

171 FERC ¶ 61,206  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Colonial Pipeline Company

Docket No. IS20-337-000

ORDER ACCEPTING TARIFF, SUBJECT TO CONDITIONS

(Issued June 11, 2020)

1. On May 13, 2020, Colonial Pipeline Company (Colonial) filed FERC Oil Tariff No. 98.38.0<sup>1</sup> (Tariff) to address issues on its system arising from the COVID-19 pandemic. As discussed below, we accept FERC Oil Tariff No. 98.38.0, subject to conditions, to become effective May 24, 2020, as requested.

**I. Proposed Tariff**

2. According to Colonial, the COVID-19 pandemic has imposed unprecedented effects on the oil industry and its shippers. Colonial explains that demand for product has declined due to travel bans and stay-at-home orders. Colonial states that there has been an “uptick in product being shipped without a valid destination,”<sup>2</sup> and that, in order to clear-out its system, Colonial must sell (i.e., auction) this product when shippers fail to accept delivery.

3. Colonial proposes changes to Item 35 in its FERC Oil Tariff No. 98.38.0 to address these issues. First, Colonial proposes to modify its existing tariff terms so that it may collect from shippers when (a) shippers leave product on Colonial’s system and (b) Colonial’s sale of that product is not sufficient to recover Colonial’s associated costs. Second, Colonial proposes to assess its 25 cent demurrage penalty on shippers if (a) starting three days prior to delivery, shippers have not identified a valid delivery destination or (b) once the product is delivered to the specified destination, shippers fail

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<sup>1</sup> Colonial Pipeline Company, FERC Oil Tariff, Product Pipeline Tariffs, [Tariff, FERC 98.38.0, 98.38.0](#).

<sup>2</sup> Transmittal Letter at 2.

to take delivery.<sup>3</sup> Third, Colonial proposes to recover lost revenues up to a maximum of \$25 million if Colonial is forced to slowdown or shutdown operations due to a shipper's failure to accept delivery of product the shipper placed on Colonial's system.<sup>4</sup>

4. Colonial states that the proposed changes will deter shipper behavior that is damaging to its operations. Colonial also states that the tariff change will enable it to recover the costs incurred resulting from a shipper's failure to remove product from the pipeline.

5. Colonial states that the proposed changes would be effective for 90 days starting May 24, 2020 to address conditions caused by COVID-19. Colonial requests a waiver of the notice and tariff requirements under 18 C.F.R. § 341.14 and section 6(3) of the Interstate Commerce Act (ICA) in order for FERC Oil Tariff No. 98.38.0 to be effective on May 24, 2020.

## **II. Intervention, Protest, and Answer**

6. On May 28, 2020, Gunvor USA LLC (Gunvor), filed a motion to intervene and protest. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>5</sup> all unopposed and timely filed motions to intervene and any unopposed motion to intervene out of time filed before this order issues are granted.

7. Gunvor, a current shipper, argues that Colonial failed to provide justification for its proposed tariff changes. Gunvor explains that Colonial's tariff already includes a substantial demurrage charge, and Gunvor objects to the proposal that demurrage will be assessed based on a calculation that begins three business days prior to scheduled delivery if the shipper has not provided a destination terminal. Gunvor adds that Colonial has access to 26.6 million barrels of overall storage capacity on its system that could be used when terminals are not accepting product from the pipeline.<sup>6</sup> Lastly, Gunvor states that damages to cover lost revenues are typically decided in state and federal courts, not

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<sup>3</sup> Currently, as provided in Item 35(d) of Colonial's tariff, such demurrage charges only apply if volumes "remain in carrier tankage beyond the end of the cycle . . . ."

<sup>4</sup> Transmittal Letter at 2.

<sup>5</sup> 18 C.F.R. § 385.214 (2019).

<sup>6</sup> Gunvor Protest at 6.

at the Commission. Gunvor urges rejection or a maximum suspension of the proposed tariff subject to further investigation.<sup>7</sup>

8. On June 2, 2020, Colonial filed a response to the protest. To support its claim that additional deterrent measures are necessary, Colonial provides data that shipper failures to take delivery in 2020 significantly exceeded Colonial's experience in recent years. Moreover, Colonial states that, since January 1, 2020, it has conducted 28 product auctions due to a shipper's failure to take delivery of product off its system; Colonial explains that 25 of those auctions were from March 16, 2020 to May 31, 2020.<sup>8</sup> Accordingly, Colonial emphasizes that almost 90% of the 2020 auctions occurred after the COVID-19 pandemic began to affect product markets.

9. Colonial also responds to Gunvor's claim that Colonial could use its operational and merchant storage when shippers fail to remove product from its system. Colonial states that its operational storage facilities are needed for carrier operations. For example, according to Colonial, it uses operational storage tanks to batch its system and to facilitate the delivery of refined products from larger-diameter pipeline segments to smaller-diameter pipeline segments. Moreover, Colonial adds that allowing shippers that fail to take delivery of their product to use either merchant or operational storage without a charge would be unfair to Colonial's other shippers that must pay for storage.

10. Colonial also defends its proposal to allow recovery of lost revenues up to a maximum of \$25 million if Colonial is forced to slowdown or shutdown operations due to shippers' failure to take delivery. Colonial states that it will be able to accurately administer this provision because it has data analytics tools and complex models guiding its operations from every origin point to every destination point.<sup>9</sup> Colonial explains that the tariff is effectively the contract that governs its relationship with the shipper, and even if the appropriate venue for recovering these costs is state or federal court, Colonial asserts that it is not precluded from including this provision in its tariff.

