

168 FERC ¶ 61,080
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gunvor USA LLC

Docket Nos. OR19-27-000

v.

Colonial Pipeline Company

Epsilon Trading, LLC, Chevron Products Company,
and Valero Marketing and Supply Company

OR18-7-000, et al.
(consolidated)

v.

Colonial Pipeline Company

ORDER ON COMPLAINT, ESTABLISHING
HEARING AND CONSOLIDATING PROCEEDINGS

(Issued August 8, 2019)

1. On June 10, 2019 (as amended on June 11, 2019), Gunvor USA LLC (Gunvor) filed a Complaint against Colonial Pipeline Company (Colonial). Gunvor raises nearly identical issues to those set for hearing by the Commission in Docket No. OR19-20-000 and consolidated with the consolidated hearing proceedings in Docket No. OR18-7-000, et al.¹ As discussed below, the Commission sets the issues raised in the Complaint for hearing and consolidates the Complaint with the ongoing proceedings in Docket No. OR18-7-000, et al. (referenced herein as the Colonial Global Complaint proceeding).

Background

2. Colonial operates a pipeline that provides interstate transportation of refined petroleum products, including motor gasoline, diesel, and jet fuel, between Houston,

¹ See, e.g., *Metroplex v. Colonial Pipeline Co.*, 167 FERC ¶ 61,165 (2019) (*Metroplex*), consolidated with *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 164 FERC ¶ 61,202 (2018) (Consolidated Hearing Order).

Texas, and destinations throughout the Southeastern and Mid-Atlantic regions of the United States.² Colonial's rates are a combination of index-based rates and market-based rates.³

3. On September 18, 2018, the Commission issued the Consolidated Hearing Order addressing four complaints challenging the lawfulness of Colonial's rates as well as Colonial's practices and charges related to transmix and product volume losses.⁴ In the Consolidated Hearing Order, the Commission found that those complaints made a sufficient showing that Colonial's indexed and grandfathered rates may be unjust and unreasonable and set those rates for hearing.⁵ The Commission also set for hearing the issue of whether, as a result of changes in market circumstances, Colonial possesses significant market power in its relevant markets. The Commission further found that the allegations regarding Colonial's transmix and product loss practices and charges warranted further investigation at a hearing. The Commission consolidated the complaints and severed the examination of Colonial's market-based rates into a separate, concurrent proceeding.⁶

4. On February 5, March 25, and May 22, 2019, the Commission issued orders addressing four additional complaints filed in Docket Nos. OR19-1-000, OR19-4-000, OR19-16-000 and OR19-20-000.⁷ The Commission set the issues raised in those complaints for hearing and settlement judge procedures and consolidated those complaint proceedings with the ongoing Colonial Global Complaint proceeding, finding that these subsequent complaints raised nearly identical issues to those in the hearing.

5. On May 2, 2019, the Acting Chief Administrative Law Judge ordered the termination of settlement judge procedures and the initiation of hearing procedures in the Colonial Global Complaint proceeding. On May 31, 2019, the presiding Administrative Law Judge

² Complaint at 3.

³ See *Metroplex*, 167 FERC ¶ 61,165 at P 2.

⁴ Consolidated Hearing Order, 164 FERC ¶ 61,202.

⁵ *Id.* P 50.

⁶ *Id.*; *Epsilon Trading, LLC v. Colonial Pipeline Co.*, Order Designating Settlement Judge (issued Sept. 28, 2018).

⁷ *Southwest Airlines Co. v. Colonial Pipeline Co.*, 166 FERC ¶ 61,094 (2019); *American Airlines, Inc. v. Colonial Pipeline Co.*, 166 FERC ¶ 61,214 (2019); *Metroplex*, 167 FERC ¶ 61,165.

granted Gunvor's May 13, 2019 late intervention in the Colonial Global Complaint proceedings. The participants have commenced pre-hearing and discovery proceedings. On July 16, 2019, the participants, including Gunvor, submitted a Joint Stipulation limiting the scope of the market-based rates portion of the proceeding to issues concerning Colonial's market power in its Gulf Coast origin markets and not its market power in Colonial's destination markets or origin markets in the Northeast.⁸

Complaint

6. The instant Complaint raises issues with the lawfulness of Colonial's rates and product loss procedure that are nearly identical to challenges that were set for hearing in the Consolidated Hearing Order.

7. In its Complaint, Gunvor argues that Colonial's FERC Form No. 6 indicates that its interstate revenue exceeded its cost of service by an average of 22 percent over the period 2009–2018 and that Colonial's realized rate of return on equity in 2018 is approximately 48 percent.⁹ Gunvor argues that in 2017 and 2018 Colonial over-recovered its costs by over \$400 million, or by approximately 50 percent of its total cost of service, and that Colonial's rates are therefore unjust and unreasonable.¹⁰ Using these figures, Gunvor states that Colonial's realized rate of return on equity in 2017 and 2018 was approximately 33 and 48 percent.¹¹ Based on this and further analysis of cost information in Colonial's annual reports, Gunvor claims to show reasonable grounds for asserting that Colonial's rates result in revenues substantially exceeding Colonial's actual costs and are therefore not just and reasonable, warranting a hearing.¹² Gunvor also challenges Colonial's grandfathered rates on the basis that the foregoing factors provide reasonable grounds to conclude that such rates are unjust and unreasonable.¹³

8. Gunvor also argues that Colonial's market-based rates are no longer just and reasonable. Gunvor states that since Colonial received market-based rate authorization in

⁸ Joint Stipulation, Docket No. OR18-7-002, et al. (July 16, 2019) (accepted by presiding administrative law judge, July 25, 2019).

