

169 FERC ¶ 61,035
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

Docket Nos. OR18-7-001

v.

Colonial Pipeline Company

BP Products North America, Inc.,
Trafigura Trading LLC, and TCPU, Inc.

OR18-12-001

v.

Colonial Pipeline Company

TransMontaigne Product Services LLC

OR18-17-001

v.

Colonial Pipeline Company

CITGO Petroleum Corporation

OR18-21-001

v.

Colonial Pipeline Company

(consolidated)

ORDER DENYING REQUEST FOR REHEARING

(Issued October 17, 2019)

1. On October 22, 2018, TransMontaigne Product Services LLC (TransMontaigne) filed a Request for Clarification, or in the Alternative, Rehearing (Request for Rehearing)

of the Commission's September 20, 2018 order,¹ which consolidated various complaints against Colonial Pipeline Company's (Colonial) rates and set certain issues raised in the complaints for hearing and settlement judge procedures. TransMontaigne argues that the Commission erred by finding cost-of-service information to be beyond the scope of and irrelevant in the examination of market power issues to be examined at the hearing.

2. For the reasons discussed below, we deny the Request for Rehearing.

I. Procedural History and Background

3. Colonial provides transportation of refined petroleum products, including gasoline, jet fuel, and diesel fuel, from Houston, Texas to Linden, New Jersey in the New York harbor area. TransMontaigne is a shipper on Colonial.

4. On March 1, 2018, TransMontaigne filed a complaint against Colonial in Docket No. OR18-17-000.² TransMontaigne challenged the lawfulness of all of the tariff rates charged by Colonial for transportation of petroleum products for all origins and destinations on Colonial's system, as well as Colonial's practices and charges related to transmix and product volume losses. Colonial's tariff includes market-based rates as well as cost-based rates (meaning, for the purposes of this proceeding, grandfathered rates that have been increased pursuant to the Commission's indexing methodology).³

¹ *Epsilon Trading, LLC v. Colonial Pipeline Co.*, 164 FERC ¶ 61,202 (2018) (Complaint Order).

² Complaint and Motion to Consolidate of TransMontaigne Product Services LLC against Colonial Pipeline Company, Docket No. OR18-17-000 (Mar. 1, 2018) (TransMontaigne Complaint). The TransMontaigne Complaint raised issues similar to other complaints consolidated in this proceeding. *See* Complaint of Epsilon Trading, LLC, Chevron Products Company, and Valero Marketing and Supply Company against Colonial Pipeline Company, Docket No. OR18-7-000 (Nov. 22, 2017) (Epsilon Complaint); Joint Complaint of BP Products North America, Inc., Trafigura Trading LLC, and TCPU, Inc. against Colonial Pipeline Company and Motion to Consolidate, Docket No. OR18-12-000 (Feb. 2, 2018) (BP Complaint); Complaint and Motion to Consolidate of CITGO Petroleum Corporation against Colonial Pipeline Company, Docket No. OR18-21-000 (Apr. 20, 2018) (collectively, Complainants).

³ Complaint Order, 164 FERC ¶ 61,202 at P 3.

5. Several of the Complainants argued that market-based rates can be challenged based on evidence that the rates were unreasonable in relation to the pipeline's cost of service.⁴

6. In the Complaint Order, the Commission found that the various complaints made a sufficient showing that Colonial's cost-based rates may be unjust and unreasonable and set those issues for hearing.⁵ The Commission also set for hearing the issue of whether, as a result of changes in market circumstances, Colonial possessed significant market power in its relevant markets.⁶

7. Further, the Commission expressly dismissed the Complainants' argument that Colonial's market-based rates cannot diverge from cost of service and remain just and reasonable.⁷ Thus, the Commission severed the examination of Colonial's market-based rates into a separate proceeding from the issues involving Complainants' challenges to Colonial's cost-based rates.⁸

II. Request for Rehearing

8. TransMontaigne alleges that the Complaint Order is unclear as to whether cost and revenue data is discoverable and relevant in the hearing regarding Colonial's market-based rates. Specifically, TransMontaigne alleges that the Complaint Order's express finding that cost-of-service information is beyond the scope of the hearing examining market power is internally inconsistent with language elsewhere in the Complaint Order stating "a divergence between costs and revenues may be relevant when investigating the issue of market power."⁹

⁴ Epsilon Complaint at PP 81-88; BP Complaint at PP 80-87. TransMontaigne did not echo this specific argument in its complaint, only noting that market power allowed Colonial to "increase its rates to levels that significantly exceed its costs." TransMontaigne Complaint at P 26.

