155 FERC ¶ 61,178
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

CHS Inc. Docket No. OR13-25-001
Federal Express Corporation
GROWMARK, Inc.
HWRT Oil Company LLC
MFA Oil Company
Southwest Airlines Co.
United Airlines, Inc.
UPS Fuel Services, Inc.

v.

Enterprise TE Products Pipeline Company, LLC

and

Chevron Products Company Docket No. OR13-26-001

v.

Enterprise TE Products Pipeline Company, LLC (Consolidated)

ORDER ON REHEARING

(Issued May 19, 2016)

1. On November 18, 2013, CHS Inc., Federal Express Corporation, GROWMARK, Inc., HWRT Oil Company, LLC, MFA Oil Company, Southwest Airlines Co., United Airlines, Inc. and UPS Fuel Services, Inc. (collectively "Complainants") jointly requested limited rehearing of the Commission's October 17, 2013 Order Granting in Part and Consolidating Complaints, and Establishing Limited Hearing on Damages in the

captioned proceeding.[1] Complainants argue that the Commission erred by ruling that it lacked jurisdiction to prevent Enterprise TE Products Pipeline Company LLC (Enterprise TE) from discontinuing transportation service for distillate and jet fuel. Complainants further argued that the Commission, in response to Enterprise TE's breach of a settlement agreement involving such transportation, should have crafted an equitable remedy and required specific performance from Enterprise TE to provide transportation of distillate and jet fuel to continue.

2. The Commission denies rehearing. Enterprise TE's decision to discontinue transportation service for distillate and jet fuel did not violate the pipeline's common carrier obligations or the requirements set forth in the Interstate Commerce Act ("ICA"). Further, the Commission's decision to establish a proceeding to determine monetary damages was the proper remedy for Enterprise TE's violation of the settlement agreement. An equitable remedy of specific performance was not appropriate.

Background

3. Enterprise TE is a common carrier pipeline providing transportation of petroleum products, unfinished gasoline, and diluent from origins on the Gulf Coast. In Docket No. IS12-203-000, Enterprise TE entered into a settlement agreement with numerous shippers where it agreed not to change its agreed-upon rates for transportation service for a period of two years. On May 31, 2013, the Commission approved the settlement agreement.[2]

4. On May 1, 2013, prior to the Commission's approval of the settlement agreement, Enterprise TE submitted FERC Tariff No. 55.28.0, stating that the pipeline would no longer accept nominations for the interstate transportation of distillate and jet fuel. The Commission accepted Tariff No. 55.28.0 on May 31, 2013.[3] In addressing arguments from protestors that Tariff No. 55.28.0 violated the settlement agreement, the Commission stated that while the abandonment of transportation service of distillate and jet fuel was beyond the Commission's jurisdiction to address, any violation of a Commission-approved settlement agreement was within the Commission's authority to remedy in a complaint proceeding.[4]

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[1] *CHS Inc., et al. v. Enterprise TE Products Pipeline Co., LLC*, 145 FERC ¶ 61,056 (2013) (Complaint Order).

[2] *Enterprise TE Products Pipeline Co. LLC*, 143 FERC ¶ 61,197 (2013).

[3] *Enterprise TE Products Pipeline Co. LLC*, 143 FERC ¶ 61,191 (2013).

[4] *Enterprise TE Products Pipeline Co. LLC*, 143 FERC ¶ 61,191 at P 26.

5. On June 14, 2013, Complainants filed a complaint in Docket No. OR13-25-000 asserting that Enterprise TE's discontinuation of transportation service for distillate and jet fuel was a violation of the settlement agreement, specifically the fact that Enterprise TE had agreed to not change rates for a period of two years. On July 3, 2013, Chevron Products Company ("Chevron") filed a similar complaint in Docket No. OR13-26-000. On October 17, 2013, the Commission issued the Complaint Order, consolidating the complaints and holding that Enterprise TE had violated the settlement agreement.[5] The Commission held that while it lacked the statutory authority to prevent Enterprise TE from abandoning service, it would establish a damages hearing for the purpose of calculating the appropriate monetary remedy for Enterprise TE's breach of the settlement agreement.[6]

6. On November 18, 2013, Complainants sought limited rehearing of the Commission's rulings in the Complaint Order.

Request for Rehearing

7. Complainants argue that the Commission erred by characterizing discontinuation of transportation service of distillate and jet fuel as an abandonment outside the scope of its regulatory authority. Complainants argue that common carriers cannot selectively abandon transportation service for particular commodities without violating their common carrier obligations. Therefore, argue the Complainants, the Commission has the authority to determine whether the discontinuation of certain services violates the ICA.

