign destinations. The Court stated that "[i]n both cases the delay in transshipment was due to nothing but the failure of the arrival of the subject to be shipped at the same

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[314] *Id.* at 19-20.

[315] *Sabine*, 227 U.S. at 123-24.

[316] *Id.* at 122.

[317] *Id.*

time as arrival of the ships at the port of transshipment."[318] The Court also noted the lack of a non-export market at the proposed point of interruption.[319]

145. As noted, this proceeding is not concerned with the issue when a foreign transportation can be said to have begun, but rather whether there has been a "sufficient break" in the continuity of transportation to demonstrate that shippers moving product through the terminal storage and the Central Florida Pipeline lack a fixed intent to move product interstate. Thus, while consideration of particular facts in individual proceedings may be informative, we affirm that no single factor is dispositive[320] and, therefore, each case must be reviewed on its own merits. Nevertheless, we agree with Trial Staff that reliance on precedent that is more similar to the case at hand is more persuasive. As the analysis is made on a case-by-case basis, the cases cited featuring other jurisdictional inquiries do not represent controlling precedent. The Court in *Sabine* and *Carson Petroleum* found that local storage and transition facilities at the point of interruption were not used to support a local market. There being no possibility of a local market, the goods were deemed dedicated to export and foreign commerce, the goods were designated for interstate export, and the intermediate stopover did not interrupt or represent a cessation in the process of exporting the goods.

146. In this proceeding, however, a similar issue arises to that in *Atlantic Coast* quoted above, namely whether the "business" of the interstate or foreign shipping had been completed and the local, intrastate business of the shippers had commenced.[321] Thus, in comparing fact patterns, the focus should be the essential nature of the transportation. In *Carson Petroleum*, the interruption represented a delay only to await marine transport for export, or sufficient supply to fill the ship. Likewise, in *Sabine*, delays existed only so as to negotiate the transfer from the initial movement to the foreign marine transportation. In this proceeding, on the contrary, shipments on the Central Florida Pipeline are not limited by the availability of transportation capacity, as the Presiding Judge found. Furthermore, although the Court in *Carson Petroleum* found it significant that there was

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[318] *Carson Petroleum*, 279 U.S. 95 at 108-09.

[319] *Id.* at 109.

[320] *Northville*, 14 FERC at 61,208: "No single factor is necessarily to be regarded as determinative in the final conclusion as to the essential character of the shipment."

[321] *Compare Carson Petroleum*, 279 U.S. 95 at 109 ("There was no possibility of any other business there"), *and Atlantic Coast*, 275 U.S. at 267-68 ("When the oil reaches these storage places along the Florida seaboard, it is within the control and ownership of [Standard Oil] for use for its particular purposes in Florida. [Standard Oil] is free to distribute the oil according to the demands of its business").

no market for petroleum at the point of terminal storage (or dock storage in *Sabine*), in this proceeding the Presiding Judge found significant evidence of local business operations, including the time swaps, sales, end-of-month balancing, allocation, reallocation, and distribution. Furthermore, delay in shipment here is attributable to the desire to maintain working inventory at the Hooker's Point terminal, and capacity was available to respond to seasonal changes in demand.[322] While the initiator of the initial movement in *Sabine* did not know of the subsequent destination of its lumber, it was likely to be aware that there was no local market and that the goods were therefore destined for export. Thus, we distinguish *Sabine* and *Carson Petroleum*. Furthermore, we do not agree with Complainants' claim that the Presiding Judge placed undue weight on supplier knowledge regarding the ultimate destination of jet fuel because she appropriately considered this factor as one of 12 additional factors after her central finding regarding the three *Northville* criteria, with no special mention of controlling importance to the overall conclusion.

147. Complainants cite *Erie* as finding the transportation of wood pulp to be interstate, even though the title of the pulp ordered from foreign suppliers for a sole buyer did not transfer to the purchasing company until the rail transportation was arranged.[323] According to Complainants, the *Erie* Court also found that "[t]here may be some delay in forwarding the wood pulp by rail after delivery on the dock, because . . . the pulp is shipped from the dock in lots of two or three cars in order to prevent congestion at [the final inland destination]."[324] Complainants note that the existence of "a local bill of lading" was not dispositive, nor was the fact that "there may be a detention before or after the shipment on the local bill of lading."[325] Complainants also note the Court's characterization that the "essential character of the commerce" was interstate because "from the time that the pulp is put aboard the steamer there is a continuing intent that it should be transported to Garfield." According to Complainants, "the Court recognized that the formalities of contracts, absence of through tariffs, and other extraneous formalities could not overcome the expressed and executed intention of the shipper to move product in interstate commerce, even if capacity restrictions at the receiving end of the rail line caused some inventory to temporarily accumulate at an intermediate point for periods of time."[326]

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[322] *See also Interstate Energy*, 32 FERC ¶ 61,294.

[323] Complainants Brief on Exceptions at 20 (citing *Erie*, 280 U.S. at 101-02).

[324] *Id.* (citing *Erie*, 280 U.S. at 101).

[325] *Id.* (citing *Erie*, 280 U.S. at 101, 102).

[326] *Id.* at 21.