⁵ Complaint Order, 164 FERC ¶ 61,202 at PP 50-53.

⁶ *Id.* PP 72-73.

⁷ *Id.* PP 50, 54-71.

⁸ *Id.* PP 80-82.

⁹ Request for Rehearing at 7-8 (quoting Complaint Order, 164 FERC ¶ 61,202 at PP 66, 81).

9. In the alternative, TransMontaigne alleges that the Commission erred by finding that cost-of-service information is beyond the scope of and irrelevant to an examination of market power at hearing.¹⁰ TransMontaigne argues that the Commission's Order No. 572,¹¹ *Guttman Energy, Inc. v. Buckeye Pipe Line Co., L.P.*,¹² other agencies' Horizontal Merger Guidelines,¹³ and similar precedent suggest that while a showing of over-recovery of costs alone does not establish market power, such data is relevant to the analysis.¹⁴ Finally, TransMontaigne argues that the precedent relied on by the Commission does not support the Commission's decision.¹⁵

10. On November 6, 2018, Colonial filed an answer to the Request for Rehearing. On November 9, 2018, TransMontaigne filed an answer in opposition to Colonial's answer.

III. Commission Determination

11. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.¹⁶ Therefore, we reject Colonial and TransMontaigne's respective answers.

12. We deny TransMontaigne's Request for Rehearing, as discussed below.

¹⁰ *Id.* at 7.

¹¹ *Market-Based Ratemaking for Oil Pipelines*, Order No. 572, FERC Stats. & Regs. ¶ 31,007 (1994) (cross-referenced at 69 FERC ¶ 61,103), *aff'd sub nom, Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

¹² 161 FERC ¶ 61,180 (2017) (*Guttman*).

¹³ Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ), Horizontal Merger Guidelines, Section 4.1.3 (Aug. 19, 2010).

¹⁴ Request for Rehearing at 11-15.

¹⁵ *Id.* at 16-17.

¹⁶ 18 C.F.R. § 385.713 (2019). The Commission has considered responses to motions for clarification in certain circumstances. *See El Paso Natural Gas Co., L.L.C.*, 152 FERC ¶ 61,039, at P 12 (2015). Here, TransMontaigne's request is styled as a request for clarification and in the alternative a request for rehearing, and the answers are styled as a response to the request for clarification portion only. However, we find that both answers are in fact substantive responses to the request for rehearing. Thus, we treat them as such for procedural purposes and reject them.

13. We find that the Complaint Order was not ambiguous as to the scope of evidence to be permitted at the hearing. The Commission explained that “on the issue of cost data in market-based rate proceedings, [] cost-of-service information is beyond the scope of and irrelevant to a hearing examining market power.”¹⁷ The language cited by TransMontaigne, from earlier in the order, noting that an extended period of “divergence between costs and revenues” may sometimes suggest the existence of market power¹⁸ was followed in the same paragraph by the statement that “such a divergence alone” was insufficient to show market power.¹⁹ This general acknowledgement of potential correlation was insufficient to create ambiguity as to whether cost-of-service data would be permitted at the market power hearing, given the Commission’s unequivocal statement that “cost-of-service information” was beyond the scope of the market power hearing. Thus, we deny TransMontaigne’s request for clarification.

14. We also reject TransMontaigne’s rehearing request, which asserts that the Complaint Order erred by finding that cost-of-service information is beyond the scope of and irrelevant to a hearing on market power. As discussed at length in the Complaint Order,²⁰ the Commission has consistently held that cost-of-service information is beyond the scope of and irrelevant in a hearing examining market power.²¹ Rather, an investigation into a pipeline’s market power is typically done through the examination of market definitions, Herfindahl-Hirschman Index (HHI) calculations, and market shares.²²

15. TransMontaigne’s arguments on rehearing repeat those offered in its complaint and remain unpersuasive. As the Complaint Order explained,²³ the precedent that TransMontaigne cites²⁴ only suggests that a high rate of return over an extended period of time provides some limited correlative support suggesting that a pipeline may have

¹⁷ Complaint Order, 164 FERC ¶ 61,202 at P 81.