8. Complainants identify three provisions of the ICA that they argue provide the Commission with the authority to evaluate and either approve or disapprove Enterprise TE's refusal to transport distillate and jet fuel. First, Complainants argue that Enterprise TE's refusal is contrary to section 1(4)'s requirement that transportation be provided upon reasonable request.[7] Complainants state that Enterprise TE is holding itself out as offering transportation service of distillate and jet fuel, and that pursuant to this holding out Complainants have made reasonable requests for transportation service pursuant to section 1(4). Enterprise TE's refusal to satisfy these requests, argue Complainants, is a violation of the ICA.

9. Complainants further argue that Enterprise TE's discontinuation of service is not an abandonment but instead a change in classification. Changes in classification, state

[5] Complaint Order.

[6] *Id.* P 40.

[7] 49 U.S.C. App. § 1(4) (1988).

Complainants, must be just and reasonable pursuant to section 1(6) of the ICA.[8] Complainants claim that the Commission has the statutory authority under section 1(6) to review and if necessary prevent Enterprise TE's discontinuation of service if it is deemed unjust and unreasonable by the Commission.

10. Complainants argue that Enterprise TE's discontinuation of service amounts to undue discrimination. Complainants state that the Commission also has the statutory authority to determine whether Enterprise TE's discontinuation of transportation service of distillate and jet fuel, while continuing to offer transportation service of other grades of petroleum, violates the anti-discrimination provisions of section 3(1) of the ICA.[9]

11. Finally, the Complainants state that the Commission erred in limiting the remedies available to monetary damages, in order to address Enterprise TE's violation of the settlement agreement. The Complainants argue that the Commission has the statutory authority to craft an equitable remedy is response to Enterprise TE's violation of the settlement agreement, and to require specific performance of the settlement agreement's terms.

Discussion

12. In the Complaint Order, the Commission ruled that Enterprise TE's discontinuation of transportation service for distillate and jet fuel constituted an abandonment of a distinct service, and therefore was beyond the scope of the Commission's authority to prevent or delay.[10] The Commission, consistent with prior precedent, held that in considering the transportation of different types of petroleum products, each constitutes a distinct service, and a pipeline's decision to no longer hold itself out as providing that service is a complete abandonment of a distinct service.[11] Under the ICA, the Commission does not possess the authority to require a pipeline to provide a service that the pipeline proposes to abandon completely.[12]

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[8] 49 U.S.C. App. § 1(6) (1988).

[9] 49 U.S.C. App. § 3(1) (1988).

[10] Complaint Order, 145 FERC ¶ 61,056 (citing *Enterprise TE Products Pipeline Co., LLC*, 143 FERC ¶ 61,197 at P 27).

[11] *See Mid-America Pipeline Co., LLC*, 131 FERC ¶ 61,012, at P 26 (2010). In *Mid-America*, the Commission found that the transportation of naptha and refinery grade butane were distinct services involving distinct commodities that were described by Mid-America as having different chemical and physical properties, different uses, different prices, different markets and different transportation characteristics.

[12] *Mid-America Pipeline Co., LLC*, 131 FERC ¶ 61,012 at P 23.

13. In the Request for Rehearing, Complainants argue that Enterprise TE's refusal to carry a particular commodity, in this case distillates and jet fuel, is not a true "abandonment" of service beyond the Commission's jurisdiction. Complainants state that because the pipeline remained in operation and continued to transport other refined petroleum products, Enterprise TE's action is instead properly characterized as a refusal to transport a particular commodity.[13] Complainants argue that the Commission has the authority and indeed the obligation to determine whether such a refusal conforms to the pipeline's common carrier obligations.[14] Complainants state that both the Complaint Order, as well as the Commission's decision in *Mid-America Pipeline Co., LLC*, were decided in error, and should be reversed.[15]

14. For the reasons discussed below, the Commission denies rehearing. Consistent with the Commission's holding in *Mid-America Pipeline Co., LLC*,[16] Enterprise TE's decision to no longer provide transportation of distillate and jet fuel is a complete abandonment of a distinct service and therefore beyond the Commission's jurisdiction. Complainants' request for service on Enterprise TE is not a "reasonable" request under section 1(4), for Enterprise TE is only required to provide services that it holds itself out as offering. By discontinuing distillate and jet fuel transportation service, Enterprise TE is no longer holding itself out as offering these distinct services. Further, the removal of distillate and jet fuel from the list of products the pipeline will accept for transport is not a "classification" or "practice," which would enable the Commission to exercise jurisdiction under section 1(6) of the ICA. In addition, Enterprise TE's refusal to transport distillate and jet fuel does not amount to undue discrimination under section 3(1) of the ICA, for Enterprise TE is discontinuing service for all potential shippers of distillate and jet fuel.[17] Finally, Enterprise TE's breach of the Commission-approved settlement did not require the Commission to create an equitable remedy calling for specific performance. Specific performance is only appropriate in situations where a remedy at law, i.e., monetary damages, is not adequate.[18] The damages resulting from Enterprise TE's breach of the settlement agreement were adequately addressed.