148. As discussed above, the *Erie* proceeding represents a within-state movement following portside delivery of raw materials. Therefore, it does not reflect transportation of oil by pipeline subject to the Commission's jurisdiction. The present case features significant differences from *Erie* that justify the different holdings. Distinguishing facts include that in *Erie* a broker would place an order for a specific number of bales of wood pulp, which the broker had specifically identified for through shipment to a specific customer, and the bales would remain intact and specifically identified through the portside receipt point. None of these details has a close parallel in the present case.

149. We similarly distinguish *Settle.* Significantly, unlike this proceeding, *Settle* does not feature a terminal, storage facility or distribution point that could serve as a point for allocation, trade or inventory prior to re-shipment. Instead, the proposed break in transportation was selected not due to the need to engage in intrastate business operations, but to take advantage of a difference in intrastate rates, compared to the interstate through rate.[327] The Court reviewed the shipper's intent, dismissing the fact that the shipper intended to take possession of the goods at the intermediate stopover, finding "that it was intended from the beginning that the cars should go" to their ultimate destination.[328] There was no question of taking delivery, reselling or reallocating, or otherwise changing the destination of the goods in question.[329] The shipper took delivery of goods in rail cars at an intermediate point and, after a pause, shipped them to the ultimate destination in the same cars. There was no evidence that the shipper intended to take delivery in order to commence local commercial operations, including storage, inventory, or trade, in any manner other than by having the cars transported to its place of business at the final destination. Thus, *Settle* may be distinguished from the precedent applicable here, in which shippers—while also generally intending to take delivery of the oil at their designated final destination—were found to be engaging in intrastate

[327] *Settle*, 260 U.S. at 169.

[328] *Id.* at 170.

[329] *Id.* ("It was conceivable that the shippers might find a customer who would take the lumber at Oakley, and in that event the rail movement would have ended there. But that was not probable or expected, nor was it the reason for shipping to Oakley"). Similarly, in *Erie*, the Court found the subsequent rail shipments to be in foreign commerce, noting no delay in shipment except as needed to arrange the rail transportation on a single train with multiple cars, so as not to run afoul of rail congestion at the ultimate destination, with both legs of the transportation arranged by the shippers' broker/agent. *Erie*, 280 U.S. 98 (citing *Settle*).

commerce because the intermediate terminal storage represented a break in interstate transportation.[330]

150. Complainants cite *Iron and Steel Articles* as an ICC case involving marine-to-ground transportation that purportedly further illustrates the Presiding Judge's error, because the ICC held that the transportation was interstate since "Lowe's whole plan is to stock its stores."[331]

151. Complainants suggest that the Presiding Judge erred by declining to consider the ICC's guidance in the 1992 Policy Statement, even though the Commission has not adopted the guidance. The ICC developed the 1992 Policy Statement, based on available precedent, to distinguish between interstate and intrastate movements of merchandise using for-hire motor traffic from warehouses or similar facilities to points in the same state after a for-hire movement from another state.[332] The Commission's line of cases is informed by the Supreme Court precedent in *Atlantic Coast*, as well as the ICC's *Petroleum Products* determination and prior relevant precedent.

152. Complainants have failed to convince us to revise our approach to be consistent with the ICC's 1992 Policy Statement. The Presiding Judge applied the approach adopted by this Commission in *Northville*, which application we affirm in this order. The Commission, in *Northville*, applied a test for determining whether subsequent within-state movements of petroleum were intrastate as defined in the *Atlantic Coast* and the earlier ICC *Petroleum Products* determinations.[333] The Commission in *Northville*

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[330] *Atlantic Coast*, 275 U.S. 257; *Northville*, 14 FERC ¶ 61,111; *Interstate Energy*, 32 FERC ¶ 61,294. *But see Dep't of Defense*, 353 I.C.C. 397; *aff'd Interstate Storage*, 28 FERC at 61,207-208.

[331] Complainants Brief on Exceptions at 22 (citing *Iron & Steel Articles*, 323 I.C.C. at 743).

[332] *Compare* 1992 Policy Statement, 8 I.C.C.2d 470 (providing guidance based on precedent, including *Sabine*, 277 U.S. at 122; *Settle*, 260 U.S. at 170), *and Northville*, 14 FERC ¶ 61,111 (recognizing precedent including *Atlantic Coast*, 275 U.S. 257 *and Petroleum Products*, 71 M.C.C. 17 (applying *Atlantic Coast* criteria and finding "that the transportation by motor carrier within a single State, of such commodities, in tank vehicles, which have a prior movement by pipeline and water from an origin in a different State is, as ordinarily performed, a movement in intrastate commerce")).

[333] *Northville*, 14 FERC ¶ 61,111 (citing *Atlantic Coast*, 275 U.S. at 267, 269; *Petroleum Products*, 71 M.C.C. at 29).

distinguished the holding in *Dep't of Defense*,[334] which itself applied *Atlantic Coast* and *Petroleum Products*. In *Dep't of Defense*, the ICC acknowledged the breadth of precedent available and noted that determinations may turn on the type of transportation under review. The ICC stated that "the Commission's assertion of its regulatory jurisdiction over carriers is partly dependent on the mode of carrier involved. Motor, railroad, and other modal regulation often differ in character and degree not only because they are frequently administered under different provisions of the act, but also because of differences in their operations and in regulatory objectives."[335]

