ORAL ARGUMENT NOT YET SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 20-1013

AIRCRAFT SERVICE INTERNATIONAL, INC., *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENTS FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA

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August 13, 2020

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioners.

B. Ruling Under Review

Aircraft Service International Group, Inc. v. Central Florida Pipeline, LLC, 169 FERC ¶ 61,119 (2019), JA 472.

C. Related Cases

This case has not been before this Court or any other court.

/s/ *Lona T. Perry*
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August 13, 2020

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GLOSSARY

Aircraft Service	Petitioner Aircraft Service International Group, Inc.
Airlines	Petitioners American Airlines, Inc., Delta Airlines, Inc., Southwest Airlines Co., United Parcel Service, Inc. and United Aviation Fuels Corporation (a United Airlines subsidiary)
Central Florida Pipeline	Intervenor Central Florida Pipeline, LLC
Chevron	Chevron U.S.A.
Commission or FERC	Respondent Federal Energy Regulatory Commission
Initial Decision	*Aircraft Service Int'l Grp., Inc. v. Central Florida Pipeline LLC*, 162 FERC ¶ 63,012 (2018), JA 69
Order	*Aircraft Service Int'l Grp., Inc. v. Central Florida Pipeline, LLC*, 169 FERC ¶ 61,119 (2019), JA 472
Shippers	Petitioners American Airlines, Inc., Delta Airlines, Inc., Southwest Airlines Co., United Parcel Service, Inc., United Aviation Fuels Corporation, Aircraft Service International Group, Inc. and Hooker's Point Fuel Facilities LLC
UPS	United Parcel Service, Inc.
Valero	Valero Services, Inc.

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STATEMENT OF THE ISSUE

The Interstate Commerce Act provides the Federal Energy Regulatory Commission (Commission or FERC) with jurisdiction over shipments of jet fuel by pipeline in interstate commerce. This appeal concerns a complaint filed by a group of airlines and airline service companies alleging that their jet fuel shipments on the Central Florida

Pipeline LLC (Central Florida Pipeline) from a terminal in Tampa to the Orlando International Airport are in interstate commerce (and thus subject to FERC ratemaking authority).

In the challenged order, the Commission upheld the determination of an Administrative Law Judge, following a full evidentiary hearing, that the jet fuel shipments on the Central Florida Pipeline are in intrastate commerce and therefore outside Commission jurisdiction. *Aircraft Service Int'l Grp., Inc. v. Central Florida Pipeline LLC*, 169 FERC ¶ 61,119 (2019) (Order), JA 472. While the jet fuel shipments originate in foreign countries or other states, the fuel's foreign or interstate movement ends upon delivery to the Tampa terminal, where the fuel is inventoried in non-operational storage and then allocated and distributed among the airlines and several Florida airports, including Orlando International. The subsequent shipment of allocated fuel from the Tampa terminal to Orlando International via the Central Florida Pipeline is intrastate movement.

The question presented on appeal is:

Whether the Commission reasonably determined, based on substantial record evidence, that the jet fuel shipments from Tampa to

Orlando on the Central Florida Pipeline are: (1) in intrastate commerce and thus (2) not subject to FERC ratemaking authority.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. THE COMMISSION'S INTERSTATE COMMERCE ACT JURISDICTION OVER OIL SHIPMENTS

Congress passed the Interstate Commerce Act in 1887 to regulate railroads and created the Interstate Commerce Commission to administer the statute. *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006). In 1906, Congress extended the Interstate Commerce Commission's jurisdiction to oil pipelines. *Id.* In 1977, Congress transferred the Interstate Commerce Commission's authority over oil pipelines to the newly-created FERC, to be exercised under the version of the Interstate Commerce Act prevailing on October 1, 1977. *Id.* Accordingly, all references to the Interstate Commerce Act in this brief are to the 1977 version, which can be found in 49 U.S.C. § 1 *et seq.* (1976), reprinted in 49 U.S.C. app. § 1 *et seq.* (1988). Interstate

Commerce Commission decisions that predate the 1977 transfer are treated as if they were FERC decisions. *Frontier*, 452 F.3d at 776.

The Interstate Commerce Act provides the Commission with jurisdiction over pipelines transporting oil in interstate commerce. 49 U.S.C. app. § 1(1). *See* Order P 123, JA 524. As the same pipeline may provide both jurisdictional interstate service and non-jurisdictional intrastate service, the jurisdictional determination is made with respect to particular shipments. *See, e.g., Amoco Pipeline Co.*, 62 FERC ¶ 61,119 at 61,803 (1993), *reh'g denied*, 67 FERC ¶ 61,378 (1994).

Consistent with longstanding precedent, the Commission presumes that all interstate shipments are jurisdictional unless the facts show a sufficient break in the continuity of interstate transportation that a portion of the shipment can be considered intrastate. *Guttman Energy, Inc. v. Buckeye Pipe Line Co., L.P.,* 161 FERC ¶ 61,180 P 49 & n.111 (2017); *Texaco Ref. & Mktg., Inc. v. SFPP, L.P.,* 80 FERC ¶ 61,200 at pp. 61,804-05, *reh'g denied*, 81 FERC ¶ 61,388 (1997); *see also Atlantic Coast Line R. Co. v. Standard Oil*, 275 U.S. 257, 271 (1927) (describing delivery of oil at port terminal for

distribution within state as a "closing of an interstate or foreign transportation and a beginning of intrastate distribution").

To determine whether delivery to terminal storage sufficiently breaks the continuity of interstate transportation, the Commission applies the three criteria set out in *Northville Dock Pipe Line Corp.*, 14 FERC ¶ 61,111 (1981):

> (1) 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,
>
> (2) whether the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and
>
> (3) whether transportation in furtherance of this distribution within the single state is specifically arranged only after sale or allocation from storage.

Guttman, 161 FERC ¶ 61,180 P 50. Satisfying these fact-based criteria establishes that interstate transmission has ended. Order P 114, JA 521 (citing *Northville*, 14 FERC ¶ 61,111 at p. 61,207; *Interstate Energy Co.*, 32 FERC ¶ 61,294 at p. 61,690 (1985); and *Determination of Jurisdiction Over Transp. of Petroleum and Petroleum Products By Motor Carriers Within a Single State*, 71 M.C.C. 17, 29 (1957) (*Petroleum Products*)).

II. THE INITIAL DECISION

In their 2016 complaint, American Airlines, Inc., Delta Airlines, Inc., Southwest Airlines Co., United Parcel Service, Inc. (UPS) and United Aviation Fuels Corporation (a United Airlines subsidiary) (collectively Airlines), Aircraft Service International Group, Inc. (Aircraft Service), and Hooker's Point Fuel Facilities LLC, alleged that Central Florida Pipeline and its affiliate Kinder Morgan Liquids Terminals are transporting Airlines' jet fuel in interstate commerce without a FERC-approved tariff in violation of the Interstate Commerce Act. *Aircraft Service Int'l Grp., Inc. v. Central Florida Pipeline LLC*, 157 FERC ¶ 61,206 P 1 (2016), JA 41. The complainants are collectively referred to in this brief as "Shippers." Central Florida Pipeline operates an 85-mile pipeline that transports jet fuel and diesel fuel from the Port of Tampa to the Orlando International Airport. *Id.*

Recognizing that determining whether a shipment of fuel is jurisdictional is an intensely factual inquiry, the Commission set the issue for hearing before an Administrative Law Judge. *Id.* P 38, JA 53. Following a lengthy evidentiary hearing, the Administrative Law Judge (Judge Suzanne Krolikowski) concluded that the transportation of jet

fuel on the Central Florida Pipeline is intrastate in nature and not subject to the Commission's Interstate Commerce Act jurisdiction. *Aircraft Service Int'l Grp., Inc. v. Central Florida Pipeline LLC*, 162 FERC ¶ 63,012 P 2 (2018) (Initial Decision), JA 69. The Administrative Law Judge's extensive findings of fact and law are summarized below.