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[13] Request for Rehearing at P 16.

[14] Request for Rehearing at 2.

[15] Request for Rehearing at 37.

[16] *Mid-America Pipeline Co., LLC*, 131 FERC ¶ 61,012.

[17] *See ConocoPhillips Co. v. Enterprise TE Products Pipeline Co. LLC*, 134 FERC ¶ 61,174 (2011).

[18] *Ballow v. PHICO Ins. Co.*, 878 P.2d 672 (Colo. 1994), *cited in* 71 Am. Jur. 2d *Specific Performance* § 1 (2016).

Abandonment

15. The Commission re-affirms its holding in *Mid-America Pipeline Co., LLC*, that the decision by a common carrier oil pipeline to no longer provide transportation of a distinct product is an "abandonment" and not merely a refusal to provide service. Enterprise TE transports various products on its pipeline, including motor fuels, which include finished and subgrade gasoline grades; distillates, which include diesel fuel, Ultra Low Sulfur Diesel and petroleum distillates; and jet fuel, which Enterprise TE defines as fungible Jet-A turbine fuel. Enterprise TE also transports unfinished gasoline, which includes natural gasoline, condensate, raffinate, straightrun gasoline, and naphtha; and natural gas liquids such as propane and butane.[19] The various types of petroleum products shipped on refined products pipelines have different chemical and physical properties, different uses, different prices, different markets and different transportation characteristics, all factors that support the finding that the transportation of each product is a distinct service.[20] Transportation of these specific commodities constitutes separate and distinct services.[21] The Commission lacks jurisdiction to require a pipeline to offer service it proposes to abandon.[22]

16. Complainants state that an abandonment under the ICA refers to the taking out of service of a particular facility, transportation system or segment, or the complete termination of all transportation service over a route.[23] This definition, however, only applies to railroads seeking permission to abandon as required by provisions of the ICA not applicable to oil pipelines. Complainants attempt to use definitions of abandonment on railroads to challenge the Commission's definition of abandonment for oil pipelines is not persuasive. The Interstate Commerce Commission (now the Surface Transportation Board or STB) is endowed with broad power to regulate a railroad's cessation of service.[24] The STB's power to regulate abandonments by rail carriers stems from the

[19] Complainants' Complaint at P 3, Docket No. OR13-26-000 (filed June 14, 2013).

[20] *Mid-America Pipeline Co., LLC*, 131 FERC ¶ 61,012 at P 24.

[21] *See SFPP, L.P.*, 86 FERC ¶ 61,022, at 61,063 (1999) (finding addition of turbine fuel to slate of refined products moved by pipeline "instituted a new service"), *aff'd in part, rev'd in part sub nom. BP West Coast Prods. v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004).

[22] *Mid-America Pipeline Co., LLC*, 131 FERC ¶ 61,012 at P 23.

[23] Request for Rehearing at P 53.

[24] *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981).

Transportation Act of 1920, which added section 1(18) to the ICA which stated: "[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."[25] In deciding whether to permit an abandonment, the STB balances "the interests of those served by the present line on the one hand, and the interests of the carrier and the transportation system on the other."[26] The STB's review of railroad abandonments is pervasive, and the revisions to the ICA adding abandonment authority over railroads by necessity defined those actions subject to such a review. Given that the STB's broad authority over railroad abandonments has no analogy in oil pipeline regulation, it is not appropriate to confine the scope of what is an abandonment to that definition applicable to railroads.

17. The Commission's definition of abandonment concerning oil pipelines is consistent with its definition for gas pipelines, which provides a far more apt analogy. An abandonment under the Natural Gas Act, section 7(b), occurs whenever a natural gas company permanently reduces a significant portion of a particular service.[27] Gas pipelines need not be physically abandoned for an abandonment to occur. An abandonment can occur when a gas pipeline does not seek to abandon a facility completely but instead changes the character of the use of the facility.[28] Ceasing use of a facility for transporting gas is an abandonment even where no physical alteration, removal or disconnection of facilities has occurred.[29] This is consistent with the Commission's definition of abandonment for oil pipelines.

18. Finally, the Commission notes that in the complaint pursuing damages against Enterprise TE, Complainants themselves characterized Enterprise TE's refusal to transport distillate and jet fuel as an abandonment. Complainants, in discussing Enterprise TE's discontinuation of service and the settlement agreement that had existed between the parties, stated that "Enterprise TE[]'s abandonment of distillate and jet fuel

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[25] 49 U.S.C. § 10903(a)(1976), cited in *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. at 320.

[26] *Purcell v. United States*, 315 U.S. 381, 384 (1942), quoted in *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. at 321.

[27] *Panhandle Eastern Pipe Line Co. v. FERC*, 803 F.2d 726, 727 (D.C. Cir. 1986).