153. Similarly, here we are mindful of the panoply of precedent available. Complainants have not convinced us that the ICC's 1992 Policy Statement represents a more "modern" or otherwise preferable approach to resolving jurisdictional questions. Instead, the Policy Statement appears to reflect an existing divergence in precedent in petroleum movements, as compared to use of motor traffic to move merchandise to its ultimate destination, which, in the ICC's analysis, reflects a greater emphasis on historical arrangements and the intent of the shipper to receive its goods at their ultimate destination.[336] The ICC's 1992 Policy Statement reflects that merchandise may remain in an intrastate movement despite arriving at a warehouse, through to the ultimate destination of the goods. The precedent applied in *Guttman*, *Interstate Energy*, and *Northville*, on the other hand, reflects that the arrival of petroleum products at terminal storage from interstate commerce represents a potential break in the continuity of movement in interstate commerce, where intrastate business activities may begin. These activities may include non-operational storage (including commingled storage), seasonal inventory, trade and processing, as may be the case for any given seaboard terminal. We therefore decline to abandon the applicable Commission precedent in favor of the approach recognized by the ICC for motor traffic shipment from warehouses.

3. Rejection of Dr. Arthur's Supply Chain Model

154. Complainants argue that the Initial Decision erred in rejecting their expert's supply chain model (Arthur model). Complainants use the Arthur model to show that the Airlines transport jet fuel from the Tampa terminal to Orlando Int'l Airport as expeditiously as possible and that inventory levels at the Tampa terminal are "a natural consequence of the inter-modal supply chain, not evidence of an intention to store jet fuel

[334] *Dep't of Defense*, 353 I.C.C. 397.

[335] *Id.* (declining to follow barge traffic precedent).

[336] *E.g.*, *Iron & Steel Articles*, 323 I.C.C. 740.

at Hooker's Point."[337] Complainants claim that the Presiding Judge's reasons for rejecting their expert's model "are invalid because they reflect a complete misunderstanding of the model's purpose, operation, and implications" and because the criticisms she relies upon are wrong.[338]

Commission Determination

155. We find that the Arthur model provides no relevant evidence for determining the jurisdictional question; therefore, the Presiding Judge was correct not to rely upon it. Even if the Arthur model were to demonstrate conclusively that jet fuel moves as expeditiously as possible through the Tampa terminal and that the Airlines use tanks at the Tampa terminal only for inventory purposes, not long-term storage, this would address none of the three *Northville* criteria; the other record evidence on these points would stand unchanged. To the extent the Arthur model holds constant all aspects of the supply chain as it exists, it can be considered for descriptive value. However, it does not attempt to reflect actual total results. It presents hypothetical expected flows for just one or two airlines. Setting aside this failing, the model's fatal error—given its stated objective—is an arbitrary assumption for the flow rate on the Central Florida Pipeline that is well below its capacity. No model that assumes less than maximum flow rate on the pipeline can claim to describe inventory levels indicative of jet fuel moving as expeditiously as possible.

156. Complainants' defense of their own evidence is replete with assumptions.[339] Complainants claim that "[a]s Dr. Arthur's model definitively demonstrates, the jet fuel levels actually observed at Hooker's Point are entirely consistent with what one would expect to observe if volumes were flowing through Hooker's Point as continuously as possible given the practical realities of the existing supply chain."[340] It is not clear from Complainants' discussion what "jet fuel levels" one could expect or what particular "practical realities" are considered in the model as preventing fuel to flow from Hooker's Point "as continuously as possible." Thus, the defense of the model in Complainants' Brief on Exceptions gives the matter a very hypothetical feel. A model cannot show

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[337] Complainants Brief on Exceptions at 27.

[338] *Id.* at 27.

[339] *E.g.*, Complainants Brief on Exceptions at 31 n.129 (explaining that Dr. Arthur's model is "based on a representative 1,000 barrel/day consumption for each airline in order to conveniently compute days of supply at Hooker's Point").

[340] *Id.* at 28.

whether jet fuel flows as expeditiously as possible from the Tampa terminal to ASIG Terminal if it holds the pipeline flow rate at levels materially below its maximum level.

157. In addition, Complainants claim that the model "demonstrates that the jet fuel inventory levels observed at Hooker's Point are a natural consequence of the inter-model supply chain, not evidence of an intention to store jet fuel at Hooker's Point."[341] Technically speaking, it would be difficult for an inter-modal supply chain model to definitively demonstrate an Airline operator's intent. Complainants continue, claiming that "[w]hen properly understood, Dr. Arthur's model provides convincing evidence that the Hooker's Point tanks are used as necessary to transition between modes of transportation, not for indefinite or long-term storage of jet fuel."[342] However, elsewhere Complainants identify the fact that "volumes" on the Central Florida Pipeline are "limited by weekly consumption" at Orlando Int'l Airport, and admit that Dr. Arthur's model demonstrates supply "which is consistent with observed temporary inventory at Hooker's Point that fluctuates between 4.1 and 20 days for an average of 9.6 days."[343] The model supports the factual finding that the pipeline is operating at a rate less than its 1,400 bbl/hr, initial flow limitation.

158. Thus, Complainants appear to acknowledge two key factual issues in this proceeding, that the Airlines lack sufficient storage capacity at the Orlando Int'l Airport to accept the jet fuel, or deliveries would not be limited by consumption, and that this lack of storage at Orlando necessitates the use of Hooker's Point for non-operational storage. There is no requirement in the applicable precedent that seaboard terminal storage be "long-term" as Complainants suggest that the model would demonstrate.[344] Certainly one would not expect long-term storage with a product, and in a market, as volatile as refined petroleum.[345] While delivery for indefinite storage prior to subsequent

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[341] *Id.* at 27.

