

169 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pilot Travel Centers, LLC
v.
Colonial Pipeline Company

Docket No. OR19-36-000

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

v.
Colonial Pipeline Company

Docket No. OR18-7-000, et al.
(consolidated)

ORDER ON COMPLAINT, ESTABLISHING
HEARING AND CONSOLIDATING PROCEEDINGS

(Issued November 7, 2019)

1. On September 25, 2019, Pilot Travel Centers LLC (Pilot) filed a complaint (Complaint) against Colonial Pipeline Company (Colonial). Pilot raises nearly identical issues to those set for hearing by the Commission in Docket No. OR19-27-000 and consolidated with the ongoing hearing proceedings in Docket No. OR18-7-000, et al.¹ As discussed below, we set the issues raised in the Complaint for hearing and consolidate the Complaint with the ongoing proceedings in Docket No. OR18-7-000, et al. (referenced herein as the Colonial Global Complaint proceeding).

Background

2. Pilot is a shipper of refined petroleum products on Colonial, a fuel distributor and a trader in refined petroleum products and other energy commodities that operates a chain of truck stops.²

¹ See, e.g., *Gunvor USA LLC v. Colonial Pipeline Co.*, 168 FERC ¶ 61,080 (2019) (*Gunvor*), consolidated with *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 164 FERC ¶ 61,202 (2018) (Consolidated Hearing Order), *reh'g denied* 169 FERC ¶ 61,035 (2019).

² Complaint at 2.

3. Colonial operates a pipeline that provides interstate transportation of refined petroleum products between Houston, Texas and destinations throughout the Gulf Coast, Southeast and Northeast pursuant to the Colonial tariff.³ Colonial's rates include index-based rates and market-based rates.⁴

4. On September 20, 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.⁵ In the Consolidated Hearing Order, the Commission found that the four initial complaints made a sufficient showing that Colonial's indexed and grandfathered rates may be unjust and unreasonable and set those rates for hearing.⁶ 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.⁷

5. On February 5, March 25, May 22 and August 8, 2019, the Commission issued orders addressing five additional complaints filed in Docket Nos. OR19-1-000, OR19-4-000, OR19-16-000, OR19-20-000, and OR19-27-000.⁸ 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.

³ *Id.*

⁴ See *Metroplex Energy, Inc. v. Colonial Pipeline Co.*, 167 FERC ¶ 61,165, at P 2 (2019) (*Metroplex*); Complaint at 9, 11.

⁵ Consolidated Hearing Order, 164 FERC ¶ 61,202.

⁶ *Id.* P 50.

⁷ *Id.*; *Epsilon Trading, LLC v. Colonial Pipeline Co.*, Order Designating Settlement Judge, Docket No. OR18-7-000, et al. (issued by Chief Administrative Law Judge on Sept. 28, 2018).

⁸ *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; *Gunvor*, 168 FERC ¶ 61,080.

6. 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 22, 2019, the participants filed a consent motion to modify the Track III procedural schedule to accommodate hearing on the cost and market-based rate issues within one procedural schedule. Thereafter, the participants commenced hearing and discovery proceedings and filed initial testimony.

7. On July 16, 2019, the participants submitted a Joint Stipulation limiting the scope of the market-based rate portion of the proceeding to issues concerning Colonial's market power in its Gulf Coast origin markets and not Colonial's market power in its destination markets or origin markets in the Northeast.⁹

8. On September 26, 2019, Pilot filed a motion to intervene out of time in the Colonial Global Complaint proceeding.

Complaint

9. 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.

10. In its Complaint, Pilot 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 2017 and 2018 were approximately 33 and 48 percent, respectively.¹⁰ Pilot argues that Colonial over-recovered its costs by over \$400 million in years 2017 and 2018, and that Colonial's rates are therefore unjust and unreasonable.¹¹ Pilot challenges Colonial's reported depreciation and cost allocation for interstate service and related cost allocations based on reported revenue. Based on this and further analysis of cost information in Colonial's annual reports, Pilot 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 Pilot also challenges Colonial's grandfathered rates

⁹ Joint Stipulation, Docket No. OR18-7-002, et al. (July 16, 2019) (accepted by presiding Administrative Law Judge, July 25, 2019). Pilot agrees to be bound by the Stipulation. Complaint at 5.

