

149 FERC ¶ 61,241
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

American Airlines, Inc.

Docket No. OR14-41-000

v.

Buckeye Pipe Line Company, L.P.

ORDER ON COMPLAINT AND ESTABLISHING HEARING

(Issued December 18, 2014)

1. On September 17, 2014, American Airlines, Inc. (American) filed a complaint against Buckeye Pipe Line Company, L.P. (Buckeye). American alleges Buckeye's rates for the transportation of jet or aviation turbine fuel from Linden, New Jersey to the three New York City area airports are not just and reasonable. American also alleges Buckeye's practices relating to nominations, scheduling, and deliveries of jet or aviation turbine fuel to the New York City area airports may not be just and reasonable, and are not properly set forth in Buckeye's tariff. For the reasons discussed below, the Commission establishes hearing and settlement judge procedures to address American's complaint.

American's Complaint

2. American's complaint is directed against the rates in Buckeye's FERC Tariff No. 440.5.0 and the predecessor tariffs in effect for the prior two years. The rates being challenged are for the interstate transportation of jet or aviation turbine fuel between Linden, New Jersey and the New York City market, specifically Newark International Airport, New Jersey; John F. Kennedy (JFK) International Airport, New York; and LaGuardia Airport, New York (New York City Destinations).¹

¹ Buckeye's rates have a complicated history and have been subject to several recent Commission orders. For purposes of brevity the history will not be repeated here. Further information can be found at *Buckeye Pipe Line Co., L.P.*, 142 FERC ¶ 61,140

(continued ...)

3. American asserts that the publicly available data on Buckeye's 2013 Form 6 indicates that it is over-recovering its cost-of service and suggests that Buckeye's current interstate rates are unjust and unreasonable. American contends that Buckeye over-recovered its jurisdictional cost-of-service in 2013, with interstate carrier revenues (\$260.6 million) exceeding interstate carrier cost-of-service (\$211.9 million) by \$48.6 million or 22.9 percent. American submits that this purported over-recovery follows a pattern of increasing revenue in relation to costs for 2008 through 2012. American argues that in 2008 Buckeye began reporting an over-recovery of costs, with reported revenue increasing in relation to costs in each year from 2008 through 2010. American asserts that the level of over-recovery has remained consistently above 22 percent since its recent peak at 28.7 percent in 2010. Thus, American contends that simply on the face of Buckeye's Form No. 6, Page 700, the Commission should investigate whether Buckeye's rates to the New York City Destinations are just and reasonable.

4. American also asserts that the extent of Buckeye's over-recovery is likely even greater than that reported in its Form No. 6. American contends that the information that is available suggests that Buckeye's Page 700 warrants adjustment. American submits that it appears that Buckeye has overstated its cost-of-service because it does not factor in \$32.7 million of other revenue reported elsewhere on its Form No. 6 into either the costs or revenues reported on Page 700.² American contends that if the costs-of-service and revenues reported on Buckeye's Page 700 are adjusted for these items Buckeye's over-recovery of its cost-of-service increases considerably.

5. American contends the over-recovery shown on Buckeye's Page 700 of its 2013 Form No. 6 causes Buckeye's existing rates to the New York City Destinations to be significantly greater than one would expect from a cost-based rate. American contends that the standard methodology employed by the Commission for setting individual cost-based rates is referred to as fully-allocated cost rate design. American states that this methodology divides total costs into distance and non-distance related components. American states that each origin-destination rates includes an equal dollar per barrel

(2013) (termination of Buckeye's experimental rate program); *Delta Air Lines, Inc. v. Buckeye Pipe Line Co., L.P.*, 142 FERC ¶ 61,141 (2013) (complaint of various airlines against rates to the New York City airports in Tariff No. 440.3.0); *Buckeye Pipe Line Co., L.P.*, 142 FERC ¶ 61,162 (2013) (Buckeye's application for market-based rates to the New York City airports).