[342] *Id.*

[343] *Id.* at 30.

[344] *See Atlantic Coast*, 275 U.S. at 271 ("It may be … that oil is being discharged into plaintiff's receptacles for its storage at the same time that it is being discharged from the storage tanks into storage tank cars for its distribution.").

[345] Otherwise, we have no problem finding that the storage in this case is for an indefinite period, as, according to the Presiding Judge, fuel may sit "on average" for 9.5 to 12 days before reshipment. Initial Decision, 162 FERC ¶ 63,012 at PP 508-12 (citing Lipscomb Test., Ex. AIR-0001 at 29-30 (min. 9.5 days)). Complainants cite no definite timeframe in which the fuel must be moved.

distribution was a feature of some of the movements cited in the inquiry leading to the *Petroleum Products* determination, in other proceedings, shippers have taken delivery of oil shipments at terminal storage to meet varying demand.[346]

159. Practically speaking, the Airlines seek to maintain sufficient inventory to ensure that they do not run out of fuel (at a cost that is favorable to business). The question, for our purpose of determining whether the movement from Hooker's Point to Orlando is part of a continuation of the movement in foreign commerce, is, under what circumstances fuel is being stored—in non-operational seaboard storage or at the inland destination.[347] As noted by Trial Staff, the factual record in this proceeding provides more direct evidence of the Orlando Airlines' intent than can be provided through an intermodal supply chain analysis. The record reflects that ASIG recommends to each Airline that it maintain approximately 20 days of fuel, divided between Orlando Int'l Airport and Hooker's Point, including a 6-10 day supply at Hooker's Point, and that the Airlines in fact seek to maintain supply at Hooker's Point.[348]

160. Complainants appear to confirm this when they state: "As Dr. Arthur explained, adding uncertainty elsewhere in the supply chain [model] simply increases the variability of inventory at each node in the chain (such as Hooker's Point or [Orlando Int'l Airport]), yielding the need for additional volumes to be maintained in the supply chain at each node relative to what is depicted in the model in order to keep the supply chain from running dry."[349] We construe this to mean that, if the supply model were more accurate, it would predict a greater need for storage.

161. Complainants do not attempt to address the Presiding Judge's concerns with the model, but instead criticize the judge for not understanding the model or focusing on

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[346] *Northville*, 14 FERC at 61,209 (noting 12-day supply at seaboard terminal and daily withdrawals during peak demand, with longer turnover during times of lower seasonal demand); *Petroleum Products*, 71 M.C.C. at 19-20 (noting variable turnover for different products and varying storage capability depending on seasonal delivery access, "gasolines … generally have a move even throughput").

[347] *Northville*, 14 FERC at 61,209 and *Interstate Energy*, 32 FERCat 61,691 (characterizing storage at seaboard terminal non-operational).

[348] Trial Staff Brief Opposing Exceptions at 28 (citing Initial Decision, 162 FERC ¶ 63,012 at PP 166, 207; Ex. S-0027 at 2, 4, 7, 10, 12 (Airline Data Responses)). *See also* Complainants Brief on Exceptions at 40 (noting the tanks only hold, on average less than ten days' supply for Orlando Int'l Airport).

[349] Complainants Brief on Exceptions at 35.

meaningless data. However, in their attempt to defend the model in their brief, Complainants admit that Dr. Arthur's model "does not attempt to model the storage levels" at Orlando Int'l Airport.[350] Further, Complainants state that "one can only flow out of Hooker's Point" into Orlando Int'l Airport over the pipeline "what is being consumed daily" at the airport.[351] No modeling is required to determine that over an extended period flows into and out of both the Tampa and ASIG terminals are approximately equal, because flows can only depart from equality to the extent of net fluctuation in storage levels. However, simple arithmetic suggests that, if inventory in the tanks at Orlando Int'l Airport is low, then more jet fuel may flow out of Hooker's Point than what is consumed at the Orlando Int'l Airport in a given week. Complainants' claim completely ignores the fact that the Airlines use Hooker's Point to allocate and distribute fuel for the regional airports, suggesting that the model is lacking. Complainants' claim that their operations at Hooker's Point deliver jet fuel as expeditiously as possible cannot therefore be a valid take on actual events occurring at the tanks, because, if the goal was to deliver fuel directly to Orlando Int'l Airport, Complainants would be unable to deliver jet fuel to the regional airports because the pipeline does not run backwards.

162. In sum, we agree with the Presiding Judge's rejection of Complainants' attempts to demonstrate that jet fuel flows from Hooker's Point to the Orlando Int'l Airport as expeditiously as possible. We find that the assumptions, lack of connection to real world circumstances, and lack of relevance to any significant issue in this proceeding support the Presiding Judge's rejection of the inter-modal supply chain model as a useful piece of evidence.

4. Findings of Fact and Weighing of the Evidence

163. Complainants contest the Presiding Judge's focus, findings of fact, and conclusions on a number of issues, including reasserting their position that the subjectively expressed intent of the Airlines is controlling and contesting each of the Presiding Judge's findings on the three *Northville* criteria.