A. Airlines' Fuel Procurement Process

To procure jet fuel for use at the Orlando International Airport and other airports during the relevant time period, Airlines entered into supply contracts with Valero Services, Inc. (Valero) and Chevron U.S.A. (Chevron) to deliver jet fuel by marine vessel to the Port of Tampa. Initial Decision PP 3-5, JA 75-77. *See infra* p. 31 (graphic illustration of fuel procurement process). Under these contracts, Airlines provide Valero and Chevron with monthly jet fuel nominations that estimate their requirements, which often turn out to differ from the estimates. *Id*. PP 124, 136, JA 127, 132. The amount of fuel delivered to Tampa frequently varies from the monthly nominations. *Id*. PP 143-146, JA 135-37; PP 150-52, JA 139-41. The marine shippers possess title to the jet fuel until it is delivered in Tampa. *Id*. PP 378-382, JA 236-37.

Valero supplies jet fuel to American, Delta and Southwest from international origins. *Id*. PP 138, 157, JA 132, 143. Valero does not load vessels based on Airlines' monthly nominations; the ultimate destination port for the vessel is not designated until well into the voyage. *Id*. P 141, JA 134. After arrival in Tampa, Valero specifies the allocation of jet fuel among the airlines it serves. *Id*. P 142, JA 135.

Chevron supplies United, UPS and Southwest largely from its refinery in Mississippi. *Id*. PP 147, 157, JA 137, 143. Chevron delivers fuel to Tampa in bulk without specifying the amount individual airlines should receive. *Id*. P 153, JA 141. After arrival, Aircraft Service allocates the fuel among the airlines served by Chevron, not based upon the airlines' monthly nominations but to ensure that each airline has the same number of days of jet fuel on hand. *Id*. P 181, JA 151.

On average, jet fuel sits in the Tampa terminal tanks for 9.5 to 12 days before being withdrawn for reshipment inland. *See id*. PP 208-213, JA 162-66. The length of storage is longer at times, with maximum ranges of 18.4 to 20 days. *Id*. P 269, JA 191. Monthly tank inflows and outflows are often mismatched, at times differing by 20 to 30 percent. *Id*. PP 214-216, 275, JA 166-67, 194. The drawdown rate

varies by season, with inventory levels increasing during periods of low demand and decreasing during periods of peak demand (spring break, summer and winter holidays). *Id*. PP 217-221, 274, JA 167-69, 194. The Administrative Law Judge determined that these facts suggest that the tanks are used for non-operational storage (i.e. storage that is not required simply to facilitate transportation service). *Id*. P 275, JA 194*; see also id*. n.484, JA 159 (operational storage is owned and operated by the carrier, between origin and destination, and is used strictly for operational purposes).

Airlines' jet fuel delivered into the Tampa terminal tanks is commingled, allowing Airlines to pool, share or reallocate jet fuel when needed, through the use of negative inventory and time swaps. *Id*. PP 245-257, JA 178-85; PP 283-290, JA 198-200; P 296, JA 202; P 453, JA 260. When Aircraft Service permits Airlines to maintain negative inventory, Aircraft Service ships fuel on an airline's behalf even though the airline's inventory at the Tampa terminal is already exhausted. Order PP 41, 183, JA 492, 551; Initial Decision P 287, JA 199. In a time swap, an airline with a negative balance borrows jet fuel from another airline. Order P 41, JA 492; Initial Decision P 255, JA 183.

The Tampa terminal tanks serve as a distribution point from which specific amounts of jet fuel are allocated for transportation to inland destinations. *Id*. PP 265, 296, 451, JA 189, 202, 259. *See also id*. PP 291-293, JA 200-01. From the tanks, approximately 90 percent of the delivered jet fuel is shipped on the Central Florida Pipeline to the Orlando International Airport, and the remaining 10 percent is transported to other regional airports by truck. *Id*. P 260, JA 186.

Aircraft Service schedules all jet fuel shipments to Orlando International on the Central Florida Pipeline. *Id*. PP 13, 160, JA 79, 144. Aircraft Service does not schedule those shipments based on Airlines' monthly nominations to their suppliers, but rather to ensure that Airlines meet their inventory targets. *Id*. PP 163-66, JA 145-47. There is insufficient space at Orlando to receive the jet fuel delivered to the Tampa terminal in a continuous flow, requiring storage in the Tampa tanks. *Id*. PP 271, 294, JA 192, 201. As jet fuel is consumed at Orlando International, Aircraft Service ships additional jet fuel to maintain the supply levels within an optimal range. *Id*. PP 225-227, 294, JA 170-71, 201. The drawdown of jet fuel from the Tampa terminal tanks, therefore, is not designed to meet the Airlines' daily

requirements at Orlando but rather to meet inventory needs. *Id*. PP 271, 294, JA 192, 201.

B. Consideration Of The Three *Northville* Criteria

The arrival and storage of Airlines' jet fuel at the Tampa terminal interrupts its movement from its foreign or interstate origins; there is no continuous flow of jet fuel out of the marine vessels into the Tampa terminal tanks and onto the Central Florida Pipeline. Initial Decision P 89, JA 109. Consistent with Commission precedent, the Administrative Law Judge applied the three *Northville* criteria (*see supra* page 5) to determine whether this interruption was a "sufficient break" in the continuity of interstate or foreign transportation such that subsequent movement to Orlando International constitutes independent, intrastate transportation. *Id*. P 90, JA 109. The Judge's exhaustive review of these factors (*see* Initial Decision PP 91-330, JA 109-219) is summarized below:

First Northville Criterion: This criterion concerns whether, at the time of the initial interstate or foreign shipment, there was a specific order for a specific quantity of jet fuel to be moved beyond Tampa terminal storage through to Orlando International, which would

indicate continuous transportation. *Id*. PP 92, 171, JA 110, 149. The Administrative Law Judge determined, based on the record, that there was no such order.

Airlines' Valero and Chevron supply contracts specify Tampa, not Orlando or any regional airport, as the delivery point. *Id*. P 185, JA 153. Valero's vessels are loaded based on factors unrelated to Airlines' monthly nominations, and vessels departing Valero's ports of origin may or may not deliver to Tampa. *Id*. PP 172-73, JA 149. Chevron does load vessels based on Airlines' aggregate nominations but, upon delivery in Tampa, Aircraft Service allocates the shipment among Airlines, not based upon Airlines' monthly nominations but to ensure each Airline has the same number of days of jet fuel on hand. *Id*. P 181, JA 151. Title to the jet fuel shipment passes to Airlines upon delivery in Tampa. *Id*. P 383, JA 237.

Moreover, neither Airlines' monthly nominations to Valero and Chevron, nor the quantities delivered to Tampa, determine the jet fuel volumes Aircraft Service ships on the Central Florida Pipeline. *Id*. PP 175, 180, JA 150, 151. Instead, Aircraft Service schedules Pipeline shipments as needed to ensure Airlines have a sufficient supply of jet

fuel at Orlando International to satisfy inventory targets. *Id.* Thus, the quantities of jet fuel shipped by Valero and Chevron are disconnected from the quantities shipped on the Pipeline to Orlando. *Id.* So the record established that, at the time of initial shipment, there is no specific order being filled for a specific quantity of jet fuel to be moved to Orlando. *Id; see also id.* PP 198, 450, JA 157, 259.

Second Northville Criterion: The second *Northville* criterion concerns whether "the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated." *Id.* P 199, JA 157 (quoting *Guttman*, 161 FERC ¶ 61,180 P 50). As applied by the Commission, this criterion focuses on "the character of the storage" at the Tampa terminal. *Id.* (quoting *Interstate Energy*, 32 FERC ¶ 61,294 at p. 61,691). The Commission considers factors such as length of storage and withdrawal rates, the reasons for withdrawal including marketing and distribution, commingling within tanks, and the presence of through rates (i.e. whether there is a single charge from origin to final destination or separate charges for each leg). *Id.* (citing *Interstate Energy*, 32 FERC ¶ 61,294 at pp. 61,691-92; *Northville*, 14 FERC ¶ 61,111 at p. 61,209).