² American asserts that the revenue includes \$15 million in Account 230 Allowance Oil Revenue, \$12.4 million in Account 250 Rental Revenue, and \$5.3 million in Account 260 Incidental Revenue.

component based on the non-distance related costs. American states that each origin-destination rate is then allocated the distance related cost component based upon the mileage between the origin and destination multiplied by the distance-related costs per barrel-mile. American asserts that it calculated fully allocated costs rates from Linden, New Jersey to the three New York City Destinations and estimated that the rates are from 48 percent to 76 percent less than the currently collected rate. Therefore, American submits that the magnitude of the difference between Buckeye's currently collected rates and the fully allocated cost-based rates strongly indicates the Buckeye's rates to the New York City airports are not reasonable. Using these estimated fully allocated cost-based rates, American estimates that it overpaid Buckeye by approximately \$4.3 million, not including interest, for jurisdictional service to the New York City Destinations during the period from September 1, 2012, through August 30, 2014.

6. In addition to its allegations that Buckeye's rates are unjust and unreasonable, American asserts that Buckeye's practices relating to the handling of nominations, scheduling and deliveries of jet or aviation turbine fuel to the New York City Destinations do not appear to be properly stated in its tariff in violation of section 6 of the Interstate Commerce Act (ICA). American contends that because Buckeye has not justified or established a basis for these practices, it is impossible to determine whether they are just and reasonable.

7. American submits that this past summer deliveries to the airports, especially to JFK Airport, have been delayed and are at levels below what American and other airlines have nominated for delivery. American asserts that twice this summer it was asked by Buckeye to reduce its consumption at JFK Airport and LaGuardia Airport to prevent the airports from running out of fuel. American asserts that this situation has occurred because one of Buckeye's lines which takes jet or aviation fuel from Linden, New Jersey to JFK Airport has been full. American submits that Buckeye, however, has not called for prorationing under its tariff. American contends that it is also not clear why Buckeye did not use another of its lines during supply constraints last summer to deliver jet or aviation turbine fuel instead of distillates, as distillate volumes are to be delivered on a best efforts basis.

8. American asserts the Buckeye's rates from Linden, New Jersey to the New York City Destinations violate Sections 1(5), 8, 9, 13, and 15 of the ICA and are unjust and unreasonable. American requests that the Commission set this matter for hearing and discovery to determine the just and reasonable rates for transportation on the Buckeye pipeline from Linden, New Jersey to the New York City Destinations. American also seeks reparations and/or refunds for all amounts it has paid Buckeye in excess of the rate and charges the Commission determines to be just and reasonable, commencing two years prior to the date of the complaint. American also requests that Buckeye be required to set forth its policies and practices relating to the handling of nominations, scheduling, and deliveries of jet or aviation turbine fuel in its tariff, that it be required to follow the

prorating procedures set forth in its tariff, and such other relief as is necessary and appropriate.

9. American also addressed arguments concerning reparations and grandfathered rates that Buckeye raised in its answer to the complaint of various airlines in Docket No. OR12-28-000 and which American believes Buckeye is likely to repeat in this proceeding. American asserts that claims that reparations are not permitted are based on the mistaken premise that Buckeye's current rates for non-competitive markets are lawful rates which have been previously determined to be just and reasonable. American contends that Buckeye misstates that law when it argues that its current rates in markets where it has failed to establish a lack of significant market power are lawful rates that have been established by the Commission. American submits that when the Commission approved Buckeye's experimental market-based rate program, it specifically removed from this program and set for investigation and hearing Buckeye's jet or aviation turbine fuel rates associated with markets where Buckeye failed to show it lacked significant market power. American asserts that the jet or aviation turbine fuel rates arose from a settlement that was approved because the settlement appeared to be fair and reasonable and in the public interest. However, American submits that rates were never determined by the Commission to be just and reasonable and since the settlement has terminated, said rates remain open to investigation.