164. Complainants further argue that record evidence proves that the Airlines have a fixed and persisting intent to transport jet fuel in interstate commerce and that the essential character of transportation on the Central Florida Pipeline is interstate.[352] Complainants argue that the Initial Decision applies fact to law in a manner that is

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[350] *Id.* at 33.

[351] *Id.*

[352] *Id.* at 39.

arbitrary and erroneous.[353] Complainants cite various facts and arguments in support of their position that their sole purpose in shipping jet fuel to Hooker's Point is to have that jet fuel transported "as efficiently as possible" and that the essential character of the commerce is always interstate.[354] Complainants rely on the fact that the Airlines formed Hooker's Point LLC for the explicit purpose of providing themselves logistical services for jet fuel supply to Orlando Int'l Airport, citing the LLC agreement whereby it was created.[355] Complainants further cite their Storage Agreement with KMLT as necessary and essential to transportation of jet fuel on the Central Florida Pipeline.

165. Complainants note the fact that the average monthly flow of fuel through Hooker's Point to the Airlines, 464,170 barrels, exceeds the working storage capacity of the tanks they lease, 231,000 barrels.[356] Complainants suggest that the tanks are "rarely more than half full," but cite testimony that they are half full or more 67 percent of the time and are more than 90 percent full 8 percent of the time. Complainants state that the tanks only hold on average less than a 10-day supply for the Orlando Int'l Airport. Complaints cite additional facts in favor of their position, noting the minimum shipping volumes and penalties for the pipeline, and ASIG's role in coordinating marine deliveries, accounting for each airline's receipts and disbursements and nominations for shipment in the Central Florida pipeline. Complainants state that having ASIG coordinate deliveries results in a more efficient supply, storage, and transportation process because ASIG can manage relative supply levels, consolidate multiple airline shipments to meet batch size requirements, cycle start times, and generally ensure adequate supply.[357] Complainants cite average inventory figures of 2.9 days' supply to a high of 18.4, with an average from September 2014 through January 2017 of 9.5 days.

166. Complainants cite the commercial arrangements established by the Airlines, including the logistics services provided by Hooker's Point LLC at Hooker's Point, the Storage Agreement with KMLT, the supply management, pooling, and other allocation arrangements performed by ASIG, as providing evidence of a "corporate structure" to transport jet fuel to Orlando Int'l Airport "on a continual and consistent basis."[358]

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[353] *Id.* at 47.

[354] *Id.* at 38.

[355] *Id.* at 39.

[356] *Id.* at 40.

[357] *Id.* at 42.

[358] *Id.* at 49.

Complainants state that the evidence regarding the procurement process, supply contracts, and nominations shows that the Airlines always have an intention to move particular amounts of jet fuel through Hooker's Point in interstate commerce. In addition, Complainants claim that this evidence demonstrates a specific order.[359]

Commission Determination

167. We reiterate the Commission's finding in *Guttman* that, even if a certain factor is relevant, "no single factor is essential or determinative."[360] The Commission further found, based on that determination, that to make a proper finding under *Northville* it is "not required to address and give weight to each criterion and factor individually to conduct a proper jurisdictional analysis."[361] We find that the Presiding Judge's analysis provides a useful factual framework from which to review the jurisdictional issue within the *Northville* framework. The Presiding Judge properly analyzed all the pertinent facts and circumstances surrounding the transportation to reasonably determine that the essential character of the movement is intrastate. We nevertheless address below certain of the issues raised by Complainants.

168. Despite the existence in this proceeding of seaboard terminal delivery representing a break in the interstate movement, Complainants argue against application of the *Northville* criteria, in favor of a focus on the subjective intent of the Airlines to transport jet fuel from outside of Florida to Orlando. We disagree with Complainants that the evidence shown to demonstrate subjective intent is controlling.

169. On the specific evidence discussed, we again emphasize the thorough job performed by the Presiding Judge in developing the factual record. Where Complainants claim the Presiding Judge ignored evidence, we see ample analysis. As for the specific arguments, we disagree that evidence of commercial arrangements and the sought for

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[359] *Id.* at 51.

[360] *Guttman*, 161 FERC ¶ 61,180 at P 64 (quoting *Northville*, 14 FERC at 61,208 and *Dep't of Defense*, 353 I.C.C. at 407: "No single factor is necessarily to be regarded as determinative in the final conclusion as to the essential character of the shipment" (citing *Texaco*, 80 FERC at 61,804 ("The determination of jurisdiction under the ICA depends on the specific facts of the individual case")); *Atlantic Coast*, 275 U.S. at 268-69 ("the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it"); *Petroleum Products*, 71 M.C.C. at 29 ("Obviously . . . it is not necessary that the entire 'bundle [of circumstances]' be present in a given case before a proper determination can be made")).

