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

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

Epsilon Trading, LLC, Chevron Products Company, and Valero Marketing and Supply Company		
v.	Docket Nos.	OR18-7-002
Colonial Pipeline Company		
BP Products North America, Inc., Trafigura Trading LLC, and TCPU, Inc.		
v.		OR18-12-002
Colonial Pipeline Company		
TransMontaigne Product Services LLC		
v.		OR18-17-002
Colonial Pipeline Company		
CITGO Petroleum Corporation		
v.		OR18-21-002
Colonial Pipeline Company		
Southwest Airlines Co. and United Aviation Fuels Corporation		
v.		OR19-1-001
Colonial Pipeline Company		
Phillips 66 Company		
v.		OR19-4-001
Colonial Pipeline Company		
American Airlines, Inc.		
v.		OR19-16-001
Colonial Pipeline Company		
Metroplex Energy, Inc.		
v.		OR19-20-000
Colonial Pipeline Company		
Gunvor USA LLC		

v. OR19-27-000
Colonial Pipeline Company

Pilot Travel Centers, LLC
v. OR19-36-000
Colonial Pipeline Company (consolidated)

ORDER ON INTERLOCUTORY APPEAL

(February 21, 2020)

1. On January 23, 2020, the Presiding Administrative Law Judge (ALJ) in this proceeding issued a bench ruling[1] granting Complainants'[2] December 30, 2019 motion to strike portions of Colonial Pipeline Company's (Colonial) testimony seeking to introduce a Stand-Alone Cost (SAC) methodology in the hearing regarding Colonial's indexed and grandfathered rates.[3] On February 6, 2020, the Chairman, acting as Motions Commissioner pursuant to Rule 715 of the Commission's Rules of Practice and Procedure,[4] referred Colonial's January 30, 2020 interlocutory appeal to the full Commission.[5] We grant the interlocutory appeal, as discussed below.

[1] *See* Tr. 451-84. *See also Epsilon Trading, LLC v. Colonial Pipeline Co.*, Docket Nos. OR18-7-000, *et al.* at PP 3-4 (Jan. 30, 2020) (J. Hurt) (order confirming bench ruling).

[2] Complainants are Epsilon Trading, LLC (Epsilon), Chevron Products Company (Chevron), and Valero Marketing and Supply Company (Valero); BP Products North America, Inc. (BP), Trafigura Trading LLC (Trafigura), and TCPU, Inc. (TCPU); TransMontaigne Product Services LLC (TransMontaigne); CITGO Petroleum Corporation (CITGO); Southwest Airlines Co. (Southwest) and United Aviation Fuels Corporation (UAFC); Phillips 66 Company (Phillips); American Airlines, Inc. (American); Metroplex Energy, Inc. (Metroplex); Gunvor USA LLC (Gunvor); and Pilot Travel Centers, LLC (Pilot).

[3] *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 164 FERC ¶ 61,202 (2018) (Hearing Order), *reh'g denied*, 169 FERC ¶ 61,035 (2019) (Rehearing Order).

[4] 18 C.F.R. § 385.715 (2019).

[5] *Epsilon Trading, LLC v. Colonial Pipeline Co.*, Docket Nos. OR18-7-002, *et al.* (Feb. 6, 2020) (Notice of Determination by the Chairman).

Background

2. 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. Beginning in November 2017, several shippers filed complaints challenging (1) Colonial's market-based rates and (2) Colonial's remaining rates on a cost-of-service basis. In the September 20, 2018 Hearing Order, the Commission set the complaints for hearing.[6]

3. As relevant here, on November 20, 2019, Colonial filed its prepared answering testimony in the cost-of-service portion of the proceeding. Colonial submitted testimony and exhibits seeking to rely in part on the SAC methodology, which Colonial describes as being "designed to reflect the tariff rates that would exist in a competitive market based on current market prices" and as reflecting "the market value of Colonial's transportation services."[7] As proposed by Colonial, the SAC methodology develops a cost of service based upon the hypothetical rate base for a newly constructed pipeline. Colonial claims that the SAC methodology determines the maximum rate that an economically efficient entrant could charge for the same services as those provided by the incumbent carrier (i.e., Colonial), which, in turn, establishes the maximum rate the incumbent carrier could charge in a competitive market.[8] Colonial argues that its existing rates are within the zone of reasonableness because they are below the rate identified by the SAC methodology.[9]