10. Section 1803 of the Energy Policy Act of 1992 deems just and reasonable any rate in effect for the 365-day period ending on the date of the enactment of the act, *i.e.*, October 24, 1992, if the rate in effect has not been subject to protest, investigation or complaint during such period. American states that Buckeye claims that its rates in non-competitive markets, such as rates to the New York City Destinations, were deemed just and reasonable pursuant to section 1803 of the Energy Policy Act of 1992. American submits that these rates should not be afforded grandfathering protection as Congress specifically excluded those rates which were subject to investigation by the Commission during the 365-day period prior to enactment of the act from being deemed just and reasonable. American asserts that because Buckeye's experimental rate program was the subject of review and evaluation (and thus investigation) as to its reasonableness during this 365-day period, and because the genesis of Buckeye's rates to the New York City destination was a settlement agreement with a three-year term, Buckeye's rates cannot be deemed just and reasonable under the Energy Policy Act of 1992.

11. American contends that even if the Commission were to conclude that under the Energy Policy Act of 1992 Buckeye's rates in 1991 should be deemed just and reasonable, it does not follow that reparations for periods since then are precluded. American states that Buckeye has changed its rates each year pursuant to the experimental rate program. American submits that once Buckeye acted under its experimental authority to increase a rate allegedly deemed just and reasonable pursuant to the Energy Policy Act of 1992, such fuel shipments no longer moved on any prescribed

or deemed just and reasonable rate. American also argues that it appears that the economic circumstances that were the basis for the potentially grandfathered rates have changed substantially, allowing the rates, even if considered grandfathered, to be changed consistent with Commission precedent.

Buckeye's Answer

12. Buckeye states that the complaint seeks reparations for rates charged up to two years prior to the complaint, or September 17, 2012, as would be permitted for a complaint against non-grandfathered rates. However, Buckeye contends that the Commission should deny the reparations request and limit relief to prospective rate changes. Buckeye submits that any retroactive change in Buckeye's rates or the imposition of reparations would violate the structure of the ICA, the rule against retroactive ratemaking and Commission policy. Buckeye maintains that its rates are grandfathered, and therefore not subject to two years of retroactive reparations allowed under the *Arizona Grocery*³ doctrine, because it believes the challenged rates were determined to be just and reasonable by the Commission and were not subject to an ongoing investigation.

13. Buckeye argues that its rates are subject to grandfathering protection under the Energy Policy Act of 1992 because its rates were not subject to protest, complaint or investigation for the year prior to October 24, 1992. Buckeye states that American argues that because the Commission retained the authority to discontinue the experimental rate program at the end of the initial three-year experimental period the rates should be held to have been under investigation during that three-year period. Buckeye contends that this ignores the plain meaning of the word "investigation," the statutory role of investigations under the ICA, and the specific findings of the Commission with respect to the Buckeye program and its rates during that period. Buckeye therefore submits that there is no rational basis for the complaint to assert that section 1803 of the Energy Policy Act of 1992 does not apply so as to grandfather Buckeye's rates. Buckeye contends that the mere fact that the Commission approved the program initially on an experimental basis with the intention to review the continuation of the experimental program at the end of three years creates no implied continuing investigation as American's complaint posits. Buckeye asserts that American therefore bears the burden of proving a substantial change in economic circumstances to justify any change to its grandfathered rates.

³ *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry. Co.*, 284 U.S. 370 (1932) (*Arizona Grocery*) (distinguishes between a legal rate, i.e., the tariff rate and a lawful rate, i.e., one that has been determined to be just and reasonable).

14. Buckeye asserts that the complaint ignores the economic circumstances that were a basis for the rates and thus fails to meet this statutory burden. Buckeye contends that its jet fuel rates to the New York Airports were established based on the economic circumstances embodied in Buckeye's competitive markets, and changes to those rates were tied directly to changes in Buckeye's rates in the competitive markets. Despite this reality, Buckeye submits that the complaint made no attempt to address the economic basis of the rates at the time the rates were established, nor did the complaint present any evaluation of how the unique circumstances of Buckeye's rates could affect the measurement of a substantial change in the economic circumstances that were the basis of the rates.