[28] *Id.*

[29] *United Gas Pipe Line Co. v. FPC*, 385 U.S. 83 (1966).

service is therefore in violation of the Settlement Agreement."[30] This characterization, which was considered in the Commission's decision to allow Complainants' pursuit of monetary damages, should not be ignored when analyzing Complainants' Request for Rehearing.

Service Upon Reasonable Request

19. Section 1(4) of the ICA states that it shall be the duty of every common carrier to provide transportation upon reasonable request.[31] Complainants state that their request for Enterprise TE to continue to transport distillate and jet fuel is a reasonable request, because Enterprise TE continues to provide transportation service for other commodities. Complainants argue that common carriers have always been under the obligation to transport *all* products offered to it for transportation,[32] and therefore Enterprise TE cannot refuse to transport distillate and jet fuel without violating its common carrier obligations.[33]

20. The Complainants are incorrect in stating that common carriers are obligated to ship any product offered by shippers. In the long history of common carriage regulation, both under the common law as well as the ICA, common carriers were not required to transport every type of product or commodity possible. The decision to refuse to transport a particular commodity therefore is not a violation of either common law principles of common carriage regulation or the ICA.

21. Prior to the passage of the ICA, common carriers were regulated pursuant to the common law. At common law, a carrier was not required to transport every type of good offered by a prospective shipper. Instead, it was the duty of a common carrier to receive and carry goods only if such goods were of the type that the carrier held itself out as willing to carry,[34] and was accustomed to transporting. [35] A common carrier could hold

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[30] Complainant's Amended Complaint at P 3, Docket No. OR13-25-000 (filed June 21, 2013).

[31] 49 U.S.C. App. 1(4) (1988).

[32] Request for Rehearing at 17 (citing *Standard Lime & Stone Co., et al. v. Cumberland Valley Railroad Co., et al.*, 15 I.C.C. 620 (1909)).

[33] Request for Rehearing at 18 (citing *Crescent Liquor Co. et al. v. Platt*, 148 F. 894 (N.D. WV 1906)).

[34] *Covington Stock-Yards Co. v. Keith*, 139 U.S. 128 (1891), cited in *St. Louis & S.F. Ry. Co. v. State*, 184 P. 442 (Okla. 1919). *See also Burlington Transp. Co. v. Hathaway*, 12 N.W. 2d 167, 169 (Iowa 1943), 13 C.J.S. *Carriers* § 369 (2013).

[35] *Propeller Niagara v. Cordes*, 62 U.S. 7, 22 (1858).

itself out to the public as being a carrier of certain sorts of goods only, and it was under no legal obligation to receive other types of articles for carriage.[36] Thus, for example, a common carrier who elected to carry freight only was under no obligation to carry passengers, and vice versa.[37] While a common carrier could not discriminate amongst customers requesting transportation, it could limit its service by restricting the nature of the items it transported, as long as it held itself out to serve that entire class.[38]

22. The refusal of a common carrier to hold itself out as providing all services is also not a violation of the Interstate Commerce Act.[39] Under the ICA, a common carrier's obligation to furnish transportation "is defined by what it holds out to the public in its tariffs."[40] The extent to which a common carrier holds itself out to provide a specific service is defined by its filed tariff, and a common carrier can, through the language of its tariff, limit the type of services it is holding itself out to provide without violating its common carrier obligations.[41] The Supreme Court has ruled that "a carrier's holding out and actual performance may be limited to a few articles only. That is to say he may be a common carrier only of a restricted number of commodities."[42] In *Akron, Canton & Youngstown Railroad Co. v. I.C.C.*,[43] the court recognized that there existed certain goods that could be beyond that which was within the carrier's normal business to carry, and that there was no statutory duty to carry such items.[44] The court stated that the common law on common carriage required that a carrier hold itself out as providing transport of a specific commodity in order to find an obligation to transport that commodity applied.[45]

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[36] *Alabama Great Southern R. Co. v. Herring*, 174 So. 502, 503 (Ala. 1937) (citing *Director General of Railroads v. Viscose Co.*, 254 U.S. 498 (1921) (*Viscose*)).

[37] 13 Am. Jur. 2d *Carriers* § 7 (2013).

[38] *See Nugent v. Smith*, 1 C.P.D. 19, 27 (1987) (the English court of common pleas).

[39] *Potomac Elec. Power Co. v. United States*, 584 F.2d 1058, 1063 (D.C. Cir. 1978).

[40] *Id*.

[41] *United States v. Penn. Railroad Co.*, 242 U.S. 208, 236 (1916).

[42] *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 483 (1942).

[43] 611 F.2d 1162 (6th Cir. 1979).

[44] *Id*. at 1166-67.

[45] *Id*. at 1168.

The Complainants are therefore incorrect that a common carrier has a duty under the ICA to transport all products offered.