4. On December 30, 2019, Complainants filed a motion to strike the SAC-related testimony. Complainants argue that the testimony should be struck because the Commission has previously rejected use of the SAC methodology to establish rates or assess the continued validity of existing oil pipeline rates.[10]

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[6] Hearing Order, 164 FERC ¶ 61,202 at P 50. The hearing also covers Colonial's transmix and product loss charges and practices and market power issues in certain markets.

[7] Interlocutory Appeal at 4 and 5.

[8] *Id.* at 23.

[9] *Id.* at 7.

[10] Motion to Strike at 9 (citing *Williams Pipe Line Co.*, Opinion No. 391-B, 84 FERC ¶ 61,022 (1998), (*Williams*); *BP Pipelines (Alaska) Inc.*, Opinion No. 502, 123 FERC ¶ 61,287 (2008) (*TAPS*)).

5. On January 23, 2020, the ALJ heard argument and issued the bench ruling granting Complainants' motion to strike. The ALJ found that "introducing the SAC methodology is beyond the scope of the cost-based proceeding and confuses the issues."[11] In the bench ruling, the ALJ pre-emptively denied "the motion for interlocutory appeal that no doubt will come" of the ALJ's decision to grant the motion to strike.[12]

Interlocutory Appeal

6. On January 30, 2020, Colonial submitted an appeal pursuant to Rule 715 of the Commission's Rules of Practice and Procedure of the ALJ's bench ruling granting Complainants' motion to strike and denying permission to bring an interlocutory appeal. According to Colonial, the ALJ's ruling causes irreparable harm because it prevents Colonial from presenting "a full defense of the justness and reasonableness of its existing indexed rates," which is based in part upon the SAC standard.[13]

7. Colonial argues that the ALJ erred in granting Complainants' motion to strike. Colonial states that motions to strike are evaluated in accordance with Rule 509(a) of the Commission's Rules of Practice and Procedure, which provides that the presiding judge "should exclude from evidence any irrelevant, immaterial, or unduly repetitious material."[14] According to Colonial, its SAC testimony is not irrelevant, immaterial or unduly repetitious.[15] Colonial asserts that the excluded material shows that the SAC rates are "well above" Colonial's existing rates, which it concludes confirms the reasonableness of those rates.[16] Based on reports that shippers are trading capacity on the pipeline, Colonial concludes that the Commission-approved indexed rates are "significantly" too low under traditional ratemaking methodologies.[17] Colonial states

[11] Tr. at 483.

[12] *Id.* at 484.

[13] Interlocutory Appeal at 7.

[14] *Id.* at 10 (quoting 18 C.F.R. § 385.509(a)).

[15] *Id.* at 11.

[16] *Id.*

[17] *Id.* at 13.

that "SAC provides an alternative methodology that places Colonial's existing indexed rates in its proper context."[18]

8. Colonial attempts to distinguish the Commission's earlier rejections of a SAC methodology to support rate increases, noting that it merely seeks to use a SAC methodology to support existing rates.[19] Colonial characterizes the Commission's concern in *TAPS* as a concern that "stand-alone costs could be allocated to individual movements to determine the maximum rate allowable for each movement, which represented an impermissible exercise in ratemaking using hypothetical costs of a new entrant."[20] Colonial states that its SAC testimony addresses this concern because it does not "push SAC costs down to individual point to point rates to be compared with the existing tariff rate;"[21] instead, it determines whether revenues are sufficient to cover the cost of a new entrant for each point to point rate pair.