The record shows that Airlines use the Tampa terminal tanks as non-operational storage to serve Airlines' inventory needs rather than as operational storage to effectuate a continuous flow in interstate commerce. *Id.* PP 270, 275, 294, 452, JA 192, 194, 201, 259. On average, jet fuel sits in the Tampa terminal tanks for 9.5 to 12 days before being withdrawn for shipment inland, with maximum ranges of 18.4 to 20 days. *See id.* PP 208-213, 269, JA 162-66, 191. Monthly flows into and out of the Tampa tanks are often mismatched, at times differing by 20 to 30 percent. *Id.* PP 214-215, 275, JA 166-67, 194.

Similarly, jet fuel volumes received at Tampa often differ greatly from the volumes shipped on the next Central Florida Pipeline cycle. *Id.* PP 216, 276, JA 167, 194. The drawdown rate varies by season, with inventory levels increasing during periods of low demand and decreasing during periods of peak demand. *Id.* PP 217-221, 274, JA 167-69, 194.

Moreover, the storage tank capacity in Tampa is significantly larger (2.3 times) than the storage capacity available to Airlines at Orlando International. *Id.* PP 222-224, 271, JA 169-70, 192. The limitations on Airlines' Orlando fuel tank capacity result in a build-up

of jet fuel inventory in the Tampa terminal tanks. *Id.* P 271, JA 192. As jet fuel is consumed at Orlando International, Airport Service ships additional jet fuel to Orlando on the Central Florida Pipeline to maintain the supply levels in Orlando within an optimal range. *Id.* PP 225-227, 294, JA 170-71, 201. The drawdown of jet fuel from the Tampa terminal tanks is therefore not designed to meet the Airlines' daily requirements at Orlando but to meet inventory needs. *Id.* PP 271, 294, JA 192, 201.

Airlines' jet fuel in the Tampa terminal tanks is commingled with other shipments, allowing Airlines to pool or share jet fuel, have negative inventory, and perform time swaps. *Id.* PP 245-257, JA 178-85; 283-290, JA 198-200. These activities allow for the reallocation of volumes between Airlines when needed. *Id.* PP 296, 453, JA 202, 260.

Finally, the Tampa terminal tanks serve as a distribution point from which specific amounts of jet fuel are allocated for transportation to inland destinations. *Id.* PP 265, 296, 451, JA 189, 202, 259*; see also id.* PP 291-293, JA 200-01. Aircraft Service allocates specific amounts of jet fuel from the Tampa tanks for transportation to Orlando International on the Central Florida Pipeline, and fixed base operators

at regional airports allocate specific amounts for distribution by truck. *Id*. PP 259, 296, 451, JA 185, 202, 259.

Accordingly, the Administrative Law Judge concluded that the Tampa terminal tanks are used for inventory, storage and distribution rather than continuous transportation, which further weighed in favor of concluding that the continuity of transportation was sufficiently broken upon delivery in Tampa. *Id*. PP 297-298, 454, JA 203, 260.

Third Northville Criterion: The third *Northville* criterion concerns whether the onward transportation of Airlines' jet fuel from the Tampa terminal to Orlando International is arranged before or after that fuel is allocated from storage at the Tampa terminal. Initial Decision PP 299, 302, JA 203, 205.

The jet fuel is available for shipment on the Central Florida Pipeline at the earliest approximately one to two days after it is delivered to Tampa; on average the fuel sits in the Tampa terminal tanks for 9.5 to 12 days before it is withdrawn for shipment. *Id*. P 319, JA 216. Aircraft Service decides the volume of jet fuel to ship on the Central Florida Pipeline in its weekly nomination only a few days

before it is transported and may revise that nomination even as jet fuel is being injected into the Pipeline. *Id.* PP 317, 319, JA 214, 216.

Based on these facts, the Administrative Law Judge concluded that fuel shipments on the Central Florida Pipeline are, for all practical purposes, always arranged after the jet fuel has arrived at Tampa. *Id.* Thus, criterion three also weighed in favor of concluding that the continuity of transportation is sufficiently broken when the jet fuel arrives at the Tampa terminal. *Id.* PP 321, 324, 330, JA 216, 217, 219.

III. THE FERC ORDER AFFIRMING THE INITIAL DECISION

The Commission affirmed the Administrative Law Judge's jurisdictional determination, finding her 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. Order P 109, JA 519. The Administrative Law Judge correctly found that the circumstances relating to the jet fuel movements following storage satisfy the three *Northville* criteria and demonstrate a sufficient break in continuity to establish that the movements are intrastate transportation. Order P 112, JA 520. Satisfying the three *Northville* criteria established that the interstate transportation has ended. *Id.*

P 114, JA 521 (citing Initial Decision P 456, JA 260; *Northville*, 14 FERC ¶ 61,111 at p. 61,207; *Petroleum Products*, 71 M.C.C. 17 at 29; *Interstate Energy*, 32 FERC ¶ 61,294 at p. 61,690).

This appeal followed. In FERC cases arising under the Interstate Commerce Act, unlike cases arising under the more familiar Federal Power Act and Natural Gas Act, there is no statutory obligation to first petition for agency rehearing. *See*, *e.g.*, *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007).

SUMMARY OF ARGUMENT

The Interstate Commerce Act provides the Commission with jurisdiction over the transportation of oil by pipeline in interstate commerce. Because oil pipelines may carry both jurisdictional and non-jurisdictional shipments, a jurisdictional determination is made regarding individual shipments. Here, both the Administrative Law Judge and the Commission, based upon a review of the circumstances presented, made the fact-specific, record-specific judgment that the transportation at issue is intrastate is nature and thus lies outside the agency's jurisdiction.

Under relevant Supreme Court, Interstate Commerce Commission and FERC precedent, the jurisdictional determination turns on whether the shipper intends to ship the product from interstate origins through to the ultimate destination in one continuous movement. Here, Airlines secure jet fuel for their planes at Orlando International and regional airports through two distinct movements: first, a foreign or interstate marine movement by their suppliers to deliver fuel to the Tampa terminal where Airlines take ownership and keep it until needed to maintain an adequate supply at the airport; and second, when the fuel is needed their agents arrange intrastate movements from the Tampa terminal to airports by pipeline or truck. Where a within-state pipeline reshipment follows terminal storage, under long-standing precedent the Commission evaluates the facts of the transaction to determine shipper intent under a three criteria test, referred to as the *Northville* criteria.

The Commission affirmed the findings of the Administrative Law Judge, following an extensive evidentiary hearing, that the transportation at issue here meets all three of the *Northville* criteria, demonstrating that transportation of the jet fuel on the Central Florida Pipeline is in intrastate, not interstate, commerce: (1) Airlines' foreign

and interstate marine suppliers (Valero and Chevron) only deliver to Tampa and do not fill specific orders for specific quantities of jet fuel to be moved through Tampa to any ultimate destination, including Orlando (*Northville* criterion one); (2) the Tampa terminal serves as a point of inventory and distribution from which the bulk marine shipments of jet fuel are allocated among Airlines and among Orlando International and regional airports (*Northville* criterion two); and (3) reshipment of jet fuel on the Central Florida Pipeline to Orlando (and by truck to regional airports) is not arranged until after the marine shipments are delivered to Tampa (*Northville* criterion three). Under Commission precedent no single factor is essential or determinative, but a finding that all three factors are present demonstrates a sufficient break in interstate transportation such that subsequent within-state transportation is intrastate.