¹⁰ Complaint at 7-8.

¹¹ *Id.* at 8-9.

¹² *Id.* at 9.

on the basis that the foregoing factors provide reasonable grounds to conclude that such rates are unjust and unreasonable.¹³

11. Pilot also argues that Colonial's market-based rates are no longer just and reasonable. Pilot states that since Colonial received market-based rate authorization in 2000 and 2001, the competitive landscape has changed in the relevant markets and Colonial now possesses the opportunity to exercise market power. Pilot notes that since the time of Colonial's market-based rate authorizations, Colonial's capacity has become severely constrained.¹⁴ According to Pilot, 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 transportation of refined petroleum products from the Gulf Coast origin markets.¹⁵ Pilot asserts that Colonial had market power in the Gulf Coast origin markets from which it has been collecting market-based rates during the two years prior to the filing of the Complaint and concludes that Colonial's collection of market-based rates during that two-year period and continuing "until new cost-based just and reasonable rates go into effect" is unjust and reasonable.¹⁶

12. Pilot alleges that Colonial's transmix and product loss practices and charges do not appear to be reasonable, as they are not stated in Colonial's tariff, no explanation is provided for how such charges are calculated, and such charges have not been shown to be just and reasonable.¹⁷

13. Finally, Pilot moves to consolidate its Complaint with the Colonial Global Complaint proceeding.¹⁸ Pilot argues that it challenges Colonial's rates on grounds similar to those set for hearing 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 Pilot acknowledges the amount of time that has passed since the filing of the original complaint but argues that

¹³ *Id.* at 10-11.

¹⁴ *Id.* at 11.

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

¹⁶ Complaint at 11-12.

¹⁷ *Id.* at 12-14.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

consolidation is appropriate at this phase of the hearing, citing a series of SFPP, L.P. proceedings by way of example.²⁰ Pilot states that it will not raise any issues that are not already at issue in the consolidated proceedings, nor seek a delay of the procedural schedule to accommodate its participation.²¹

Public Notice, Interventions, and Answers

14. Notice of the Complaint was issued on September 26, providing for answers, protests and interventions to be filed on or before October 25, 2019.

15. On October 25, 2019, Colonial filed a timely answer (Answer) to the Complaint, raising defenses similar to those it raised in Docket No. OR18-7-000, et al. In particular, Colonial contests the sufficiency of the presentation made in the Complaint, which cross-references the testimony submitted with the prior complaints.²² Despite this challenge, Colonial acknowledges that the Complaint raises facts and arguments similar to those being reviewed in the Colonial Global Complaint proceeding.²³ Colonial opposes consolidation of the instant Complaint with the ongoing Colonial Global Complaint proceeding, citing Pilot's delay in filing the Complaint, the different time frame at issue in the Complaint, and the fact that testimony has been filed and discovery is under way.²⁴ Colonial notes that the administrative law judge has issued significant rulings governing the proceedings.²⁵

16. As an alternative to consolidation, Colonial suggests that the Commission should hold Pilot's complaint in abeyance, subject to the outcome of the Colonial Global Complaint proceeding, citing a proceeding involving tariff filings by the Trans Alaska Pipeline System (TAPS) carriers.²⁶ Colonial requests that if the actions are consolidated,

²⁰ *Id.* at 4-5 (citing *SFPP, L.P.*, 63 FERC ¶ 61,014, at 61,123, *aff'd*, 63 FERC ¶ 61,275 (1993); *Mobil Oil Corp. v. SFPP, L.P.*, 73 FERC ¶ 61,032 (1995); *Tosco Corp. v. SFPP, L.P.*, 74 FERC ¶ 61,056 (1996)).

²¹ *Id.* at 5-6.

²² Colonial Answer at 22.

²³ *Id.* at 2.