23. A situation similar to Enterprise TE's discontinuation of transportation service of distillate and jet fuel occurred when the United Parcel Service ("UPS"), a common carrier, attempted to discontinue transportation of fireworks. Initially, the Interstate Commerce Commission ("I.C.C.") ruled that the discontinuance amounted to unreasonable discrimination under the ICA.[46] However, the I.C.C. reopened the record of that proceeding and ultimately found that the decision to discontinue transport of a particular commodity was not unreasonably discriminatory and was not otherwise unlawful under the ICA.[47]

24. In assessing the lawfulness of UPS' decision to discontinue transportation service of a particular commodity, the I.C.C. examined whether a common carrier proposing to discontinue service of a particular commodity violated the common carrier obligations that it assumed when it first obtained its certification.[48] The I.C.C. held that the obligation to provide service was not absolute. According to the I.C.C., a common carrier could decline to provide a particular service, even a service for which it had been certified, if such a service was economically or operationally impracticable.[49] Common carriers could decide to provide service for additional commodities, or limit the scope of the transportation service they provided when such service was not cost effective.[50]

25. The D.C. Circuit affirmed the I.C.C., ruling that an unlimited duty of carriage was never the rule, and that a common carrier was free to carve out as large or as small a niche as it felt appropriate.[51] The court also examined the role that certification played in the decision to discontinue service, finding that a discontinuation of service originally

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[46] *B.J. Alan Co., et al. v. United Parcel Service, et al.*, 4 I.C.C.2d 704 (1988) (*UPS I*).

[47] *B.J. Alan Co., et al. v. United Parcel Service, et al.*, 5 I.C.C.2d 700 (1989) (*UPS II*), aff'd sub nom, *B.J. Alan Co. Inc. v. I.C.C.*, 897 F.2d 561 (D.C. Cir. 1990).

[48] *UPS II*, 5 I.C.C.2d at 710. Unlike oil pipelines, motor carriers must obtain certificates.

[49] *Id*. at 713 (citing *Steere Tank Lines, Inc. v. I.C.C.*, 675 F.2d 103, 105 (5th Cir. 1982)).

[50] *UPS II*, 5 I.C.C.2d at 713.

[51] *B.J. Alan Co. Inc. v. I.C.C.*, 897 F.2d 561, 563 (D.C. Cir. 1990).

requested in the certification process did not violate the ICA if such service was discontinued due to a reasonable analysis of the prevailing economic circumstances.[52]

26. A key factor in the court's analysis of UPS's common carrier obligations was determining when a common carrier is "holding out" or offering to provide service. The court upheld the I.C.C.'s determination that merely having the authorization to provide a service was not an actual offer to provide that service, and therefore more was necessary in order for a request for service to be reasonable.[53] Historically, the I.C.C. had interpreted the meaning of service "upon reasonable request" to mean that service must be offered to the full extent of the carrier's certificate authority.[54] The I.C.C. later modified its interpretation based on two court rulings, and determined that a common carrier would not be seen as holding itself out to provide a specific type of transportation service merely due to its having certification to provide that service.[55] Ultimately, the court ruled that discontinuing transport service of a particular good was not discriminatory, and did not violate section 1(4) since there was no holding out.

27. In the present case, there is even less an issue whether the common carrier was holding itself out as providing a particular transportation service. As oil pipelines are not certificated, there was never a situation where Enterprise TE's authority to operate had been defined in any way by what it had been originally certificated to provide. The extent of Enterprise TE's holding out, as is any oil pipeline's, is limited to what it offers in its tariffs.

28. Another case involving a common carrier's obligation to transport particular commodities, a case relied upon heavily by Complainants, is *Riffin v. Surface Transportation Board*.[56] In *Riffin*, an applicant sought a certificate of public convenience and necessity to operate a railroad that explicitly proposed to limit the transport of toxic materials.[57] The Surface Transportation Board, in rejecting the application, ruled that

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[52] *Id.* at 564.

[53] *Id.*

[54] *See Elimination of Certificates as the Measure of "Holding Out," Proposed Rules, Interstate Commerce Commission*, 46 FR 8604-01 (1981).

[55] *See Elimination of Certificates as the Measure of "Holding Out," Proposed Rules, Interstate Commerce Commission*, 48 FR 11136-02 (1983) (citing *Steere Tank Lines, Inc. v. I.C.C.*, 675 F.2d 103, 105 (5th Cir. 1982), *J.H. Rose Truck Lines, Inc. v. I.C.C.*, 683 F.2d 943, 949 (5th Cir. 1982)).

[56] 733 F.3d 340 (D.C. Cir. 2013) (*Riffin*).