9. Colonial states that its SAC testimony also addresses the concerns identified in *Williams*, relating generally to the failure of a system-wide analysis to account for local costs and demand and cost shifts, by allocating revenues to each segment (on an individual cost per barrel/barrel-mile basis), which permits an analysis of the individual segments.[22] Colonial claims that an additional concern raised by Complainants – that the SAC methodology does not consider changes in demand, and thus overall revenues, that may occur if the hypothetical rates were in effect – is not relevant because Colonial is not proposing to adopt rates under the SAC methodology.[23]

10. Colonial acknowledges Complainants' concerns that the court in *Farmers Union II* found that "presumed market forces may not comprise the principal regulatory constraint" under the Interstate Commerce Act (ICA)[24] and that *Farmers Union II* precludes Colonial's SAC testimony because such testimony identifies "a very high

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[18] *Id.*

[19] *Id.* at 17 (noting that Colonial "does not use its SAC testimony to establish an overall revenue requirement").

[20] *Id.* at 9 (citing *TAPS*, 123 FERC ¶ 61,287, *order on reh'g*, 127 FERC ¶ 61,317).

[21] *Id.*

[22] *Id.* at 19 (citing *Williams,* 84 FERC ¶ 61,022 at 61,099).

[23] *Id.* at 20 n.62.

[24] *Id.* at 14 (citing Tr. 458).

ceiling based on replacement costs of a new, hypothetical pipeline. . . ."[25] According to Colonial, *Farmers Union II* also concluded that "departures from cost-based rates are permissible when non-cost factors are clearly identified and the substitute or supplemental ratemaking methods ensure that the resulting rate levels are justified by those factors."[26]

Determination by Motions Commissioner

11. On February 6, 2020, the Chairman, acting as Motions Commissioner pursuant to Rule 715 of the Commission's Rules of Practice and Procedure, determined that "Colonial has demonstrated extraordinary circumstances in accordance with Rule 715(c)(5) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.715 (2019), that make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person."[27] Accordingly, the Chairman referred Colonial's interlocutory appeal to the full Commission.[28]

Answers

12. On February 10, 2020, CITGO and two groups of complainants, Joint Complainants[29] and Joint Parties,[30] filed answers to the interlocutory appeal. CITGO argues that the ALJ was correct in finding that Colonial's SAC methodology is outside the scope of a cost-of-service rate proceeding under the ICA, and accordingly irrelevant, immaterial and needlessly repetitious.[31] According to CITGO, the SAC methodology

[25] *Id.* (citing Tr. 458).

[26] *Id.* at 16 (citing *Farmers Union Central Exch., Inc. v. FERC*, 734 F.2d 1486, 1501-02 (D.C. Cir. 1984) (*Farmers Union II*)).

[27] Notice of Determination by the Chairman.

[28] Once the matter is referred to the Commission, under 18 C.F.R. § 715(d) (2019), the Commission must act within 15 days of the referral, or the ruling will be reviewed by the Commission in the ordinary course of the proceeding as if the appeal had not been made, and the Judge's ruling will effectively be upheld.

[29] Composed of American, BP, Chevron, Epsilon, Metroplex, Phillips 66, Southwest, TCPU, Trafigura, UAFC and Valero (Joint Complainants).

[30] Composed of TransMontaigne, Gunvor and Pilot (Joint Parties).

[31] CITGO Answer at 4-5.

was created under an entirely different statutory regime, is extremely expensive to adjudicate, and produces unpredictable results.[32]

13. CITGO asserts that the Commission has been "perfectly clear that the SAC methodology will not be considered in oil pipeline rate proceedings."[33] CITGO describes Colonial's proposed SAC testimony as "precisely the same type of testimony" that the Commission rejected in *TAPS*, noting that the proposed testimony is premised on replacement cost valuation, and involves the construction of "a hypothetical pipeline that will never be built."[34]