[361] *Id.*

efficiencies is sufficient to demonstrate a fixed intent of a specific shipper to transport a specific quantity of jet fuel through Tampa terminal. As we have seen throughout this analysis, the structure of a shipper's commercial arrangements is not determinative.[362] As the court in *Majure* explained, consistent with the *Northville* criteria,

> any time a shipper moves products to a terminal his ultimate intent is that they be distributed among various consumers at various consuming points. If this is the only intention, the interstate journey ordinarily ends at the terminal. However, if, at the time he moves products to a terminal his present intention is that they merely be put through the terminal on their way to specific consumers at specific consuming points the interstate journey does not end until the products reach those consumers at those points.[363]

170. Complainants claim that the Airlines' intent is not that of a specific airline moving specific quantities of jet fuel into Hooker's Point and through to a specific destination for consumption under the facts in this proceeding, but instead that in the aggregate the airlines have a collective intent to move all of the jet fuel they individually procure at Tampa to one of the destinations in Central Florida in which they operate. This is not the legal standard under the available precedent and this analysis ignores the actions of the individual airlines and masks the local distribution activities occurring at Hooker's Point. The record reflects that the Airlines seek to move varying amounts of jet fuel into Hooker's Point according to their immediate inventory needs at the time of delivery, that the specific amounts may not reflect the specific amounts arranged for shipment, but instead are set in an allocation process overseen by ASIG, and that no specific amount is settled for nomination on the pipeline until usage and inventory need at Orlando are taken into account. Furthermore, the specific amounts received by each airline are not

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[362] *See Settle*, 260 U.S. 166. *Accord* Initial Decision, 162 FERC ¶ 63,012 at P 55 (noting finding that contracting with fuel service supplier, Storage Agreement and hiring ASIG may have been developed "to effectuate the movement of jet fuel in the most efficient and economically practical way," but that designing their business model in this fashion "does not mean it meets the jurisdictional test for interstate commerce").

[363] *U.S. v. Majure*, 162 F.Supp. 594, 601 (S.D. Miss. 1957) (finding shipment of gasoline purchased by U.S. in Texas for shipment to bases in Alabama to be interstate transport under *Atlantic Coast*, 275 U.S. 257, and *Petroleum Products*, 71 M.C.C. 17, when original shipper could not obtain required authority from the ICC and replacement shipper moved product from marine terminal).

designated for a through movement but may be diverted by allocation to the regional airports or by negative inventory or swaps.

171. Complainants' discussion of the Airlines' varying reliance on storage at Hooker's Point does not controvert the evidence relied on by the Presiding Judge. The Presiding Judge noted that fuel build up at Hooker's Point varies by season. Complainants cloud such relevant facts by their focus on storage data aggregated over extended time periods. Complainants report that the tanks are generally half full or more two-thirds of the time, representing at least 9.5 days' supply and that inventory at Hooker's Point ranges 3 to 18 days, confirming that inventory builds up at Hooker's Point. We find no merit in the contention that inventory does not build up simply because the supply is consumed according to the dictates of seasonal demand.[364]

172. We find unconvincing and beside the point Complainants' claims that it is impossible to build up inventory. The record reflects that Complainants' volumes at Hooker's Point are sensitive to cycles of seasonal demand, corresponding to increases in consumption during peak travel periods. No build up, other than to obtain fuel in advance of this peak usage, is expected. Complainants attempt to use the circumstances in *Northville*, where generator fuel oil was obtained and stored for months and inventory exceeded throughput, as a counterexample. However, we do not find this distinction convincing. *Northville* reflected LILCO's need for generator fuel oil, which varied seasonally. During peak months, drawdowns were made daily, and at other times, the seaport storage would remain unreplenished for months. However, we do not find the contrast in demand fluctuations sufficient to distinguish the determinations. *Northville* notes changes in seasonal demand that affected the supply chain. These changes were apparently dramatic enough to nearly idle activity for some months. The interstate journey does not appear dependent on the frequency of delivery or the constancy of demand. The fact that a northern utility may face seasonal demand and also seasonal limits in port access that cause a greater volatility in supply schedules is a factor that was acknowledged in *Petroleum Products*, but did not affect the jurisdictional analysis.[365]

173. The Airlines' desire for efficiency is admirable, but does not distinguish their circumstances from any other business. Certainly, no one expects them to maintain unused fuel sitting idle in tanks. The economics and logistical difficulties will determine the scale and scope of any businesses procurement operations; with a commodity as

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[364] Initial Decision, 162 FERC ¶ 63,012 at PP 271-72.

[365] 71 MCC 17 at 19 (noting that "time in storage . . . varies substantially" with fuel-oil sales in Northern states in the summer being negligible, while turnover rate may rise to three or four months during the fill up period).

important to the bottom line and variable fuel cost, we would expect any entity to attempt to manage and minimize such costs.

a. Criterion 1: Through Movement

174. Complainants contest the finding of the Presiding Judge regarding the first criterion, that there is no specific order being filled for a specific quantify of product to be moved through to a specific destination beyond the Hooker's Point Terminal.[366] Complainants fault the Presiding Judge for focusing too narrowly on the shippers' intent for specific physical quantities of jet fuel to the exclusion of the commercial purpose for which fuel is acquired[367] and whether the relevant focus is the intent of the supplier or the shipper at the time the initial movement is made or at some other time.[368]

175. Complainants argue that the Initial Decision erroneously concluded that there is no specific order for a specific quantity of jet fuel.[369] Complainants fault the Presiding Judge for failing to define factors in the analysis such as "binding agreement" or "specific quantity."[370] Complainants point to the possibility of variances and defend their reliance on estimates. Complainants claim the Presiding Judge ignored testimony that RFPs, supply arrangements, and monthly nominations are "specific orders being filled for a specific quantity of product."[371] Complainants note the Airlines' practice to reference destinations in their RFPs.