Shippers argue that the *Northville* factors fail to consider evidence bearing on shippers' intent. To the contrary, the *Northville* criteria expressly were derived from Supreme Court and agency decisions distilling factors that identify major manifestations of shipper intent. Shippers' primary evidence -- their intent to supply themselves with jet

fuel from out-of-state sources through recurring shipments -- does not address the jurisdictional issue, which is whether each airline shipper intends that each jet fuel shipment go from origin to ultimate destination in one continuous movement.

On the first criterion, Shippers argue that their requests for proposals, supply contracts and monthly nominations to their marine suppliers constitute specific orders for specific quantities of jet fuel to be shipped to Orlando. But the Commission and the Administrative Law Judge found that: these amounts are estimates not binding requirements; marine suppliers deliver only to Tampa and are not aware of ultimate destinations; deliveries to Tampa frequently differ from amounts contracted for or nominated; and neither the nominations nor the deliveries dictate amounts shipped on the Central Florida Pipeline, which Aircraft Service sets to maintain adequate inventory at Orlando International.

On the second criterion, Shippers argue that throughput through the Tampa terminal demonstrates continuous transportation, and no appreciable activity occurs with respect to the jet fuel shipments while in storage in Tampa. But the Commission and Administrative Law

Judge found that the length of storage (averaging 9.5 to 12 days), mismatched monthly inflows and outflows, and seasonally variable drawdown rates evidence that there is non-operational storage at the Tampa terminal instead of a continuous flow of jet fuel. The Commission and the Administrative Law Judge also found significant operations affecting the marine fuel deliveries at the Tampa terminal where the bulk shipments of jet fuel are allocated among Airlines and among the various airports prior to onward transportation.

Shippers' brief does not challenge the factual finding on the third criterion, that reshipments on the Central Florida Pipeline are arranged after the jet fuel has been delivered to Tampa.

ARGUMENT

I. STANDARD OF REVIEW

This case concerns the Commission's interpretation of the scope of its jurisdiction over interstate commerce under 49 U.S.C. app. §1(1) of the Interstate Commerce Act. This Court has recognized that Congress empowered the Commission to administer the Interstate Commerce Act. *Frontier*, 452 F.3d at 792; *Ass'n of Oil Pipelines v. FERC*, 83 F.3d 1424, 1439 (D.C. Cir. 1996). As the scope of "interstate commerce" is not defined in the statute, the Commission is entitled to deference for

its reasonable interpretation of the statute it administers. *City of Arlington, Texas v. FCC*, 569 U.S. 290, 307 (2013); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984); *see also Western Refining Southwest, Inc. v. FERC*, 636 F.3d 719 (5th Cir. 2011) (applying *Chevron* to FERC jurisdictional determination under the Interstate Commerce Act).

The Court reviews FERC orders under the Administrative Procedure Act's deferential "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). The "scope of review under [that] standard is narrow." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted). The relevant inquiry is whether the agency has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Court has not "expressly stated" whether it reviews the Commission's factual findings in orders under the Interstate Commerce Act under the substantial evidence standard, as it does when reviewing

orders under other FERC-administered statutes. *United Airlines, Inc. v. FERC*, 827 F.3d 122, 127 (D.C. Cir. 2016). But "in their application to the requirement of factual support, the substantial evidence test and the arbitrary and capricious test are one and the same." *Id.* (citing *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (citation omitted). If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Big Bend Conservation All. v. FERC*, 896 F.3d 418, 423 (D.C. Cir. 2018) (finding that substantial evidence supports FERC's finding that a natural gas pipeline is a non-jurisdictional intrastate pipeline, not subject to regulation by the Commission); *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

The challenged order affirmed determinations of an Administrative Law Judge following a trial-type evidentiary hearing. Where the Commission adopts an Administrative Law Judge's conclusion, it need not repeat the Administrative Law Judge's findings and reasoning. *See, e.g., Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 967-968 (D.C. Cir. 1984).

II. THE COMMISSION REASONABLY AFFIRMED THE ADMINISTRATIVE LAW JUDGE'S INTRASTATE TRANSPORATION FINDING.

The Interstate Commerce Act provides the Commission with jurisdiction over the transportation of oil by pipeline in interstate commerce. Order P 123, JA 524 (citing 49 U.S.C. app. §1(1)). As the same pipeline may carry both jurisdictional interstate and non-jurisdictional intrastate shipments, the jurisdictional determination is made with respect to individual shipments. *See, e.g., Amoco Pipeline Co.*, 62 FERC ¶ 61,119 at p. 61,803 (1993), *reh'g denied*, 67 FERC ¶ 61,378 (1994).

Under well-settled Supreme Court precedent, whether a shipment is interstate or intrastate depends upon "the essential character of the movement." *Baltimore & Ohio Southwestern R.R. Co. v. Settle*, 260 U.S.

166, 170 (1922) (quoted in Order P 123, JA 524). One of the main factors in determining the character of the movement is "the original and persisting intention of the shippers which was carried out." *Settle*, 260 U.S. at 173; *see also* Order PP 109, 121, JA 519, 523. A shipper intends interstate shipment where there is one "through movement to the point of ultimate destination." *Settle*, 260 U.S. at 174*; see also*, *e.g.*, *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 101 (1927) (the crucial question in determining whether a shipment is moving in interstate commerce is "the continuity of transit").

As the Supreme Court has found, where an interstate or foreign shipment is reshipped in-state, the "reshipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character." *Atlantic Coast*, 275 U.S. at 268. Rather, jurisdiction over the reshipment turns on whether the shipper intended to deliver product from interstate origins through the point of reshipment and on to the final destination by "immediate continuity of transportation," or whether the shipper brought the product to rest at the point of interruption "for a purpose outside its mere transportation." *Id.* at 269-

270*; see also* Order P 51, JA 495 (distinguishing the intent to move the particular shipment continuously in interstate commerce from the intent to store it for a later shipment that is disconnected from the first leg of transportation).

Consistent with longstanding precedent, the Commission presumes that all interstate shipments are jurisdictional unless the facts show a sufficient break in the continuity of interstate transportation that a portion of the shipment can be considered intrastate. Order P 109, JA 519 (citing *Guttman,* 161 FERC ¶ 61,180 P 49 & n.111; *Texaco,* 80 FERC ¶ 61,200 at pp. 61,804-05). Where, as here, product shipment is interrupted at a terminal, storage facility, or distribution point, the Commission may find a sufficient break in interstate transportation if:

> (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 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.

Order P 110, JA 519 (citing *Northville*, 14 FERC ¶ 61,111 at p. 61,207*)*; *see also Interstate Energy*, 32 FERC ¶ 61,294 at p. 61,690; *Guttman*, 161 FERC ¶ 61,180 P 50. The three *Northville* criteria look to the factual nature of the break in transportation to determine whether the shipper intends to complete the shipment in one continuous movement. *Id.*

The Commission recognized, as it did in *Guttman* (Brief at 46-47), that "no single factor is essential or determinative" and all factors need not be individually addressed in every jurisdictional analysis. Order PP 145, 167, JA 535, 545 (quoting *Guttman*, 161 FERC ¶ 61,180 P 64). Nevertheless, where, as here, transportation is found to meet all three *Northville* criteria, these findings establish that the continuity of transportation has been broken, the initial shipments have come to rest, and the interstate journey has ceased. Order P 111, JA 520 (citing *Guttman*, 161 FERC ¶ 61,180 P 50 n.111; *Petroleum Products*, 71 M.C.C. at 29).

Here, the extensive record established that Airlines supply jet fuel to their planes at Orlando International and regional airports through two distinct movements: first, the interstate or foreign marine delivery

of fuel to the Tampa terminal; and second, the intrastate movement of fuel from the Tampa terminal to Orlando International by pipeline or to regional airports by truck. Order P 122, JA 524. Consistent with its long-standing precedent, the Commission reasonably affirmed the Administrative Law Judge's determination -- after an extensive factual examination at hearing -- that the facts here show a sufficient break in the continuity of interstate transportation under the three *Northville* criteria, so that the Central Florida Pipeline transportation is intrastate. Order P 108, JA 519.