¹⁸ Request for Rehearing at 7-8 (quoting Complaint Order, 164 FERC ¶ 61,202 at PP 66, 81).

¹⁹ Complaint Order, 164 FERC ¶ 61,202 at P 66.

²⁰ *Id.* PP 54-71.

²¹ *Magellan Pipeline Co., L.P.*, 134 FERC ¶ 61,117, at P 12 (2011) (*Magellan*).

²² *See, e.g.*, Complaint Order, 164 FERC ¶ 61,202 at PP 57, 70.

²³ *Id.* P 66.

²⁴ Request for Rehearing at 11-15 (citing cases).

market power. For example, TransMontaigne relies on the DOJ and FTC Horizontal Merger Guidelines that address a distinct context from a hearing into market-based rates.²⁵ TransMontaigne partially quotes a footnote in the Guidelines as stating that “margins are important for implementing the hypothetical monopolist test”²⁶ but leaves out the point – which is that “high margins are not in themselves of antitrust concern.”²⁷ Further, the text supported by the footnote states that “high pre-merger margins normally indicate that each firm’s product individually faces demand that is not highly sensitive to price.”²⁸ Thus, on balance, the Horizontal Merger Guidelines suggest that high margins are of little probative value in examining market-based rates.

16. Similarly, we find unpersuasive TransMontaigne’s argument that the Commission precedent cited in the Complaint Order does not support the exclusion of cost-of-service data evidence in a market-based rates examination. Specifically, TransMontaigne asserts that it “would be illogical to conclude that cost over-recoveries are relevant evidence sufficient to warrant an investigation into a pipeline’s market-based rates, and then refuse to consider such evidence at the hearing set to conduct that investigation.”²⁹ But as the Commission explained in the Complaint Order, “divergence between cost and revenue does not in and of itself demonstrate that a pipeline’s rates are above the competitive level.”³⁰ TransMontaigne claims that the Commission’s recent decision in *Guttman* supports its argument that cost over-recoveries are relevant to the issue of market power.³¹ But while *Guttman* acknowledged that a significant divergence between costs and revenues may warrant investigation, the Commission also explained in *Guttman* that market power would then need to be proven through an “investigation involving a specific and detailed analysis of the market-based rates in question,” and that “[t]he likelihood that a current market-based rate is derived by an exercise of market power is

²⁵ *Id.* at 11.

²⁶ *Id.* (quoting FTC and DOJ Horizontal Merger Guidelines, Section 4.1.3 at 11, n.6).

²⁷ DOJ and FTC “Horizontal Merger Guidelines,” Section 4.1.3 at n.6.

²⁸ *Id.* at Section 4.1.3, at 12.

²⁹ Request for Rehearing at 13-14.

³⁰ Complaint Order, 164 FERC ¶ 61,202 at P 55.

³¹ Request for Rehearing at 13.

not influenced by the cost and revenue data currently reported on a pipeline's Form No. 6.”³²

17. By contrast, and as explained in the Complaint Order, Commission precedent overwhelmingly suggests that once an investigation into market-based rates has begun, market definitions, HHIs, and market shares are far more probative as to whether a pipeline actually has market power.³³

18. As a result, the Commission's exclusion of cost-of-service information from the hearing on Colonial's market-based rates is appropriate.³⁴ The Commission and its designated Administrative Law Judges are expressly empowered to exclude irrelevant, immaterial, or repetitive evidence from evidentiary hearings.³⁵ Even where evidence has some probative value, the need for this information to create a full record is balanced against the burden created by allowing the gathering of such evidence.³⁶ Here, given the limited probative value of cost-of-service data,³⁷ the burden cost-of-service discovery

³² *Guttman*, 161 FERC ¶ 61,180 at PP 117-118; *see also id.* P 116 (“a significant divergence between a market-based rate and a cost-based rate . . . is not in itself proof of the existence of market power”).

³³ Complaint Order, 164 FERC ¶ 61,202 at PP 56-70.