[57] *Id.*

railroads have a statutory obligation to transport hazardous materials and that Congress had expressed a clear intent to establish an integrated national rail network. In reviewing the case, the court of appeals analyzed whether the common carrier obligation of the ICA, in conjunction with the STB's licensing authority, authorized the STB to compel transport of hazardous materials.[58]

29. The court inquired whether the STB could require a railroad to hold itself out to provide a service such that a request for the service would be considered reasonable. The court made two key observations on what made this a reasonable request: (1) there had been promulgated comprehensive safety regulations on the hazardous products in question; and (2) allowing a refusal to carry would create gaps in the national rail network contrary to the national transportation policy and the public interest. The court upheld the STB's statement that the only appropriate mechanism a railroad may employ to excuse itself from its common carrier obligations on a line of railroad are abandonment, discontinuance, or embargo.[59]

30. While the court upheld the STB's determination that the railroad could not limit the commodities it would transport, the many legal, factual, and regulatory differences between that proceeding and Enterprise TE's actions make *Riffin* inapplicable to the present proceeding. In *Riffin* there were specific statutory provisions requiring the result reached by the STB and the court. These statutory provisions simply do not apply to oil pipelines, and *Riffin* in fact demonstrates that absent these specific statutory provisions there is no requirement that common carrier oil pipelines transport every commodity offered by shippers. Complainants have failed to apply *Riffin*, a case involving certification authority and national transportation policies applicable to railroads, to the present case involving an oil pipeline.[60]

31. As the court stated in *Riffin*, the question whether the railroad had an obligation to carry particular commodities needed to be decided by analyzing a common carrier's obligation to provide service upon reasonable request *in conjunction with the Board's licensing authority*.[61] Unlike oil pipelines, railroads must demonstrate public convenience and necessity in order to be certified. Pursuant to 49 U.S.C. § 10901, the STB shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the

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[58] *Id*. at 344.

[59] *Id*. at 347.

[60] Request for Rehearing at 23.

[61] *Riffin*, 733 F.3d at 344 (emphasis added).

application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest. The ability of the STB to require conditions be met before certification is granted was a fundamental element of the court's ruling in *Riffin* that the applicant railroad could be required by the STB to transport particular commodities.[62] The absence of such certification authority over oil pipelines clearly demonstrates that the court's holding in *Riffin* is inapplicable to the present proceeding.

32. The court in *Riffin* also analyzed the railroad's common carrier obligation to provide service in connection with the STB's mandate to execute the National Transportation Policy, and the benefit of providing for rail transportation of hazardous materials.[63] The STB had ruled that railroads have a common carrier obligation to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations.[64] The court upheld the STB's view that railroads had a duty to protect the public interest in ensuring the rail network remained open for transport of hazardous materials where comprehensive security and safety regulations were present.[65] These elements establishing a duty of a railroad, seeking a certificate, to transport hazardous materials are not to be found in the present proceeding, and once again demonstrate the inapplicability of *Riffin* to the case of Enterprise TE. Complainant's reliance on the *Riffin* decision is therefore misplaced.

33. As a final note, Complainants state that the Request for Rehearing assumes that Enterprise TE is no longer accepting nominations and thus not providing interstate transport of distillates and jet fuel.[66] However, Complainants argue that in FERC Tariff No. 55.32.0, filed November 8, 2013, Enterprise TE is again holding itself out as offering transport for distillate and jet fuel.[67] Regardless of its contents, Tariff No. 55.32.0 is beyond the scope of this rehearing. This rehearing addresses issues concerning

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[62] *Id*. at 344-348.

[63] *Riffin*, 733 F.3d at 345-47; *see also Akron, Canton & Youngstown Railroad Co. v. I.C.C.*, 611 F.2d 1162, 1168 (6th Cir. 1979) (The court noted that an additional duty to carry certain commodities had been placed on railroads in their role as affecting the National Transportation Policy).

[64] *Riffin*, 733 F.3d at 346.

[65] *Id*. at 347-48.

[66] Request for Rehearing at P 9 n2.

[67] Request for Rehearing at P 43.

Enterprise TE's Tariff No. 55.28.0, filed May 1, 2013 and accepted on May 31, 2013, as it pertains to the complaints filed Docket Nos. OR13-25-000 and OR13-26-000.