A. Airlines' Fuel Procurement Process Demonstrates A Break In Continuity At The Tampa Terminal.

The record evidence showed that: Airlines' foreign and interstate marine suppliers (Valero and Chevron) deliver jet fuel only to Tampa; they do not fill specific orders for specific quantities of jet fuel to be moved through Tampa to any ultimate destinations, including the Orlando airport (*Northville* criterion one). Order P 113, JA 520 (citing Initial Decision P 450, JA 259); *see also* Initial Decision PP 92-198, JA 110-57 (findings on criterion one). The Tampa terminal tanks do not simply store an individual airline's jet fuel until it can be shipped, but rather serve as a point of inventory and distribution from which the

commingled bulk marine shipments of jet fuel are allocated among Airlines and among Orlando International and regional airports (*Northville* criterion two). Order P 113, JA 520 (citing Initial Decision PP 451-454, JA 259-60); *see also* Initial Decision PP 199-298, JA 157-203 (findings on criterion two). The subsequent transportation of jet fuel on the Central Florida Pipeline to Orlando International (and by truck to regional airports) is not arranged until after the marine shipments are delivered to Tampa and Aircraft Service has allocated the jet fuel to be shipped from storage (*Northville* criterion three). Order P 113, JA 520 (citing Initial Decision PP 455, JA 260); *see also* Initial Decision PP 299-330, JA 203-19 (findings on criterion three).

The following diagram, relied on by the Administrative Law Judge in the Initial Decision, illustrates the flow of Airlines' jet fuel (Exhibit No. JET-0001, JA 426):

Aircraft Service International Group, Inc., *et al.* v. Central Florida Pipeline LLC, *et al.* Exhibit No. JET-0001
Docket No. OR16-26-000
Jet Fuel Flow Illustration

*Hooker's Point Leased Tanks (70-1, 70-2, 42-2, 42-3, and 42-4)
*World Fuel Leased Tanks (55-1 and 42-1)
*Tanks connected to the truck racks (55-1, 42-1, 42-2, 42-3, and 42-4)
**Staff and Respondents note that truck rack reports (which are not in any pre-filed testimony) reflecting information input by truck drivers indicate that deliveries have been made to other airport destinations; however, the information is not complete and has not been independently verified. Airlines believe the listed airports are the only airports to which jet fuel has been delivered during the relevant time frame (as reflected in pre-filed testimony).

B. The Commission Reasonably Rejected Shippers' Challenges To The *Northville* Criteria Findings.

1. No Through Movement (*Northville* Criterion 1)

The Commission affirmed the Administrative Law Judge's determination that there are no through movements, i.e., specific orders from a specific shipper (an individual airline) that are shipped intact from interstate origins through Tampa to Orlando. Order P 176, JA 548. Shippers claim Airlines' requests for proposals to suppliers, their supply contracts with Valero and Chevron, and their monthly nominations for jet fuel under those contracts are "specific orders." Brief at 55-56. Shippers failed to demonstrate that their arrangements satisfy this criterion. Order P 176, JA 548.

Airlines' requests for proposals solicit bids by providing estimates of future jet fuel needs; they do not initiate any movement of fuel, and individual shipments are not based upon the requests for proposals. Initial Decision P 184, JA 152; *see also id.* PP 103-08, JA 116-19 (describing individual airlines' requests for proposals).

The Valero and Chevron supply contracts specify Tampa as the delivery point; they do not address any movement beyond Tampa. *Id.* P 185, JA 153. The marine shippers possess title to the commingled jet

fuel until delivery in Tampa, at which point Airlines take title. *Id.* PP 378-382, JA 236-37. The supply contracts, moreover, are generally estimates of quantity, and are silent as to when shipments must take place and the quantities of fuel that must be delivered during individual months. *Id.* PP 185-186, JA 153; *see also id.* PP 109-25, JA 120-28 (describing individual airlines' supply contracts).

Airlines' monthly nominations to Chevron and Valero are not binding as to the quantity that must be delivered to Tampa, but rather are estimates that are subject to modification. *Id.* P 189, JA 154. The amounts actually received in Tampa frequently vary from the monthly nominations. *Id.* PP 143-146, JA 135-37 (Valero variances between nominations and deliveries); *Id.* PP 150-152, JA 139-41 (Chevron variances). Valero loads its ships based on other factors, not airline (American, Delta and Southwest) nominations. *Id.* P 190, JA 154; *see also id.* PP 137-142, JA 132-35 (Valero delivery process). Aircraft Service submits aggregated monthly nominations to Chevron on behalf of the Chevron-supplied airlines (Southwest, United and UPS). *Id.* P 129, JA 129. While Chevron loads ships with the aggregated nominations in mind, Aircraft Service allocates the Chevron bulk

delivery among the Chevron-supplied airlines not based upon their monthly nominations but to ensure that each airline has the same number of days of jet fuel on hand. *Id*. PP 154, 181, 190, JA 142, 151, 154; *see also id*. PP 124-136, JA 127-32 (describing individual airlines' monthly nomination process). Southwest does indicate on its monthly nominations to Valero and Chevron an amount for delivery to Orlando International, but the nomination does not specify the timing or quantity of individual shipments, and neither Valero nor Chevron have any contractual obligation to deliver beyond Tampa. *Id*. PP 130, 419, JA 130, 250.

Further, the jet fuel volumes Aircraft Service schedules for transportation on the Central Florida Pipeline are not based on either Airlines' monthly nominations to Valero and Chevron or the specific quantities received in Tampa. *Id*. PP 175, 180, 192, JA 150, 151, 155. Indeed, Aircraft Service does not receive any communication from Airlines regarding how much jet fuel they want shipped on the Pipeline during any pumping cycle. *Id*. P 166, JA 147. Rather, Aircraft Service schedules volumes primarily to ensure optimal inventory levels in the tanks at Orlando International. *Id*. PP 166, 192, JA 147, 155. The

amount of jet fuel tendered for shipment on the Central Florida Pipeline may vary from Airlines' monthly nominations by as much as 30 percent or more. *Id.* P 163, JA 145.

The quantities of jet fuel nominated by Airlines therefore are disconnected from the amounts received in Tampa, and amounts received in Tampa are disconnected from the quantities shipped to Orlando on the Central Florida Pipeline. *Id.* PP 175, 180, 196, JA 150, 151, 156. So the Commission reasonably affirmed the conclusion that, at the time of initial shipment of jet fuel to Tampa, there is no specific order being filled for a specific quantity of jet fuel to be moved to Orlando International. Order P 176, JA 548; *see also* Initial Decision PP 198, 450, JA 157, 259.

2. The Character Of Storage (*Northville* Criterion 2)

The Commission also reasonably affirmed the Administrative Law Judge's determination that the Tampa terminal tanks are used as a point of inventory and distribution, rather than as simply representing a temporary pause in a continuous interstate movement. Order PP 44, 179, JA 493, 550; Initial Decision PP 265, 290, JA 189, 200.

a. The Delay Is Not Solely For Transportation Purposes.

The record here established that the delay between jet fuel arrival in Tampa and subsequent delivery to Orlando is a pause "for a purpose outside its mere transportation." *Atlantic Coast*, 275 U.S. at 270. The record shows that the delay is not caused by any limitation on onward pipeline transportation. Order PP 146, 180, JA 535, 550. The Commission rejected Shippers' supply chain model purporting to show that fuel moves as expeditiously as possible from marine delivery through the Tampa terminal to Orlando, a finding Shippers do not challenge in their brief. *See* Order PP 155-162, JA 540-43; Initial Decision PP 228-232, JA 171-74. Among other failings, the model's "fatal error" was assuming expeditious fuel movement when the Central Florida Pipeline runs at less than full capacity. Order P 155, JA 540: Initial Decision PP 233-240, JA 174-76 (Central Florida Pipeline capacity does not limit the flow of jet fuel through the Tampa terminal).