⁹ Complaint at 5, 7.

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 8.

2000 and 2001, the competitive landscape has changed in the relevant markets and Colonial now possesses the opportunity to exercise market power. Gunvor notes that since the time of Colonial's market-based rate authorizations, Colonial's capacity has become severely constrained.¹⁴ According to Gunvor, its witness Catherine Palazzari reviewed the analysis submitted with the Complaints in the Colonial Global Complaint proceeding and agrees with the conclusion that Colonial possesses significant market power in the Gulf Coast to East Coast, origin to destination markets.¹⁵ Gunvor argues that "Colonial has had market power in the markets for which it has been collecting market-based rates during the two years prior to the filing of this Complaint."¹⁶

9. Gunvor also argues that Colonial's practices and charges related to transmix and product losses do not appear to be reasonable, as they are not stated in Colonial's tariff, are not properly accounted for, and have not been cost justified.¹⁷

10. Finally, Gunvor moves to consolidate its Complaint with the Colonial Global Complaint proceeding.¹⁸ Gunvor argues that it challenges Colonial's rates on grounds similar to those used by complainants in the proceedings addressed in the Consolidated Hearing Order and consolidated thereafter and that the "arguments, issues and relief sought in this Complaint are similar to" those in the Colonial Global Complaint proceeding.¹⁹ Gunvor accepts the procedural schedule and the record as it stands.

Public Notice, Interventions, and Answers

11. Notice of the Complaint was issued on June 12, 2019, providing for answers, protests, and interventions to be filed on or before July 11, 2019.

12. Colonial filed a timely answer to the Complaint, raising defenses similar to those it raised in Docket No. OR18-7-000, et al. Although Colonial challenges the adequacy of evidence presented in the Complaint, Colonial acknowledges that the Complaint raises facts and arguments similar to those being reviewed in the Colonial Global Complaint

¹⁴ *Id.* at 10.

¹⁵ *Id.* See also Consolidated Hearing Order, 164 FERC ¶ 61,202 at P 19.

¹⁶ Complaint at 10.

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 4, 14.

¹⁹ *Id.* at 4.

proceeding.²⁰ Colonial opposes consolidation of the instant Complaint with the ongoing Colonial Global Complaint proceeding, citing Gunvor's delay in filing the Complaint.²¹ Colonial requests that if the actions are consolidated, the examination into Colonial's market-based rates be severed and heard separately from the examination of Colonial's cost-based rates.²²

13. On July 12, Gunvor filed an answer to Colonial's answer and a request for expedited action.

Discussion

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), all unopposed and timely filed motions to intervene and any unopposed motion to intervene out of time filed before this order issues are granted. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to answers unless otherwise ordered by the decisional authority.²³ We will accept Gunvor's answer because it has provided information that assisted us in our decision-making process.

15. The instant Complaint raises nearly identical challenges to the lawfulness of the rates charged by Colonial as the complaints that are the subject of the Consolidated Hearing Order.²⁴ Consistent with the Commission's determinations in the Consolidated Hearing Order and subsequent orders on complaint, the Commission finds that the Complaint makes a sufficient showing that Colonial's indexed and grandfathered rates may be unjust and unreasonable.²⁵ Also consistent with the Consolidated Hearing Order, the Commission finds that the Complaint sufficiently raises the issue of whether Colonial possesses significant market power such that its market-based rate authority should be

²⁰ Colonial Answer at 2.

²¹ *Id.*

²² *Id.* at 40.

²³ 18 C.F.R. § 385.213(a)(2).

²⁴ The Commission undertook a detailed analysis of the challenges to Colonial's current rates in the Consolidated Hearing Order and adopts that analysis in the present order.

²⁵ Consolidated Hearing Order, 164 FERC ¶ 61,202 at P 50.

revoked.²⁶ Finally, Gunvor's allegations regarding Colonial's transmix and product loss practices and charges warrant further investigation.²⁷ The Commission therefore sets these matters for hearing.

16. Due to the substantial overlap in the issues raised in the Complaint and those being addressed in the Colonial Global Complaint proceeding, the Commission consolidates Docket No. OR19-27-000 with the consolidated Docket No. OR18-7-000, et al. complaint proceedings. Consistent with the Consolidated Hearing Order, we sever the examination of Colonial's market-based rates from the examination into Colonial's other rates and its transmix and product loss practices.²⁸

17. As for Colonial's objections to consolidation, Colonial fails to demonstrate that the Colonial Global Complaint proceeding would be negatively impacted or that efficiency would not be achieved, given the commonality of issues in the proceedings.

The Commission orders:

(A) Pursuant to the authority conferred on the Commission by the Interstate Commerce Act, a public hearing shall be held for the purpose of determining whether changes in market circumstances have resulted in Colonial no longer lacking significant market power in its relevant markets, and a separate public hearing shall be held concerning the other allegations in the instant Complaint, as discussed in the body of this order.

(B) Docket No. OR19-27-000 is hereby consolidated with Docket No. OR18-7-000, et al., for purposes of hearing procedures, as discussed in the body of this order.

(C) The investigation into Colonial's market-based rates is hereby severed from the hearing to review the remaining issues raised in this proceeding, consistent with the Consolidated Hearing Order.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

(D) Any procedural orders issued by the Chief Administrative Law Judge or the Presiding Administrative Law Judge in Docket No. OR18-7-000, et al., prior to the issuance of this order shall likewise apply to Docket No. OR19-27-000, including the establishment of Track III procedural time standards.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.