34. The passage of the ICA established and/or codified the obligations of common carriers. However, the ICA did not alter the rule that common carriers were only required to provide services they held themselves out as being willing and able to provide. As the Commission properly ruled in *Mid-America*, the decision to discontinue transport of a particular commodity, absent conditions not present in this proceeding, is a compete abandonment of service and beyond the Commission's jurisdiction to regulate.[68]

Unjust and Unreasonable Classifications

35. Pursuant to section 1(6) of the ICA, common carrier oil pipelines must establish, observe and enforce just and reasonable classifications of property for transportation.[69] In the Request for Rehearing, Complainants argue that Enterprise TE's refusal to transport distillate and jet fuel is not an abandonment but instead a change in classification subject to regulation by the Commission under section 1(6).[70] Complainants state that the Supreme Court, in *Viscose*,[71] determined that the decision of a common carrier not to transport a particular commodity is a classification of that commodity and therefore subject to the Commission's jurisdiction.[72]

36. While the Complainants are correct that whether excluding certain items from a classification is just and reasonable has been found to be within the purview of the Commission under the ICA,[73] Enterprise TE's discontinuation of transportation service for distillate and jet fuel did not involve a classification, regulation, or practice.[74] A classification assigns each of many different commodities transported by a common carrier into a specific class based upon the commodity's particular characteristics.[75]

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[68] *Mid-America Pipeline Co., LLC*, 131 FERC ¶ 61,012 at P 25.

[69] 49 App. U.S.C. § 1(6) (1988).

[70] Request for Rehearing at 35.

[71] 254 U.S. 498.

[72] Request for Rehearing at 36.

[73] *Viscose*, 254 U.S. 498.

[74] *ARCO Pipe Line Co.*, 66 FERC ¶ 61,159, at 61,314 (1994).

[75] *All States Freight, Inc. v. New York, New Haven and Hartford Railroad Co.*, 379 U.S. 343, 345 (1964) (*All States Freight*).

Classification involves grouping commodities which, due to their shared characteristics, may justly and conveniently be given similar rates.[76]

37. Enterprise TE, however, does not have rates based on classification. The rates on Enterprise TE are instead commodity rates. Commodity rates are not classifications.[77] Commodity rates are rates made specifically applicable for the transport of a particular commodity or group of commodities from one designated point to another.[78] Unlike classifications, commodity rates are not regulated under section 1(6) of the ICA.[79] The discontinuance of transportation of a distinct product is not a change of a classification, regulation or practice under the ICA.[80] The refusal to transport distillates and jet fuel is therefore not a change in classification such as occurred in *Viscose*. Enterprise TE's actions were a discontinuation of a distinct service, the transportation of distillate and jet fuel.

38. It is clear upon examining the history of amendments to the ICA that discontinuation of services was not considered a classification or practice subject to regulation pursuant to section 1(6). The ICA, pursuant to section 1(6) thereof, provided jurisdiction over classifications since its inception. As the Commission stated in *ARCO*, if the discontinuation of service was in fact a classification, there would have been no need for the Transportation Act of 1920's amendment granting the I.C.C. authority over the discontinuation of service by railroads.[81] Section 1(6) also applies to "regulations and practices affecting classifications, rates, or tariffs." Yet in 1910 the ICA was amended to permit the Commission to determine whether a practice was unjust and unreasonable, and to prescribe a practice that would be just and reasonable.[82] If this power over practices was applicable to abandonments, then adding explicit authority over abandonments of railroads to the ICA would not have been necessary in the Transportation Act of 1920.

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[76] *Viscose*, 254 U.S. at 503.

[77] *State of New York v. United States*, 331 U.S. 284, 290 n.3 (1947).

[78] *All States Freight*, 379 U.S. at 345.

[79] *Id*. at 351-352.

[80] *ARCO Pipe Line Co.*, 66 FERC at 61,314.

[81] *Id*. (citing *Williams Pipe Line Co.*, 21 FERC ¶ 61,260, at 61,690 n.217 (1982)).

[82] *See Baltimore and Ohio Railroad Co. v. United States*, 391 F. Supp. 249, 258 (E.D. Pa. 1975).

Undue Discrimination

39. In the Request for Rehearing, Complainants reference many cases in an effort to establish that the refusal to transport a particular product amounts to undue discrimination. However, these cases do not demonstrate that such a refusal alone, without evidence of disparate treatment towards shippers, is a violation of the anti-discrimination provisions of the ICA. The cases cited by Complainants address situations of potential undue discrimination where the carrier moved a particular product for one person but not another. Enterprise TE, however, has not moved distillate and jet fuel for certain shippers while denying service to others. Enterprise TE has refused to provide transportation service of distillate and jet fuel for any shipper. As the Commission has held, "as long as a pipeline completely abandons a service, there is no issue of discrimination because all shippers receiving the service are subject to the abandonment."[83]

40. A more detailed analysis of the case law relied upon by Complainants demonstrates its inapplicability to Enterprise TE's discontinuation of service. In *American Trucking Assns., Inc. v. Atchison, T. & SFR Co.*,[84] the railroad was offering a service to rail carriers but refused to offer the same service to motor and water carriers. The Court stated that railroads may not offer a service to some shippers but deny that same service to motor carriers.[85] Service, if offered to others in a railroad's tariff, must be provided to all similarly-situated shippers.[86] The Court differentiated the situation of disparate service based on ownership of the goods, which they found unlawful, from situations where railroads treated particular goods differently.[87]