Rather, jet fuel is stored in Tampa because there is insufficient space at Orlando International to receive the jet fuel in a continuous flow. Order PP 157-158, 180, JA 541-42, 550; Initial Decision P 294,

JA 201. The storage capacity in Tampa is significantly larger (2.3 times) than the capacity available to Airlines at Orlando International. Initial Decision PP 222-224, 271, JA 169-70, 192. As jet fuel is consumed at Orlando International, Aircraft Service schedules pipeline shipments to maintain supply levels in Orlando within an optimal range. *Id*. P 294, JA 201. Based upon Aircraft Service's recommendation, each airline seeks to maintain approximately 20 days of fuel, divided between Orlando and Tampa. Order P 159, JA 542; Initial Decision PP 166, 207, JA 147, 162.

Shippers point out that the monthly turnover rate in the Tampa tanks (2 or 3 times per month) is higher than that found to be "continuous throughput" in *U.S. v. Majure*, 162 F. Supp. 594 (S.D. Miss. 1957). Brief at 53. *Majure*, however, exemplifies "continuous throughput from barge to storage tank to tank truck." 162 F. Supp. at 596. There, gasoline was "merely put through the storage tanks" to "facilitate loading into trucks and this was done as continuously and rapidly as possible." *Id*. "The only reason for loading the tank trucks from the storage tanks rather than directly from the barges was that it

was not practicable or feasible to do the latter." *Id*. None of the gasoline remained in storage. *Id*.

In contrast, here, the Commission and the Administrative Law Judge reasonably found that the length of storage (averaging 9.5 to 12 days, Initial Decision PP 208-213, JA 162-66), mismatched inflows and outflows (*id*. PP 214-216, 275, JA 166-67, 194), and seasonally variable drawdown rates (Order P 172, 180, JA 547, 550; Initial Decision PP 217-221, 274, JA 167-69, 194 (lower average monthly inventories in Tampa coincide with peak travel periods during spring break, summer and winter holidays)) all represent evidence that non-operational storage is occurring at the Tampa terminal as opposed to a continuous flow of jet fuel. Initial Decision PP 275-276, JA 194-95. The drawdown of jet fuel from Tampa -- like the patterns of withdrawals in *Northville*, 14 FERC ¶ 61,111 at p. 61,209, and *Interstate Energy*, 32 FERC ¶ 61,294 at p. 61,191 -- is not designed to meet Airlines' daily requirements at Orlando International. Order P 179, JA 550; Initial Decision P 294, JA 201.

Shippers note that *Northville* had a higher degree of seasonal variation than here. Brief at 54. But there is no requirement that

inventory be comparable to consumption in any given time frame. Order PP 179, 181, JA 550, 551. Airlines can be expected to maintain only as much inventory as necessary to guard against seasonal fluctuations in demand and disruptions in supply. *Id.* PP 172, 179, JA 547, 550. Thus, it is not the degree of seasonal volatility but its existence that matters in the jurisdictional analysis.

b. Significant Operations Affecting Shipments Occur During The Delay.

Rather than a temporary pause in continuous interstate movement, the record here showed that significant operations affecting the marine fuel deliveries occur at the Tampa terminal tanks. Order P 146, JA 535. The Tampa terminal tanks serve as a distribution point from which specific amounts of jet fuel are allocated for transportation to inland destinations. Initial Decision PP 265, 296, 451, JA 189, 202, 259; *see also id.* PP 291-293, JA 200-01. Aircraft Service, on Airlines' behalf, allocates jet fuel for transportation to Orlando International on the Central Florida Pipeline, and regional airport base operators allocate specific amounts for transportation to regional airports by truck. Initial Decision PP 259, 296, 451, JA 185, 202, 259. Aircraft Service and the regional airport base operators determine how much

fuel to allocate to each airport and airline based on demand and the inventory of each airline at the airports they supply from the Tampa terminal. Order P 48, JA 494; Initial Decision PP 292-293, JA 200-01. Thus, jet fuel is not simply "transported from the terminal to Orlando and other airports," Brief at 41, but rather bulk marine shipments of jet fuel are broken up and allocated among airlines and airports while in storage at Tampa.

Further, the record showed that Airlines treat the jet fuel stored at Tampa as a shared, fungible pool. Order P 41, JA 492. Aircraft Service permits Airlines to maintain negative inventory, i.e., Aircraft Service will ship fuel on an airline's behalf even though the airline's inventory at the Tampa terminal is already exhausted. *Id.* PP 41, 183, JA 492, 551; Initial Decision P 287, JA 199. Shippers dismiss this practice as "an accounting convention with negligible practical impact," Brief at 41, but the practice necessarily involves airlines borrowing fuel from other airlines' accounts, thereby reallocating or redistributing the stored fuel. Order P 183, JA 551. So while negative inventory avoids money changing hands among Airlines, the transaction is nevertheless

tantamount to a sale and distribution between the exchanging airlines. Initial Decision P 287, JA 199.

Airlines also exchange fuel among themselves through time swaps, where an airline with a negative balance reaches agreement with another to borrow jet fuel. Order P 41, JA 492; Initial Decision P 255, JA 183. While time swaps are rare, Order P 43, JA 493; Initial Decision P 288, JA 199 (*see* Brief at 42), negative inventory is not. Order P 183, JA 552; *see also* Order P 42, JA 492 (individual airlines relied on negative inventory from 4 to 185 times in the five years under review). Also, the presence of spot sales, though rare, establish that jet fuel may be sold at the Tampa terminal. Order P 44, JA 493; Initial Decision P 290, JA 200.

Shippers complain that Airlines are end users rather than distributors in the "usual commercial sense," as in *Atlantic Coast*. Brief at 41. Under Commission precedent, it is not determinative that Airlines are end users; the Commission followed its *Northville* and *Interstate Energy* precedent in finding that use of storage by end users for inventory and distribution constitutes a sufficient break in interstate transportation under the *Northville* criteria. Order PP 46,

126, JA 493, 527; *see also* Initial Decision P 266, JA 189 (citing *Northville*, 14 FERC ¶ 61,111 at p. 61,209 (while an end user, Long Island Lighting Company still used portside tanks as a "true point of inventory and storage"), and *Interstate Energy*, 32 FERC ¶ 61,294 at pp. 61,191-92 (utilities transporting oil for use in their own power plants do not use portside storage for daily requirements, but for inventory needs)).

c. Shippers' Precedent -- Finding Continuity Where Delay Is Solely For Purposes Of Transportation -- Is Inapplicable Here.

Shippers cite to Supreme Court cases (Brief at 34-40) as purportedly reflecting "the Supreme Court's plain direction that holding product at an intermediate point for a period of time does not change the essential character of commerce." Brief at 38. But as the Commission explained, *see* Order PP 134-149, JA 530-37, unlike here, in the cited cases shippers paused through shipments of unbroken bulk only as long as necessary to facilitate onward travel.

In *Texas & New Orleans Railroad Co. v. Sabine Tram Co.*, 227 U.S. 111 (1913), and *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1927), shippers paused product at local facilities prior to it being loaded onto

ships for export. The pause did not interrupt the continuity of interstate transportation because the exporter had no purpose for the pause other than facilitating onward transportation. Order PP 143-145, JA 534-35; *see* Brief at 39-40. None of the bulk shipment of lumber (*Sabine*) or oil (*Carson Petroleum*) was disbursed or distributed at the intermediate stopover and the shipments were held only as long as necessary to move them onto ships. Order PP 144, 146, JA 534, 535. "In 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." *Carson Petroleum*, 279 U.S. at 108-109. "The quickness of transshipment in both cases was the chief object each exporter plainly sought. In both cases, the selection of the point of shipment and equipment at that point were solely for the speedy and continuous export of the product sold abroad and for no other purpose." *Id*. at 109. The fact that the commerce in *Sabine* was recurring (Brief at 37) did not establish interstate jurisdiction; the nature of each shipment in the recurring practice determined that jurisdiction. Order P 170, JA 546.