14. CITGO adds that the Surface Transportation Board and the Department of Justice have come to doubt the efficacy of SAC testimony because it is costly, unpredictable, and requires the resolution of innumerable arguments over imaginary details.[35] In sum, CITGO argues that "[a]llowing Colonial's SAC testimony will inflate the cost of this proceeding by millions of dollars while consuming massive additional Commission resources."[36]

15. Joint Complainants argue that the motion to strike was properly granted based on the ALJ's finding that the SAC methodology "is beyond the scope of the cost-based proceeding and confuses the issues."[37] Joint Complainants contest Colonial's assertions that the SAC testimony is permissible under *Farmers Union II* as a departure from cost-based rates,[38] that nothing in the ICA mandates use of historic costs, and that "the SAC test readily meets the *Farmers Union II* 'reasonableness' standard."[39] According to

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[32] *Id.* at 4 (citing Trial Staff Witness McComb Direct and Answering Test., Ex. S-00022 at. 9 (Jan. 14, 2020) (McComb Test.)).

[33] *Id.* at 5 (citing *TAPS*, 123 FERC ¶ 61,287 at P 209: "since SAC is based on a replacement cost valuation, it contravenes Commission policy and precedent").

[34] *Id.* (citing Colonial testimony).

[35] *Id.* at 6-7.

[36] *Id.*

[37] Joint Complainants Answer at 2-3 (citing Tr. 483; *Power Mining, Inc.,* 45 FERC ¶ 61,311, at 61,972 n.1 (1988) (holding material may be struck where it has "no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party")).

[38] Interlocutory Appeal at 16.

[39] *Id.* at 24; *see Farmers Union II*, 734 F.2d 1486, 1500-02.

Joint Complainants, these claims "are directly contrary" to *TAPS*[40] where the Commission held that "non-cost factors" discussed in *Farmers Union II* failed to justify the SAC methodology,[41] finding the SAC methodology not in accordance with *Farmers Union II*, and outside the purview of the cost-based Opinion No. 154-B methodology.[42]

16. Joint Complainants contest Colonial's attempt to distinguish *TAPS* because the proceeding involved setting rates while, in this proceeding, Colonial is defending its existing rates.[43] Joint Complainants state that there is no meaningful distinction between the use of a SAC methodology in *TAPS* and in this case. Joint Complainants cite the Commission's holding in *TAPS* that the pipeline's "attempt to use SAC as a test of revenue adequacy by suggesting that SAC rates are simply benchmarks, is without merit, since the [pipeline] acknowledge[s] the use of SAC as justification of the challenged rates and as a ceiling to assess both the . . . filed rates and the calculated Opinion No. 154-B rates."[44]

17. Joint Complainants state that the Commission found in *TAPS* that "it 'does not intend to involve itself in the details of pipeline engineering, construction, and costs for a hypothetical pipeline that will never be built, potentially every time it sets an oil pipeline rate case for hearing.'"[45] Joint Complainants object to Colonial's proposal as requiring

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[40] *TAPS*, 123 FERC ¶ 61,287.

[41] Joint Complainants Answer at 3 (citing *TAPS*, 123 FERC ¶ at PP 35, 200).

[42] *Id.* at 3-4 (citing *TAPS*, 123 FERC ¶ at P 208); *see* CITGO Answer at 9 (providing quote). *See also Williams Pipe Line Company,* Opinion No. 154-B, 31 FERC ¶ 61,377 (1985).

[43] Joint Complainants Answer at 4 (citing Interlocutory Appeal at 17-18, 11 ("Colonial provided the SAC testimony as an alternative theory to affirm the justness and reasonableness of its challenged existing indexed rates")).

[44] *Id.* (citing *TAPS*, 123 FERC ¶ 61,287 at P 206). *See also* Joint Parties Answer at 2 (characterizing Colonial's arguments as presenting "distinctions without a difference").