15. Buckeye states that to support its allegations that Buckeye's rates to the New York Airports are unreasonable, American relies upon analyses of Buckeye's rates and revenues, both as actually reported and revised and re-calculated by its expert witness. Buckeye asserts that the complaint makes various adjustments to Buckeye's costs which are speculative, conclusory, or made without justification or any analysis of the facts. Buckeye states that American attributes postulated interstate portions of various non-transportation or non-jurisdictional revenue amounts as credits against Buckeye's costs, serving to shrink the cost of service. Buckeye contends that the purported adjustments are performed without reference to costs or to the relevance of the revenues to Buckeye's service to the New York Airports. Buckeye contends that American's allegation that Buckeye improperly included certain expenses in its Form 6, Page 700 cost of service is aimed at undermining Buckeye's credibility and is unsupported.

16. Buckeye asserts that American's criticisms of Buckeye's handling of high peak period jet supply demands are inaccurate and inflammatory. Buckeye states that it provides an enhanced form of service for jet transportation customers delivering to JFK Airport and the other New York Airports. Buckeye asserts that consistent with its tariff it provides priority service to jet fuel shippers, managing and, when necessary, reducing its transportation of other products to ensure that priority is given to jet fuel delivery. Buckeye states that it serves diesel shippers on a best-efforts basis, which results in significant reductions in the capacity available to these shippers during the peak season for jet fuel demand.

17. Buckeye contends that the allegation that there is a lack of transparency in how jet fuel service is handled ignores the reality that Buckeye acts as the jet supply scheduler/manager for JFK Airport and LaGuardia Airport. In that role and recognizing the trend of rising jet fuel usage at JFK Airport, Buckeye worked to ensure that storage was full heading into the peak season. Buckeye submits that if it had formally declared prorationing, no additional jet fuel supply would have become available. Instead, Buckeye contends that existing jet fuel supply would have been reshuffled among the airlines based on shipper history. Buckeye submits such a scenario could have led to one or more airlines being without supply and having to cancel flights, while other airlines

had more supply than they needed. Buckeye asserts that no airline customer questioned Buckeye's supply management nor did any request such a re-allocation, except for American's hind-sight criticism in the complaint. Buckeye argues that the sum and substance of American's allegations appear to be little more than ill-informed, post-hoc criticism over jet fuel supply constraint that are not of Buckeye's making and as to which Buckeye has worked hard to provide assistance and solutions.

18. Buckeye asserts that American's complaint should be rejected. If the complaint is not rejected, Buckeye submits that it should be held in abeyance pending the outcome of the complaint in Docket No. OR12-28-000, in which the justness and reasonableness of these same rates is being adjudicated. Buckeye submits that consolidation would be inappropriate in light of the advanced stage of the proceeding (answering testimony has been filed) and the divergence of relevant data (American seeks to rely upon 2013 data; the Docket No. OR12-28-000 proceeding involves 2011 and 2012 data).

Discussion

19. In its complaint American alleges that Buckeye's rates for the transportation of jet or aviation turbine fuel from Linden, New Jersey to the New York Airports are not grandfathered, are not just and reasonable, and it therefore seeks reparations for two years prior to the date of the complaint. American points to the data on Buckeye's Form No. 6, the unique circumstance of Buckeye's experimental program, and the settlement genesis of certain rates, to support its thesis that the rates should be reduced and that retroactive reparations are appropriate. Buckeye interprets much of the same information in support of its position that the rates to the New York Airports are indeed subject to grandfathering protection under the Energy Policy Act of 1992. Buckeye also argues that reparations are not available because the rates were lawful, just and reasonable rates, and therefore subject only to prospective change as grandfathered rates. Finally, Buckeye asserts that American has not shown the rates have become unjust and unreasonable by showing that economic circumstances have so substantially changed as to remove grandfathering protection. Accordingly, Buckeye concludes that American's complaint concerning its rates should be rejected.