United States v. Erie Railroad Co., 280 U.S. 98 (1929), concerned a manufacturing company's order for a specific number of bales of wood pulp, which were delivered portside and shipped through to the manufacturing company intact, with no diversion, sale or any other action taken with regard to the shipment at portside. Order P 148, JA 537; *see also Erie*, 280 U.S. at 101. As in *Sabine* and *Carson Petroleum*, there was no delay in shipment at the port except as necessary to arrange transportation on a train with multiple cars, so as not to cause rail congestion at the ultimate destination. Order P 148 n.329, JA 537; *Erie*, 280 U.S. at 101; *see also, e.g., N.C. Utils. Comm'n v. U.S.*, 253 F. Supp. 930, 936 (E.D.N.C. 1966) (affirming *Iron & Steel Articles*, 323 I.C.C. 740 (1965) (cited Brief at 49, 52) (iron and steel products held portside in transit sheds for not more than 3 days before being trucked to in-state destinations were in interstate commerce where shipper had no distribution or storage facilities at the port and no purpose to store cargo at the port).

In *Baltimore & Ohio Southwestern Railroad Co. v. Settle*, 260 U.S. 166, 167 (1922) (Brief at 39), a lumber dealer had out-of-state lumber shipped by rail to Ohio, and then, without unloading any of the rail

cars, reshipped them within a few days elsewhere in Ohio under an intrastate rate that was less expensive than the interstate through rate to the ultimate destination. Order P 149, JA 537. There was no terminal, storage facility or distribution point that could serve as a point for allocation, trade or inventory prior to reshipment. *Id.* As there was no purpose for the intermediate stop other than to obtain the cheaper intrastate rate (*id.*; *Settle*, 260 U.S. at 169), the shipper's unbroken shipment was a through movement to the point of ultimate destination. *Settle*, 260 U.S. at 173.

Shippers argue that their "overarching" intent to supply themselves with out-of-state fuel at Orlando International through recurring deliveries was sufficient to prove that the Central Florida Pipeline reshipment was interstate. Brief at 33-38; 46-52. But Airlines' collective intent to supply themselves with jet fuel does not address the jurisdictional question: whether a specific airline shipper has a fixed intent to transport an individual shipment of jet fuel from its out-of-state origins through the Tampa terminal to Orlando *in one continuous movement*. Order PP 122, 169-170, JA 524, 545-46. That Shippers have a pattern of shipping to the same ultimate destinations is not

determinative. Order PP 168-169, JA 545-46. To the contrary, "[t]he instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began." *Settle*, 260 U.S. at 173.

The Supreme Court and the Commission have found intrastate commerce following terminal storage in cases where the shipper -- while generally intending to take delivery of oil at its own stations or generating plants -- interrupted the oil shipment "for a purpose outside its mere transportation." *Atlantic Coast*, 275 U.S. at 270; *see also* Order P 149, JA 537 (citing *Atlantic Coast*, 275 U.S. at 266, 269; *Northville*, 14 FERC ¶ 61,111 at p. 61,209; *Interstate Energy*, 32 FERC ¶ 61,294 at p. 61,692). In *Atlantic Coast*, marine deliveries of out-of-state petroleum products to portside storage tanks were subsequently reshipped in-state by tank car. Order P 135, JA 531; *Atlantic Coast*, 275 U.S. at 263-64. The Supreme Court pointed to the following factors in finding the within-state transportation by tank car to be intrastate: the marine sellers of the products had no delivery destination beyond the Tampa and Jacksonville portside storage; no particular product was

designated for any particular place beyond storage; title to the bulk shipment passed to the purchaser on delivery; and the purchaser then had control of the product and was free to distribute it according to its needs. *Id.*

Northville concerned an electric utility (the Long Island Lighting Company) that shipped fuel oil from interstate origins to portside storage and then within-state by pipeline to its generating plant. Order P 126, JA 527; *Northville*, 14 FERC ¶ 61,111 at pp. 61,205-06. The Commission concluded that the within-state pipeline transportation was intrastate, notwithstanding that the utility intended ultimately to ship to its generating plant as the final destination. Order P 126, JA 527; *Northville*, 14 FERC ¶ 61,111 at p. 61,209. The utility used the portside storage to maintain inventory levels, not to meet current daily requirements at the generating plant, and drawdowns were dictated by seasonal demand. *Id.* The marine and pipeline shipments were covered by separate bills of lading and were separately arranged. *Id.* The Commission found that this pattern did not show a continuous flow of interstate commerce. *Northville*, 14 FERC ¶ 61,111 at p. 61,209.

In *Interstate Energy*, three electric utilities purchased oil that was delivered into portside storage and then within-state by pipeline to their power plants. Order P 127, JA 527; *Interstate Energy*, 32 FERC ¶ 61,294 at p. 61,692. The Commission found the within-state shipments were intrastate since oil for all three utilities arrived in a commingled bulk shipment at portside storage, pipeline transportation for the various utilities was not arranged until after the oil arrived at the terminal, there was no through bill of lading covering marine and inland transportation, and the size of the storage facilities indicated that they were not used to meet daily requirements but rather to meet the inventory needs of the individual utility shippers. Order P 127, JA 527; *Interstate Energy*, 32 FERC ¶ 61,294 at p. 61,691.

Here, similar factual considerations point to a pause of the jet fuel shipment in terminal storage that was not for purposes of facilitating "immediate continuity of transportation," but rather was for "a purpose outside its mere transportation." *Atlantic Coast*, 275 U.S. at 269-270.

3. Transportation In Furtherance Of Distribution (*Northville* Criterion 3)

The third *Northville* criterion concerns whether the onward transportation of Airlines' jet fuel from the Tampa terminal to Orlando

International is arranged before or after that fuel is allocated from storage at the Tampa terminal. Order P 51, JA 495; Initial Decision PP 299, 302, JA 203, 205. As the Commission and the Administrative Law Judge determined, the record established that onward transportation on the Central Florida Pipeline is not arranged until after the jet fuel has been delivered to Tampa and an allocation process has taken place to determine the batching onto the pipeline. Order P 62, JA 499; *see also id*. PP 51-62, JA 495-99 (describing findings). This further supported the conclusion that continuity of transportation is broken once the jet fuel arrives in Tampa. *Id*. P 62, JA 499.

Following delivery, the earliest that the jet fuel is available for shipment on the Central Florida Pipeline is approximately one to two days after it arrives in Tampa, but on average the fuel sits in the Tampa terminal tanks for 9.5 to 12 days before it is withdrawn for shipment. Initial Decision P 319, JA 216. Aircraft Service decides what jet fuel volume to ship on the Central Florida Pipeline in its weekly nomination, only a few days (usually one to two) before transportation on the Pipeline and may revise that nomination even as jet fuel is being injected into the Pipeline. *Id*. PP 317, 319, JA 214, 216. Based on these

facts, the Administrative Law Judge concluded that, for all practical purposes, fuel shipments on the Central Florida Pipeline are always arranged after the jet fuel has arrived at Tampa. *Id.* P 319, JA 216.