11. On June 4, 2020, Gunvor submitted an answer to Colonial's June 2, 2020 response to its protest. Gunvor objects that Colonial failed to support its proposal in its transmittal.<sup>10</sup> Gunvor states that Colonial waited until its answer to allege that shippers were violating its tariff or that Colonial's ability to provide reliable service had been

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<sup>7</sup> *Id.* at 13.

<sup>8</sup> Colonial Answer at 6-7.

<sup>9</sup> *Id.* at 22.

<sup>10</sup> Gunvor Answer at 2-4.

impaired.<sup>11</sup> Gunvor states that these belated arguments lack credibility. Gunvor reiterates that Colonial should use its operational and merchant storage to address issues related to shippers leaving product on Colonial's system.<sup>12</sup> Regarding Colonial's proposed provision allowing it to recover lost revenues following a shutdown or slowdown, Gunvor argues that it affords Colonial too much discretion.<sup>13</sup> Moreover, Gunvor argues that with the gradual reopening of the economy and increased usage of refined products in markets served by Colonial, the impact of the pandemic seems to be abating.<sup>14</sup>

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to an answer unless otherwise permitted by the decisional authority. We accept Gunvor's answer because it has provided information that assisted us in our decision-making process.<sup>15</sup>

### III. Discussion

13. As discussed below, we accept FERC Oil Tariff No. 98.38.0, subject to conditions, to be effective May 24, 2020.<sup>16</sup> Colonial made this tariff filing in response to the extraordinary circumstances and the rapidly changing market conditions resulting from the COVID-19 pandemic. These tariff provisions are temporary and will only be effective for 90 days. Furthermore, Colonial's answer demonstrates that there have been

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<sup>11</sup> *Id.* at 4-5.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> Colonial's initial transmittal letter failed to sufficiently support its filing. Instead most of the support was provided in Colonial's answer. We accept Gunvor's answer because it reflects Gunvor's response to the additional support contained in Colonial's answer. *Infra* n.16.

<sup>16</sup> Pipelines are required to support their proposal in their transmittal letter. Failure to include adequate support may lead to the filing's rejection. *E.g., Plains Pipeline, L.P.*, 168 FERC ¶ 61,201, at P 10 n.18 (2019). As noted above, Colonial's initial transmittal letter failed to sufficiently support its filing. Instead most of the support was provided in Colonial's answer. However, in order to avoid delaying implementation of this temporary measure to address the market conditions resulting from the COVID-19 pandemic, we will not reject Colonial's filing on this basis. Nonetheless, we emphasize that all filings should be fully supported by the pipeline's transmittal letter.

increased incidents in which shippers have failed to take delivery, and that increased penalties are necessary to deter this conduct.<sup>17</sup> Contrary to Gunvor's assertions, Colonial's operational storage is needed for other purposes and is not intended to address shippers' failure to take timely delivery as required by Colonial's current tariff. Likewise, Colonial is not obligated to provide free storage to shippers that fail to remove their volumes from Colonial's system.

14. However, we reject Colonial's proposal in Items 35(e) and 35(f). These proposed provisions state that if, as a result of a shipper's failure to remove product from the system:

Carrier must either slow or shut down any pipeline segment, the Shipper will be responsible for any tariff revenue lost by the Carrier, calculated by taking the tariff rate associated with the scheduled batch origin/delivery times the scheduled volume lost due to the downtime up to a maximum of \$25 million. Failure of Shipper to pay said bill within 15 days of the date on the bill may result in the loss of shipping privileges until bill is paid in full.

15. First, this provision is unclear. It does not define what constitutes a slowdown of a pipeline segment triggering the penalty. The provision also does not specify how Colonial would determine "volumes lost due to the downtime" or address any mitigation by Colonial to reduce those losses. Furthermore, although Colonial states that it has "data analytics tools and complex models" to monitor its system, Colonial's proposal does not sufficiently explain how a slowdown of a pipeline segment would necessarily be attributed to the conduct of a particular shipper on Colonial's large, complex system.

16. Second, by requiring shippers to either pay Colonial's assessment in full or lose service within 15 days, this proposal does not include sufficient safeguards against the imposition upon shippers of unjust and unreasonable damages.

17. Third, Colonial has not justified a finding at this time that it is entitled to lost revenues in the specific circumstances addressed by the proposed provision. Colonial cites no Commission precedent approving a similar provision in an oil pipeline tariff subject to Commission regulation under the ICA. Although a pipeline may include penalties in its tariff to deter shipper misconduct, Colonial seeks to replace lost revenues, which may exceed any penalty level needed for deterrence purposes. As a general

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<sup>17</sup> For example, Item 35(e) of Colonial's tariff already requires a shipper to identify a delivery destination not later than three business days prior to the delivery date. In order to apply added deterrence given the changing shipper incentives resulting from the COVID-19 pandemic, Colonial proposes to assess a penalty to those shippers that fail to comply with this existing requirement.

matter, the appropriate venue for Colonial to resolve such damage claims is the relevant state or federal court.

18. Therefore, we accept Colonial's proposed tariff subject to the condition that it remove the language in Items 35(e) and 35(f) discussed above within 15 days of the date of this order.

The Commission orders:

(A) Pursuant to the authority contained in the Interstate Commerce Act, Colonial's FERC Oil Tariff No. 98.38.0 is accepted, subject to conditions, to become effective May 24, 2020.

(B) Colonial is directed to make the tariff language changes as discussed herein within 15 days of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.