20. American also alleges Buckeye's practices relating to nominations, scheduling, and deliveries of jet or aviation turbine fuel to the New York City area airports may not be just and reasonable and are not properly set forth in Buckeye's tariff. Buckeye contends that it is providing the enhanced delivery service for jet fuel required under its tariff and that as the jet fuel supply scheduler and manager for JFK Airport and LaGuardia Airport it is making sure that all airlines have supply during the peak summer travel season. Buckeye asserts that American's complaint concerning its practices should also be rejected.

21. American's complaint concerning Buckeye's rates to the New York Airports is virtually identical to the complaint filed by various other airlines in Docket No. OR12-

28-000 with the exception that American has used more recent data for its rate and cost-of-service calculations. Buckeye's answer to American's complaint is virtually identical to its answer to the airlines in Docket No. OR12-28-000. As with the complaint in Docket No. OR12-28-000, the Commission finds that there are disputed issues of material fact concerning Buckeye's rates to the New York City Airports that are properly addressed at an evidentiary hearing before an Administrative Law Judge (ALJ).

22. The Commission also finds that there are disputed issues of material fact concerning Buckeye's practices relating to nominations, scheduling and deliveries of jet or aviation turbine fuel to the New York City area airports that also need to be determined at an evidentiary hearing. While Buckeye asserts that it is providing enhanced jet fuel delivery service under its tariff and is also acting in its capacity as a jet fuel manager/scheduler for certain airports, it is unclear from the record before the Commission whether certain nomination, scheduling, and prorationing procedures to accomplish these purposes are in Buckeye's tariff and, even if such procedures are in the tariff, how Buckeye's actions during peak summer jet fuel demand were in accordance with those procedures. Therefore, the Commission will set all issues raised by the complaint for hearing and settlement judge procedures.

23. While the Commission is setting this matter for hearing, the Commission encourages parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, the Commission will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁴ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Administrative Law Judge (Chief ALJ) will select a judge for this purpose.⁵ The settlement judge shall report to the Chief ALJ and the Commission within 30 days of the date of the appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief ALJ shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a Presiding Administrative Law Judge (Presiding ALJ).

⁴ 18 C.F.R. § 385.603 (2014).

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

24. Finally, the Commission will not hold American's complaint in abeyance pending the outcome of the complaint in Docket No. OR12-28-000. While it might be the case that a decision in that proceeding will affect the complaint here, we disagree with Buckeye that we should delay the administrative litigation procedures here. First, the complaint is subject to settlement judge procedures so there is a possibility that the complaint may never reach the formal litigation stage. Second, even if settlement judge procedures fail, there is a separate issue concerning Buckeye's practices during peak summer jet fuel demand at the New York City Airports that is not present in Docket No. OR12-28-000. The Commission sees no reason to delay litigation on that issue. As the instant case and the case in Docket No. OR12-28-000 proceed, the parties will have the opportunity to inform the Presiding ALJ of the status of the Docket No. OR12-28-000 litigation and have him or her determine whether or not any delay in the procedural schedule of the rate aspect of American's complaint is warranted.

The Commission orders:

(A) Pursuant to the authority conferred on the Commission by the ICA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the ICA, a public hearing shall be held concerning American's complaint against Buckeye. However, the hearing shall be held in abeyance to provide time for settlement judge procedures.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure,⁶ the Chief ALJ is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief ALJ designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief ALJ within five days of the date of this order.

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

⁶ 18 C.F.R. § 385.603 (2014).

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a Presiding ALJ, to be designated by the Chief ALJ, shall, within 15 days of the date of the Presiding ALJ's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The Presiding ALJ is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.