On brief, Shippers do not challenge the factual finding that onward pipeline transportation is arranged after jet fuel arrives in Tampa. Instead, Shippers argue that the Interstate Commerce Commission decision in *Railroad Commission of Texas v. Oil Field Haulers Ass'n*, 325 I.C.C. 697, 701 (1965), undermines consideration of this factor. Brief at 48. *Oil Field Haulers* found in-state transportation of pipe by motor carrier from a storage yard to oil fields to be interstate even though the orders to move out of the storage yard were given only after the pipe reached the storage yard. *Id.*

As the Administrative Law Judge found, however, the pipe in *Oil Field Haulers* moved under the terms of a tariff "storage-in-transit" provision. Initial Decision P 491, JA 272; *see Oil Field Haulers*, 325 I.C.C. at 701 (the "critical fact" is that "this pipe is transported by defendants pursuant to the terms of the storage-in-transit arrangement provided in the tariff"). Under such provisions, "transit rests upon a fiction that the incoming and outgoing transportation services, which

are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination." *Oil Field Haulers*, 325 I.C.C. at 701. As these tariff provisions "tie[] together two separate transportation services into a single interstate movement," they can convert intrastate movement into interstate transportation. *Id.*; Initial Decision P 491, JA 272. No such storage-in-transit tariff provision is at issue here. *Id.* P 492, JA 273.

C. The Commission Reasonably Affirmed Application Of The *Northville* Criteria.

The Commission reasonably rejected Shippers' argument that the Administrative Law Judge should not have relied on the *Northville* criteria in evaluating Airlines' intent. Brief at 46. The *Northville* inquiry derives shipper intent from all the facts and circumstances surrounding the transportation. *Guttman*, 161 FERC ¶ 61,180 P 66; *see also Settle*, 260 U.S. at 171 (shippers' intention "as it was carried out" determined the essential nature of the movement); *Atlantic Coast*, 275 U.S. at 268-269 ("[T]he determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it"). The Commission set this case for hearing in recognition of "the need for an intensely factual inquiry and the need to examine closely the complex

nature of the transactions and relationships between various entities on both sides of the complaint." *Aircraft Service*, 157 FERC ¶ 61,206 P 38, JA 53.

The three *Northville* criteria specifically 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. Order P 110, JA 519; *Guttman*, 161 FERC ¶ 61,180 P 50. The *Northville* criteria are based on factors identified by the Supreme Court in *Atlantic Coast*, as defined and elaborated by the Interstate Commerce Commission in its 1957 *Petroleum Products* decision, 71 M.C.C. 17. Order P 152, JA 538; *see Northville*, 14 FERC ¶ 61,111 at p. 61,207. In *Petroleum Products*, following years of extensive hearings, the Interstate Commerce Commission issued industry-wide guidelines to indicate when the transportation of petroleum products by motor carrier within a single state, following a prior interstate movement by pipeline or water, is in interstate commerce. Following the "landmark" case of *Atlantic Coast*, the Interstate Commerce Commission identified factors (later adopted in *Northville*) that assess the "essential character of the commerce" by focusing on the "major manifestations" of a

shipper's "fixed and persisting transportation intent" regarding the continuity of transportation. *Petroleum Products*, 71 M.C.C. at 26, 29.

Thus, the *Northville* criteria are not unduly narrow (*see* Brief at 46), but appropriately provide a framework that focuses on the fixed and persisting intent of the shipper and the essential character of the commerce, so all the pertinent facts surrounding the transportation are analyzed and its essential character is determined. Order PP 121, 167, JA 523, 545.

As a long-standing interpretation of the scope of the Commission's statutory jurisdiction -- one premised on landmark Supreme Court precedent (Order PP 151-152, JA 538-39) -- the Commission's approach should receive particular deference. *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *see also Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) (affording particular deference to agency interpretation of more than 25 years that was consistent with the original interpretation of its predecessor agency).

The Commission moreover reasonably declined to abandon this long-standing interpretation, premised on *Atlantic Coast* and *Petroleum Products*, in favor of the Interstate Commerce Commission's 1992 *Policy*

Statement -- Motor Carrier Interstate Transportation -- From Out-Of-State Through Warehouses To Points In Same State, 8 I.C.C.2d 470 (1992). *See* Brief at 56-59. The 1957 Interstate Commerce Commission decision in *Petroleum Products* is binding precedent on the Commission. *See Frontier*, 452 F.3d at 776 (Interstate Commerce Commission decisions that predate the 1977 transfer to FERC are treated as if they were FERC decisions). The Interstate Commerce Commission's 1992 Policy Statement is not. Order PP 151-153, JA 538-39.

Shippers, moreover, failed to demonstrate that the Policy Statement represented a preferable approach. Order P 153, JA 539. The 1992 Policy Statement requires the same assessment of a shipper's intent regarding continuous interstate movement based on Supreme Court precedent. 1992 Policy Statement, 8 I.C.C. 2d at 470 & n.1. That the 1992 Policy Statement may evaluate certain manifestations of that intent differently -- in the different factual context of motor traffic shipment of merchandise from warehouses -- does not compel the Commission to abandon its long-standing precedent. Order P 153, JA 539.

Thus, the Commission and the Administrative Law Judge reasonably determined that Airlines intend to take delivery of jet fuel at portside terminal storage to commence intrastate distribution-type activities, including allocation, trading activity, distribution-maintaining inventory, and accommodating seasonal demand at the Orlando airport. Order P 125, JA 525. Airlines' intent to take delivery and commence intrastate operations represents a break in the continuity of prior interstate or foreign marine transportation sufficient to establish that interstate transportation has ended. *Id.* The Commission's fact-based, record-based assessment of intent, following an evidentiary hearing and factual findings of the Administrative Law Judge, should be respected by this Court. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("not [the reviewing court's] job to render that judgment, on which reasonable minds can differ"; instead, court's "important but limited role is to ensure that the Commission engaged in reasoned decisionmaking -- that it weighed competing views, selected [a result] with adequate support in the record, and intelligibly explained the reasons for making that choice.").

CONCLUSION

For the reasons stated, the petition for review should be denied and the challenged FERC order should be affirmed.

Respectfully submitted,

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August 13, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word, in 14-point Century Schoolbook) and contains 10,749 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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TO
TITLE 50—WAR AND NATIONAL DEFENSE

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TITLE 49, APPENDIX—TRANSPORTATION

This Appendix consists of sections of former Title 49 that were not included in Title 49 as enacted by Pub. L. 95-473 and Pub. L. 97-449, and certain laws related to transportation that were enacted after Pub. L. 95-473. Sections from former Title 49 retain the same section numbers in this Appendix. For disposition of all sections of former Title 49, see Table at beginning of Title 49, Transportation.

CHAPTER 1—INTERSTATE COMMERCE ACT, PART I; GENERAL PROVISIONS AND RAILROAD AND PIPE LINE CARRIERS

§ 1. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470; Pub. L. 96-258, § 3(b), June 3, 1980, 94 Stat. 427

Section repealed subject to an exception related to transportation of oil by pipeline. Section 402 of Pub. L. 95-607, which amended par. (14) of this section by adding subdiv. (b) and redesignating existing subdiv. (b) as (c) subsequent to the repeal of this section by Pub. L. 95-473, was repealed by Pub. L. 96-258. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 1. Regulation in general; car service; alteration of line

(1) Carriers subject to regulation

The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102;

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

(2) Transportation subject to regulation

The provisions of this chapter shall also apply to such transportation of passengers and property, but only insofar as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering; storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter;

(b) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102.

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this chapter except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) Definitions

(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

(b) For the purposes of sections 5, 12(1), 20, 304(a)(7), 310, 320, 904(b), 910, and 913 of this Appendix, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

(4) Duty to furnish transportation and establish through routes; division of joint rates

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this Appendix, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) Just and reasonable charges; applicability; criteria for determination

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this chapter.

(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this chapter shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the "proponent carrier"). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this chapter, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies shall be presumed to be just and reasonable.

Aircraft Service International, Inc., et al., **Docket No. OR16-26**
v. FERC,
D.C. Cir. No. 20-1013

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 13th day of August 2020, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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