[45] Joint Complainants Answer at 4 (citing *TAPS*, 123 FERC ¶ at P 209 n.349). *See also* Joint Parties Answer at 4 ("If [Colonial's testimony is] not stricken . . . the Presiding Judge and the Commission will be required to rule on what will likely be many disputed issues of fact and law concerning the facilities and associated costs of a hypothetical new pipeline.")

the Commission, the ALJ and the participants to involve themselves in "just such an extremely burdensome and wasteful exercise."[46]

18. Joint Parties assert that Colonial does not dispute that "this Commission's long-standing ratemaking policy is based on original costs, not replacement costs."[47] According to Joint Parties, the SAC test is fundamentally different from the Commission's methodology and has been rejected by the Commission and the courts.[48] Joint Parties state that the Commission "expressly rejected" reliance on an SAC methodology as evidence of the propriety of oil pipeline rates in *TAPS*.[49] Joint Parties point out that the Surface Transportation Board, which has used the SAC methodology, has found it "too complicated, costly, and time consuming" and is reviewing different methodologies.[50]

19. Joint Parties describe the contested materials as "voluminous testimony" proposing the hypothetical facilities that would need to be constructed to replicate the Colonial system, accompanied by an entire cost of service and an analysis of "crossover traffic" that compares individual point to point revenues with the hypothetical costs to serve each such point to point rate pair.[51] According to Joint Parties, if this testimony is not stricken, the Commission and Trial Staff will face a "massive new burden," with all parties and Commission Trial Staff being required to produce "equally extensive rebuttal testimony and briefs."[52]

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[46] Joint Complainants Answer at 4.

[47] Joint Parties Answer at 1-2.

[48] *Id.* (citing *TAPS*, 123 FERC ¶ 61,287 at P 206).

[49] *Id.* (citing *TAPS*, 123 FERC ¶ at P 207, finding proposed SAC proxy "does not serve as adequate, credible, acceptable evidence of the propriety of" filed rates). *See also* CITGO Answer at 8.

[50] Joint Parties Answer at 3 (citing McComb Test. at. 17-18). *See also* CITGO Answer at 6-7 (quoting testimony).

[51] Joint Parties Answer at 3-4.

[52] *Id.* at 4.

Discussion

20. The issue presented on appeal is whether the ALJ properly excluded Colonial's testimony regarding the SAC methodology from the proceeding to resolve complaints against Colonial's indexed and grandfathered rates, based on her finding that the material confuses the issues and is beyond the scope of the cost-based rate phase of the hearing to review Colonial's rates.[53] Rule 509(a) of the Commission's Rules of Practice and Procedure provides, in relevant part: "The presiding officer should exclude from evidence any irrelevant, immaterial, or unduly repetitious material."[54] However, Commission precedent is clear that motions to strike are disfavored and the movant carries a heavy burden, such that "objectionable material will not be struck unless the matters sought to be omitted from the record have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party."[55] In *La. Pub. Serv. Comm.* the Commission further explained that "the imposition of this heavy burden on the movant is justified because a complete record upon which the Commission can base its decision is the preferred approach in administrative proceedings."[56]

21. We find that the heavy burden for striking the material has not been met and hereby overturn the ALJ's bench ruling granting Complainants' motion to strike. We clarify that the participants may litigate what weight, if any, to give Colonial's SAC testimony in the course of the proceeding, including the opportunity for cross-examination and rebuttal at hearing.

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[53] *See* Hearing Order, 164 FERC ¶ 61,202; Rehearing Order, 169 FERC ¶ 61,035.

[54] 18 C.F.R. § 385.509(a) (2019).

[55] *La. Pub. Serv. Comm. v. Entergy Servs. Inc.*, 163 FERC ¶ 61,117, at P 74 (2018); *Power Mining, Inc*., 45 FERC ¶ 61,311 at 61,972.

[56] *La. Pub. Serv. Comm.*, 163 FERC ¶ 61,117 at P 74 (citing *CenterPoint Energy Gas Transmission Co*., 109 FERC ¶ 61,197, at P 36 (2004); internal quotation marks omitted).

The Commission orders:

The Commission grants Colonial's interlocutory appeal, without reaching any merits issue as to weight and applicability, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.