²⁴ *Id.* See also *id.* at 14 (citing discovery schedule).

²⁵ *Id.* at 17.

²⁶ *Id.* at 16-17 (citing *BP Pipelines (Alaska) Inc.*, 117 FERC ¶ 61,352 (2006)).

the examination into Colonial's market-based rates be severed and heard separately from the examination of Colonial's cost-based rates.²⁷

Discussion

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), all unopposed and timely filed motions to intervene and any unopposed motion to intervene out of time filed before this order issues are granted.

18. The instant Complaint raises nearly identical challenges to the lawfulness of the rates charged by Colonial as were raised by the complaints that are the subject of the Consolidated Hearing Order.²⁸ Consistent with the Commission's determinations in the Consolidated Hearing Order and subsequent orders on complaint, we find that the Complaint makes a sufficient showing that Colonial's indexed and grandfathered rates may be unjust and unreasonable.²⁹ Also consistent with the Consolidated Hearing Order, we find that the Complaint sufficiently raises the issue of whether Colonial possesses significant market power such that its market-based rate authority should be revoked.³⁰ Finally, Pilot's allegations regarding Colonial's transmix and product loss practices and charges are identical to those found to warrant further investigation in prior orders.³¹ We therefore set these matters for hearing.

19. Due to the substantial overlap in the issues raised in the Complaint and those being addressed in the Colonial Global Complaint proceeding, we consolidate Docket No. OR19-36-000 with the consolidated Docket No. OR18-7-000, et al. complaint proceedings. Issues concerning Colonial's market-based rates, other rates, and transmix and product loss practices shall be addressed at hearing consistent with the

²⁷ *Id.* at 52.

²⁸ The Commission undertook a detailed analysis of the challenges to Colonial's current rates in the Consolidated Hearing Order and we adopt that analysis in the present order.

²⁹ Consolidated Hearing Order, 164 FERC ¶ 61,202 at P 50.

³⁰ *Id.*

³¹ *Id.* See also *Gunvor*, 168 FERC ¶ 61,080 at P 15.

determinations of the Chief Administrative Law Judge or Presiding Administrative Law Judge on how best to conduct the hearings on the consolidated complaints.³²

20. 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. We do not find that the TAPS carrier rate proceedings discussed by Colonial justify another result. Those proceedings involved a series of annual rate filings by the TAPS carriers, each of which were protested by the State of Alaska and several shippers. The protesters requested abeyance of the proceeding to review the third annual filing, and the carriers did not object, while the participants litigated the rate calculation methodology for all of the filings.³³ Thus, holding the third proceeding in abeyance while the TAPS carriers' other rate proceedings were reviewed did not limit the participation of any party.

21. Pilot has stated that it will take the record as it stands in the Colonial Global Complaint proceeding, and we order consolidation based on this condition. Thus, Pilot cannot raise any issue outside the scope of the issues already stipulated in the ongoing proceeding.³⁴ The procedural schedule should not be delayed to accommodate Pilot. However, if the Presiding Administrative Law Judge finds it appropriate, Colonial may be granted an opportunity to seek discovery from Pilot.

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 concerning the other allegations in the instant Complaint, as discussed in the body of this order.

(B) Docket No. OR19-36-000 is hereby consolidated with Docket No. OR18-7-000, et al., for purposes of hearing procedures, as discussed in the body of this order.

³² Consolidated Hearing Order, 164 FERC ¶ 61,202 at P 83. The issues will be heard consistent with the modified Track III procedural schedule approved by the Chief Administrative Law Judge, which provides for a bifurcated hearing. *See e.g., Epsilon Trading, LLC v. Colonial Pipeline Co.*, Order Extending Track III Procedural Time Standards, Docket No. OR18-7-002, et al. (issued May 24, 2019).

³³ *BP Pipelines (Alaska)*, 117 FERC ¶ 61,352 at PP 9-14.

³⁴ *See Tosco v. SFPP*, 74 FERC ¶ 61,056 at 61,143.

(C) 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. OR19-36-000, including the establishment of modified Track III procedural time standards.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.