41. In *Akron, Canton & Youngstown Railroad Co. v. I.C.C.*, the I.C.C. ordered a railroad that was transporting nuclear materials as a private, contract carrier to publish rates for common carriage. The court ruled that, unlike prior cases where the Commission was prevented from requiring certain services not being provided, in this case the railroad was "extensively engaged in the carriage being regulated" as a private,

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[83] *ConocoPhillips Co. v. Enterprise TE Products Pipeline Co. LLC*, 134 FERC ¶ 61,174 at P 56 (citing *Arco Pipe Line Co.*, 66 FERC at 61,313); *see also B.J. Alan Co. Inc. v. Interstate Commerce Commission*, 897 F.2d at 564 (Discontinuing transport of a specific type of good for all shippers raises no issue of undue discrimination).

[84] 387 U.S. 397 (1967).

[85] *Id*. at 407.

[86] *Id*. at 412.

[87] *Id*. at 408.

contract carrier.[88] The court ruled that a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation.[89]

42. In *Crescent Liquor Co. v. Platt*, a common carrier express company refused to transport liquor from companies in West Virginia, while continuing to provide liquor transport in other states.[90] The reasoning was a state statute concerning the shipment of intoxicating liquors and the carrier's belief that transport would run afoul of the law. The court found that by refusing to accept shipments from liquor dealers in the state, while providing similar service to other avocations, the common carrier had unduly discriminated against the liquor dealers.[91] The court also found the underlying state law concerning liquor transport unconstitutional. Importantly, *Crescent* did not stand for the proposition that a carrier was required to enter into a particular form of business, only that it could not conduct such business with undue discrimination.[92]

43. While the cases cited by Complainants do not support a finding of undue discrimination by Enterprise TE, there is more relevant case law in which the issue of the relationship between discrimination and common carrier obligations has been examined. In *UPS II*, discussed *supra*, the I.C.C. examined whether the discontinuation of transportation service for a particular commodity raised anti-discrimination concerns. The I.C.C. stated that the determination of undue discrimination depends upon four elements: (1) disparity in rates; (2) actual or potential competitive injury; (3) control of both the lower and higher rates; and (4) an absence of differences in transportation conditions that would justify the rate disparity.[93] The I.C.C. determined that UPS's decision to discontinue service of a particular commodity did not involve rate levels but rather involved whether the service will be provided at all.[94] The court affirmed that the case did not involve rate disparity or competitive injury, as would be required in an undue

[88] 611 F.2d 1162, 1166.

[89] *Id*.

[90] 148 F. 894, 895-6 (N.D. W. Va. 1906).

[91] *Id*. at 901-902.

[92] *See Davis Hotel Co. v. Platt*, 172 F. 775 (N.D. West Va. 1908); *see also Danciger v. Wells, Fargo & Co.*, 154 F. 379 (W.D. Mo. 1907).

[93] *UPS II*, 5 I.C.C.2d at 708 (citing *Harborlite Corp. v. Southern Pac Trans. Co.*, 364 I.C.C. 585, 586 (1981)).

[94] *UPS II*, 5 I.C.C.2d at 709.

discrimination case.[95] The Commission concurs with this reasoning, and finds that Enterprise TE's discontinuation of transportation service of distillate and jet fuel did not violate the anti-discrimination provisions of the ICA.

Equity

44. Complainants make a final argument that the Commission erred in limiting the type of remedy available to address Enterprise TE's violation of the settlement agreement. Complainants argue that the Commission should have crafted an equitable remedy and ordered Enterprise TE to specifically enforce the terms of the settlement agreement, instead of requiring only monetary damages for the breach.[96]

45. The Commission denies rehearing. There is no statutory provision of the ICA that would grant the Commission the authority, by means of an equitable remedy, to effectively obstruct the decision of an oil pipeline to abandon a particular service. Further, even were the Commission to have statutory authority to prevent abandonment, which in the case of oil pipelines it does not have, specific performance is not a matter of absolute right, but is at the Commission's discretion.[97] Specific performance is appropriate in situations where the remedy at law, in this case monetary damages, is not adequate to insure a just result.[98] The Commission determined, and now affirms, that monetary damages were sufficient to remedy Enterprise's breach of the settlement agreement. An equitable remedy of specific performance was neither available here, nor justified if it were.

Conclusion

46. For the reasons set forth in the above order, Complainants' Request for Rehearing is denied.

[95] *B.J. Alan Co. Inc. v. I.C.C.*, 897 F.2d at 564 n3.

[96] Request for Rehearing at 14.

[97] *See Texas v. New Mexico*, 482 U.S. 124 (1987).

[98] *Ballow v. PHICO Ins. Co.*, 878 P.2d 672 (Colo. 1994), cited in 71 Am. Jur. 2d *Specific Performance* § 1.

The Commission orders:

Enterprise TE's request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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