

171 FERC ¶ 61,162
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sheetz, Inc.

v.

Colonial Pipeline Company

Docket No. OR20-7-000

Apex Oil Company, Inc. and FutureFuel Chemical Company

v.

Colonial Pipeline Company

Docket No. OR20-9-000

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 COMPLAINTS, ESTABLISHING
HEARING PROCEDURES AND CONSOLIDATING PROCEEDINGS

(Issued May 26, 2020)

1. On February 25, 2020, Sheetz, Inc. (Sheetz) filed a Complaint against Colonial Pipeline Company (Colonial). On March 9, 2020, Apex Oil Company, Inc. (Apex) and FutureFuel Chemical Company (Future) also filed a Complaint against Colonial. Sheetz and Apex and Future (Complainants) raise nearly identical issues to those set for hearing by the Commission in Docket No. OR19-36-000 and consolidated with the ongoing hearing proceedings in Docket No. OR18-7-000, et al. in the Consolidated Hearing Order.¹ As discussed below, we set the issues raised in the Complaints for hearing and consolidate the Complaints with the ongoing proceeding in Docket No. OR18-7-000, et al. (referenced herein as the Global Complaint proceeding).

¹ See, e.g., *Pilot Travel Centers, LLC v. Colonial Pipeline Co.*, 168 FERC ¶ 61,098 (2019), 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).

Background

2. Sheetz owns and operates a chain of convenience stores and gasoline stations in the Mid-Atlantic region.² Apex states that it is a provider of wholesale distribution, storage and transportation of petroleum products.³ Future manufactures chemical products and biofuels.⁴ Complainants, as shippers on Colonial's system, challenge the rates and practices of Colonial under the Interstate Commerce Act.⁵

3. Colonial operates a pipeline that provides interstate transportation of refined petroleum products between Houston, Texas and destinations throughout the Gulf Coast, Southeast, Mid-Atlantic, and Northeast regions of the United States pursuant to the Colonial tariff.

4. On September 20, 2018, the Commission issued the Consolidated Hearing Order addressing four complaints challenging the lawfulness of Colonial's rates and Colonial's charges and practices relating to transmix and product loss allowances.⁶ 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.⁷ The Commission also set for hearing the issue of whether, as a result of changes in market circumstances, Colonial possesses significant market power in 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 and consolidated the initial complaints.⁸

5. Subsequently, the Commission issued orders consolidating and setting for hearing and settlement judge procedures six additional complaints filed in Docket Nos. OR19-1-000, OR19-4-000, OR19-16-000, OR19-20-000, OR19-27-000 and OR19-36-000.⁹ The Commission consolidated each of those complaint proceedings

² Sheetz Complaint at 2.

³ Apex and Future Complaint at 2.

⁴ *Id.*

⁵ 49 U.S.C. App. § 1 *et seq.* (1988).

⁶ Consolidated Hearing Order, 164 FERC ¶ 61,202.

⁷ *Id.* P 50.

⁸ *Id.*; *see Pilot*, 169 FERC ¶ 61,098 at P 4.

⁹ *Sw. Airlines Co. v. Colonial Pipeline Co.*, 166 FERC ¶ 61,094 (2019); *Am.*

with the ongoing Global Complaint proceeding, finding that each raised nearly identical issues to those raised in the Global Complaint.

6. The Global Complaint proceeding remains pending before the Commission. 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 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 and rebuttal testimony.

Complaints

7. Complainants state that the issues they raise regarding the lawfulness of Colonial's rates and practices and the relief they seek are nearly identical to those raised and sought in the complaints set for hearing in the Consolidated Hearing Order and subsequent orders. Therefore, they move to consolidate their Complaints with the earlier complaints, as further discussed below.¹⁰

8. Complainants argue that Colonial's FERC Form No. 6 indicates that its revenue from interstate transportation service exceeded its cost of service by an average of 22% over the period 2009 through 2018 and that Colonial's realized rate of return on equity in 2018 was approximately 56%. Complainants argue 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. Complainants challenge 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, Complainants claim to show reasonable grounds for asserting that Colonial's rates result in revenues substantially exceeding its actual costs and are therefore not just and reasonable, warranting a hearing.¹¹ Complainants also challenge Colonial's grandfathered rates on the basis that the

Airlines, Inc. v. Colonial Pipeline Co., 166 FERC ¶ 61,214 (2019); *Metroplex Energy, Inc. v. Colonial Pipeline Co.*, 167 FERC ¶ 61,165 (2019); *Gunvor USA LLC v. Colonial Pipeline Co.*, 168 FERC ¶ 61,080 (2019); *Pilot*, 169 FERC ¶ 61,098.

¹⁰ Sheetz Complaint at 3-6; Apex and Future Complaint at 3-6. For ease of reference, because the Complaints are substantially similar, this order cites hereafter to the Sheetz Complaint.