176. Complainants fault the Presiding Judge for failing to define the terms in the *Northville* criteria, whether it is necessary to have a binding agreement to demonstrate a specific order, or what is meant by a "specific quantity." We affirm the Presiding Judge's reasoned decision, which was based on substantial evidence. The record evidence does not demonstrate that the Airlines have specific orders for a specific quantity to be moved through to a specific destination beyond terminal storage. Instead,

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[366] Complainants Brief on Exceptions at 55.

[367] *Id.*.

[368] *Id.* at 56-57 (citing *Sabine*, 227 U.S. 111, as noting that the knowledge of the original shipper is not determinative; noting the focus in *Erie*, 280 U.S. 98, on the intent of the shipper from the time the raw materials were loaded on foreign steamers.

[369] *Id.* at 60.

[370] *Id.*

[371] *Id.* at 62.

Complainants' evidence demonstrates contrary facts: the Airlines have RFPs for amounts that may or may not be delivered, based on the allocations assigned to a given shipment on arrival at Hooker's Point;[372] volumes are not bound for specified through destinations; and, at any rate, any volumes derived based on the demand at a specific destination are subject to being reallocated to truck delivery, exchanges via swaps, or negative inventory. Thus, quantity, through destination, recipient, and —even title of the fuel—are all subject to change depending on the distribution activities occurring at the terminal. Complainants have had the opportunity to demonstrate that their arrangements meet the criteria; while they cite evidence in support of their position, that evidence does not outweigh the countervailing evidence supporting the position adopted by the Presiding Judge.

b. Criterion 2: Character of Storage

177. Complainants contest the Presiding Judge's determination that Hooker's Point represents a distribution point or local marketing facility. Complainants argue that the Initial Decision ignored evidence showing that the Tampa terminal is not intended to be used as a storage facility and that it cannot function as a storage facility.[373] Complainants cite witness testimony to the effect that none of the Airlines intend for jet fuel to remain in inventory or storage.[374] Complainants claim that throughput, that is, the amount of jet fuel passing through Hooker's Point on a monthly basis, is three times greater than storage capacity at the site.[375]

178. Complainants argue that the Initial Decision gives undue weight to and misinterprets the significance of negative inventory levels.[376] Complainants argue that the Initial Decision placed outsize importance on aberrant events.[377] Complainants argue

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[372] Initial Decision, 162 FERC ¶ 63,012 at P 182.

[373] Complainants Brief on Exceptions at 67.

[374] *Id.*; *but see* Initial Decision, 162 FERC ¶ 63,012 at P 207 & n.504 (citing airline targets to maintain 20 days of jet fuel supply between Orlando and Hooker's Point tanks, with approximately six to ten days of jet fuel supply at both locations (citing testimony of Mr. Lipscomb)).

[375] Complainants Brief on Exceptions at 69. *But see* Trial Staff Brief Opposing Exceptions at 34 (noting throughput of approximately twice Hooker's Point capacity).

[376] *Id.* at 78.

[377] *Id.* at 80.

that the Initial Decision incorrectly concluded that the storage capacity at Tampa terminal is needed to make up for limited capacity at Orlando Int'l Airport.[378]

179. We reject Complainants' arguments that the Hooker's Point facility is not a point of inventory and distribution. At Hooker's Point, the Airlines pool and coordinate their fuel supply, and the deliveries, though arranged by one or another airline may be allocated to any of the Airlines. Complainants appear to understate the volumes held at Hooker's Point and overstate the volumes that pass through the facility. Regardless, we are unaware of any requirement that inventory be comparable to consumption in any given time frame. The Airlines may be expected to maintain only such inventory as needed to guard against fluctuations in demand for their services, fuel cost fluctuations and disruptions in supply. What that amount may be is expected to vary from situation to situation, location to location, and industry to industry. We do not find Complainants' positions to be effective rebuttals of the Presiding Judge's findings, including the testimony of the Airline witnesses that the site is used to maintain fuel supply, and that allocations from marine deliveries are made with an eye to meeting each airline's inventory targets. Complainants appear to admit as such when they state: "Marine deliveries are based on the estimated fuel needs of a particular Airline for the coming month, while the volumes are constrained by the actual consumption" at Orlando Int'l Airport.[379] This appears to confirm that fuel is acquired at Hooker's Point not for immediate use, but for use several weeks out, and must be stored because there is insufficient capacity at Orlando.

180. Complainants charge that the Presiding Judge overreached when looking for "ratable transportation" from the marine delivery to inland transportation. According to Complainants, such a showing is not possible due to the mismatch between speed and volume of deliveries between barge and pipeline.[380] But we do not believe that such a showing is required or implied. As the facts in this proceeding show, patterns of use of the pipeline and storage at Hooker's Point indicate fluctuations due to seasonal demand.[381] The facts do not support a position that no more storage is utilized than that needed to unload the barges prior to shipment to the ultimate destination, because the

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[378] *Id.* at 82.

[379] *Id.* at 74.

[380] *Id.* at 75.