³⁴ “[A]gencies are free to fashion their own rules of procedure, so long as these rules satisfy the fundamental requirements of fairness and notice.” *Iroquois Gas Transmission Sys., L.P.*, 54 FERC ¶ 61,103, at 61,348 (1991) (finding “ALJ acted well within his discretion by limiting discovery in order to prevent unnecessary delays”); *see also* 5 U.S.C. § 556(d) (2018) (“agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence”).

³⁵ *See, e.g.*, 18 C.F.R. § 385.410(c) (2019) (presiding judge may “limit discovery . . . in order to . . . [p]rotect a participant or other person from undue [] burden, [or] [p]revent undue delay in the proceeding”); 18 C.F.R. § 385.509(a) (2019) (“The presiding officer should exclude from evidence any irrelevant, immaterial, or unduly repetitious material. The presiding officer may also exclude from evidence any other material which the presiding officer determines is not of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs.”).

³⁶ *Portland Gen. Elec. Co. and Enron Power Mktg., Inc.*, 102 FERC ¶ 61,189, at 61,524 (2003) (“the proper analysis under Section 410(a) is balancing the burden of production with the need for the information for a full record”).

³⁷ TransMontaigne itself “recognizes that the Commission has held that market based rates can diverge from a pipeline's cost of service and potentially remain just and

would entail and the potential for distraction from the core questions to be decided at the hearing on market-based rates, the Commission has appropriately bifurcated the cost-of-service proceeding from the market-based rates proceeding³⁸ and limited the gathering of cost-of-service information in the market-based rates proceeding.³⁹ Such a balancing of efficiencies is well within the Commission's discretion.⁴⁰

19. Finally, TransMontaigne fails to distinguish *Magellan*, where the Commission, when ruling on an interlocutory appeal on the issue of cost data in market-based rate proceedings, held that cost-of-service information is beyond the scope of and irrelevant to a hearing examining market power.⁴¹ TransMontaigne argues that *Magellan* is not relevant because it involved an application for market-based rate authority, rather than an investigation into existing rates.⁴² This distinction is irrelevant. *Magellan* held that “the underpinning of the approval of market-based rates is that sufficient competition exists such that shippers can find alternatives to the pipeline if the pipeline attempts to raise rates above a certain threshold” and so should be determined based on the Commission's

reasonable.” Request for Rehearing at 7; *see also Guttman*, 161 FERC ¶ 61,180 at P 116 (discussing *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012); *Enterprise Products Partners L.P. and Enbridge Inc.*, 146 FERC ¶ 61,115 (2014)). Instead, TransMontaigne merely asserts that “cost over-recoveries are *additional evidence supporting* a finding that Colonial has market power.” Request for Rehearing at 7.

³⁸ *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,001 (1984) (“The Commission, like other agencies, is generally master of its own calendar and procedures. It is within the Commission's purview to determine how best to allocate its resources for the most efficient resolution of matters before it. To permit petitioner/investigatees to dictate procedure to the Commission and to allocate agency resources in conformance with the investigatees' notions of efficiency would hamstring the agency in carrying out its statutory mandates.”) (citations omitted).

³⁹ *See Iroquois Gas Transmission Sys., L.P.*, 54 FERC ¶ 61,103 at 61,348 (finding Commission acted within discretionary authority limiting discovery).

⁴⁰ *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case).

⁴¹ 134 FERC ¶ 61,117 at P 12; *see Complaint Order*, 164 FERC ¶ 61,202 at P 81.

⁴² Request for Rehearing at 15-17.

established market power inquiry rather than an inquiry into costs.⁴³ This reasoning is equally applicable to the current context and we find TransMontaigne's efforts to distinguish *Magellan* unpersuasive particularly where, as discussed above, Commission precedent otherwise supports the Commission's decision in the Complaint Order finding that adducing cost-of-service information is beyond the scope of and may reasonably be excluded from a hearing examining market power.

20. Accordingly, we affirm the Commission's decision to exclude the gathering of cost-of-service evidence from the evidentiary hearing on Colonial's market-based rates.

The Commission orders:

TransMontaigne's Request for Rehearing is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴³ *Magellan*, 134 FERC ¶ 61,117 at PP 12, 15; *see also Mobil Pipe Line Co. v. FERC*, 676 F.3d at, 1103-04.