¹¹ Sheetz Complaint at 7-9.

foregoing factors provide reasonable grounds to conclude that such rates are unjust and unreasonable.¹²

9. Complainants further argue that Colonial's market-based rate authority is no longer supported by relevant market power indicators. They state that, since Colonial received market-based rate authorization in 2000 and 2001, the competitive landscape has changed in the relevant markets and Colonial now has the ability to exercise market power. Complainants note that since the time of Colonial's market-based rate authorizations, Colonial's capacity has become severely constrained.¹³ According to Complainants, their witness Catherine Palazzari reviewed the analysis submitted with the complaints in the Global Complaint proceeding and she agrees with the conclusion that Colonial possesses significant market power in the transportation of refined petroleum products from the Gulf Coast origin markets to all destinations.¹⁴ Complainants assert 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 Complaints, and they conclude that Colonial's collection of market-based rates during those respective two-year periods and continuing "until new cost-based just and reasonable rates go into effect" is not just and reasonable.¹⁵

10. Complainants allege 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. Complainants also allege that no explanation is provided for how such charges are calculated and that such charges have not been shown to be just and reasonable.¹⁶

11. Finally, Complainants move to consolidate their respective Complaints with the Global Complaint proceeding. They each argue that they challenge 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 their respective Complaints are similar to those in the Global Complaint proceeding.¹⁷ Complainants each acknowledge the amount of time that has passed since the filing of the pending complaints, but they argue that consolidation is nevertheless appropriate

¹² *Id.* at 10-11.

¹³ *Id.* at 11.

¹⁴ *Id.* See also Consolidated Hearing Order, 164 FERC ¶ 61,202 at P 19.

¹⁵ *E.g.*, Sheetz Complaint at 11-12.

¹⁶ *Id.* at 12-14.

¹⁷ *Id.* at 3-4.

even at this phase of the hearing, citing a series of SFPP, L.P. proceedings by way of example.¹⁸ Complainants state that they will neither raise issues that are not already at issue in the Global Complaint proceeding nor seek a delay of the procedural schedule there to accommodate their participation.¹⁹

Notice, Interventions, and Responsive Pleadings

12. Notice of the Sheetz Complaint was issued on February 27, 2020, with answers, protests and interventions due March 26, 2020. Notice of the Apex and Future Complaint was issued March 11, 2020, with answers, protests and interventions due April 11, 2020. Pursuant to Rule 214, all timely motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance of this order are granted.²⁰

13. On March 25 and April 8, 2020, Colonial filed its answers to the Complaints, raising defenses similar to those it raised in Docket No. OR18-7-000, et al. On April 2, 2020, Sheetz filed an answer to Colonial's answer, and on April 14, 2020, Apex and Future filed an answer to Colonial's answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to answers unless otherwise ordered by the decisional authority.²¹ Consequently, we reject Sheetz's and Apex and Future's answers.

14. In its Answers, Colonial contests the sufficiency of the presentation made in the Complaints, responding to Complainants' arguments and evidence with arguments that Colonial made in responding to prior complaints and evidence that Colonial has sponsored in the Global Complaint proceeding.²² Colonial acknowledges that the Complaints raise facts and arguments similar to those being reviewed in the Global Complaint proceeding.²³ Nevertheless, Colonial opposes consolidation of the Complaints with the ongoing Global Complaint proceeding, citing Complainants' delay in filing the Complaints, the different time frames at issue in each of the Complaints, and the fact that

¹⁸ *Id.* at 5-6 (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)).

¹⁹ *Id.*

²⁰ 18 C.F.R. § 385.214 (2019).

²¹ 18 C.F.R. § 385.213(a)(2).

²² *E.g.*, Colonial Answer, Docket No. OR20-7-000, at 16-40.

²³ *Id.* at 2.

testimony has been filed and discovery closed.²⁴ Colonial notes that the administrative law judge has issued significant rulings governing the proceedings.²⁵

15. As it did in Docket No. OR19-36-000, Colonial suggests that rather than consolidate the Complaints the Commission should hold them in abeyance, subject to the outcome of the 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, the examination into Colonial's market-based rates be severed and heard separately from the examination of Colonial's cost-based rates.²⁷

Discussion

16. The Complaints raise challenges to the lawfulness of the rates charged by Colonial that are nearly identical to those that 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 each of the Complaints 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 each of the Complaints sufficiently raises the issue of whether Colonial possesses significant market power such that its market-based rate authority should be revoked.³⁰ Finally, Complainants' allegations regarding Colonial's transmix and product loss practices and charges appear to be identical to those found to warrant further investigation in prior orders.³¹ We therefore set these matters for hearing.

17. Due to the substantial overlap in the issues raised in the Complaints and those being addressed in the Global Complaint proceeding, we consolidate Docket

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)).

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 *Pilot*, 169 FERC ¶ 61,098 at P 18.

Nos. OR20-7-000 and OR20-9-000 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 determinations of the Chief Administrative Law Judge or Presiding Administrative Law Judge on how best to conduct the hearings on the consolidated complaints.³²

18. As for Colonial's objections to consolidation, Colonial fails to demonstrate that the 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 was 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.

19. Complainants have stated that they will take the record as it stands in the Global Complaint proceeding, and we order consolidation based on this condition. Thus, Complainants 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 Complainants, and any remaining discovery issues may be resolved in the course of the hearing.

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 Complaints, as discussed in the body of this order.

(B) Docket Nos. OR20-7-000 and OR20-9-000 are 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.

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

³⁴ *See Tosco*, 74 FERC 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 Nos. OR20-7-000 and OR20-9-000, including the establishment of procedural time standards.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.