[381] Initial Decision, 162 FERC ¶ 63,012 at P 218.

evidence does not reflect that pipeline capacity is limiting flows to Orlando, nor that there is sufficient storage at Orlando to receive the deliveries.[382]

181. Complainants question whether Hooker's Point is used for long-term or indefinite storage of jet fuel. Jet fuel is volatile, and may not be suitable for long-term storage, whatever that might be. We do not believe the precedent examining whether petroleum products are intended to be stored for an indefinite time, such as *Northville*, means that the fuel must be stored for an indefinitely long time, only that it will be stored for an undefined time,[383] as opposed to being subject to a predefined schedule or delivery requirement.[384]

182. Seeking to minimize the importance of negative inventory as an indication of distribution and therefore intrastate activities that show the jet fuel volumes are not shipped through to specific destinations, Complainants compare the practice to the actions of a bank, not a pool. Complainants again cite testimony that the Airlines do not consider negative inventory to be borrowing or pooling of jet fuel. Complainants state that "[w]hen one Airline's balance goes negative, it has no impact on the account balances of the other Airlines."[385]

183. We disagree. While drawing on account balances of fuel from storage may be compared to the operation of a bank, it is not a bank. When a customer overdraws an account, the customer owes the overdrawn amount to the bank owner according to the terms of the account. Here there is no bank owner, there is only the pool of fuel owned by the airlines, according to the terms of their arrangements. When an airline takes more fuel than is available at Hooker's Point based on the allocations kept by ASIG, that airline must be borrowing fuel from the accounts of the other airlines. The fact that

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[382] *Id.* P 58 (citing Complainants' assertion that capacity constraints in the storage at Orlando can limit the amount of jet fuel transported on Central Florida pipeline).

[383] *Interstate Energy*, 32 FERC at 61,691 (storage time varies with drawdowns from seaboard storage made based on seasonable demand for fuel oil); *Northville*, 14 FERC ¶ 61,111 (drawdowns made to replenish local storage as dictated by seasonal demand). *Cf.*, *Carson Petroleum*, 279 U.S. 95 (fuel stored until adequate volume for shipment or suitable vessel arrives).

[384] *E.g.*, *Iron & Steel Articles*, 323 I.C.C. 740 (goods moved pursuant to instructions received only one to three days after a vessel docked and port charged if goods not moved in five days); *Sabine*, 227 U.S. at 116 (noting that only 48 hours permitted to unload rail cars not for export, while free time was allowed for export).

[385] Complainants Brief on Exceptions at 79.

replacement fuel is on the way does not negate the fact that fuel was borrowed from the other Airlines. We agree with the Presiding Judge's conclusion that the terminal is, therefore, a point of distribution and allocation.[386] Complainants argue that the other methods of trade occurring at the terminal are aberrant and therefore not representative of the essential character of the activities at Hooker's Point. However, that is not the case for the negative inventory, which, the record shows, is a not a rare occurrence.[387]

c. Criterion 3: Transportation in Furtherance of Distribution

184. Complainants argue that the Initial Decision erred in considering this factor because, they claim, there is no distribution or allocation from storage at the Tampa terminal.[388] Complainants further dispute the Presiding Judge's finding that ASIG decides how much to allocate to each airline after the jet fuel to be transported has arrived at the Tampa terminal.[389] After asserting that ASIG lacks authority to make such an allocation, Complainants make a disjointed series of assertions:

> The Airlines' monthly nominations—which determine the amount of jet fuel the suppliers will deliver to Hooker's Point for each Airline—are based on the Airlines' demand at specific locations for the following month. The Airlines expect to receive at Hooker's Point the amount of jet fuel that they ordered from their supplier. Any volume from a specific pipeline shipment credited to an Airline at [Orlando Int'l Airport] is deducted from that Airline's account at Hooker's Point, not from an unallocated communal pool at Hooker's Point.[390]

185. These statements fail to refute the Presiding Judge's findings of fact and, again, Complainants avoid addressing each airline's individual actions by discussing their

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[386] Initial Decision, 162 FERC ¶ 63,012 at P 451.

[387] *Id.* PP 249-52.

[388] Complainants Brief on Exceptions at 87.

[389] Initial Decision, 162 FERC ¶ 63,012 at P 324; *see id.* P 291.

[390] Complainants Brief on Exceptions at 88 (citations omitted).

collective expectations. We decline on this rebuttal to disregard the Presiding Judge's findings.

5. Finding KMLT Jurisdictional Status Moot

186. We disagree with Complainants' argument that the Initial Decision erred in declaring the question of ICA jurisdiction for KMLT's terminaling services moot.[391] In the Initial Decision, the Presiding Judge denied KMLT's motion for summary disposition alleging that, as a lessor, it was not subject to the Commission's jurisdiction.[392] The Presiding Judge found that there are material issues of fact that precluded a summary finding that the Airlines' Storage Agreement covering the tanks at Hooker's Point was really a lease, noting that the agreement contains tariff-like charges, minimum volumes, and other features that might indicate common-carrier like responsibilities.[393] However, the Presiding Judge did not make definitive findings as to whether the Storage Agreement was a lease, or whether, if the Storage Agreement were a lease, it contained obligations sufficient to find KMLT to be a common carrier. Moreover, in any event, the issue is moot, insofar as we affirm the findings from the Initial Decision in KMLT's favor on other grounds.[394]

The Commission orders:

We affirm the Initial Decision, and exceptions to the Initial Decision are resolved as discussed in the body of this order; to the extent an exception is not discussed, it should be considered denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[391] Complainants Brief on Exceptions at 98.

[392] Initial Decision, 162 FERC ¶ 63,012 at PP 17, 28.

[393] Storage Agreement, Ex. AIR-0051.

[394] Initial Decision, 162 FERC ¶ 63,012 at P 17 n.48.