

144 FERC ¶ 61,158
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Colonial Pipeline Company

Docket No. IS13-11-001

ORDER DENYING REHEARING

(Issued August 27, 2013)

1. On November 16, 2012, the Commission issued an order that accepted an October 17, 2012 tariff filing of Colonial Pipeline Company (Colonial) to establish a new grade of “clear” Ultra Low Sulfur Diesel (ULSD), Grade 62.¹ BP Products North America Inc. (BP) and New York Mercantile Exchange, Inc. (NYMEX) jointly filed for rehearing of the November 16 Order. For the reasons set forth below, the Commission denies rehearing.

Background

2. Colonial owns and operates a common carrier refined products pipeline system that transports petroleum products (including gasoline, distillate, kerosene, and jet fuel) over an area extending from production areas at Houston, Texas to Linden, New Jersey in the New York harbor area.

3. Commencing in 2006, Colonial has provided interstate transportation of ULSD pursuant to its Grade 61 product specification which did not allow any renewable diesel content. On December 1, 2010, Colonial filed FERC Tariff No. 98.1.0, which added a new Grade 63 specification that allowed up to five percent renewable diesel.² In that

¹ *Colonial Pipeline Co.*, 141 FERC ¶ 61,133 (2012) (November 16 Order).

² Section 3.2.7 of Colonial Shippers’ Manual defines Renewable Diesel as follows:

3.2.7 - Renewable diesel is a liquid fuel derived from 100% hydrotreated bio-mass feedstocks that meets the registration requirements for fuels and fuel additives established by the EPA under section 211 of the Clean Air Act and the requirements of ASTM D975. Renewable diesel containing fatty acid esters (FAME, FAEE, or other esters) is

(continued...)

same filing, Colonial changed the Grade 61 specification to provide that Grade 61 “may contain” up to 5% renewable diesel at delivery locations downstream of Meridian, Mississippi (i.e., east to coast and then north to New York). FERC Tariff No. 98.1.0 was not protested and became effective January 3, 2011.

4. In FERC Tariff No. 98.9.0, filed September 27, 2012, in Docket No. IS12-588-000, Colonial proposed to add a new “clear” Grade 62. Colonial also proposed to eliminate Grade 61, although not until April 1, 2013. FERC Tariff No. 98.9.0 was protested by Valero Marketing and Supply Company (Valero). On October 17, 2012, following the protest, Colonial withdrew FERC Tariff No. 98.9.0. Simultaneously with the withdrawal on that date, Colonial filed FERC Tariff No. 98.10.0, which canceled FERC Tariff No. 98.8.0, and added the “clear” Grade 62,³ but left Grade 61 in place. On November 1, 2012, BP protested FERC Tariff No. 98.10.0.

5. BP’s protest contended that Colonial’s proposed Grade 62 would create market confusion and potential disruption, given that Colonial already transports Grades 61 and 63. BP stated that the addition of Grade 62 meant that Colonial will have three grades of ULSD, two of which would have virtually identical specifications. Furthermore, BP claimed there was potential grade identity confusion depending on the location of the product vis-a-vis Meridian, Mississippi, since Grade 61 can be identical with Grade 62 upstream of Meridian as clear, but identical to Grade 63 downstream of Meridian as containing up to 5% renewable. Further, BP stated, renewable diesel can be injected into Grade 63. BP asserted that the solution was to require Colonial to offer Grade 61 as a clear grade ULSD at all locations rather than the “may contain” existing specification for Grade 61 downstream of Meridian.

6. Moreover, BP contended that when Colonial established a renewable grade in Grade 63, Colonial granted a non-public waiver to allow Valero to inject renewable diesel into the Grade 61 pipeline stream upstream of Meridian rather than requiring Valero to ship its product (which contained renewable diesel) as Grade 63 in accordance with Colonial's specifications. BP stated it did not know whether Colonial granted similar waivers to other shippers. BP requested the Commission to require Colonial to immediately stop all waivers allowing renewable diesel in Grade 61 upstream of

prohibited for all distillate grades which allow up to 5% renewable (61, 63, 83, 86). Product with >5% renewable diesel may be shipped as 69 grade.

³ In addition to implementing Grade 62 ULSD, the tariff revision adds corrosion inhibitor options to meet established shipper expectations and corrects a classification error on product Grade 72 (segregated distillate blendstocks).

Meridian, and also to eliminate Grade 61. BP stated it recognized a transition period may be needed to eliminate Grade 61.

7. BP also urged that the Commission to direct Colonial to specify Grade 63 “must contain” rather than “may contain” renewable diesel. BP contends the specification that the grade “may contain” up to five percent renewable product creates the opportunity for market gamesmanship because there is currently no economic way to test for the presence or level of renewable product in ULSD.

8. On November 7, 2012, NYMEX filed comments. NYMEX asked that Colonial be required to transport only two grades of ULSD – one clear grade (preferably Grade 61) and one with renewable content (preferably Grade 63) –so the proposed Grade 62 would then be unnecessary. Valero, on the other hand, also intervened but urged acceptance of the new clear Grade 62, and requested that the Commission reject BP’s and NYMEX’s proposals to change the pre-existing Grades 61 and 62.

9. Colonial filed a response, stating it was important to allow the Grade 62 specification to become effective as scheduled on October 29, 2012, to permit it to offer this much-needed entirely “clear grade” specification to shippers. Colonial stated that no party, either in this docket or in the earlier Docket No. IS12-588-000, has taken issue with the addition of Grade 62 in any respect, and thus under the Commission’s regulations⁴ no basis existed to warrant suspending FERC Tariff No. 98.10.0.

10. Colonial asserted that the bulk of BP’s protest involves not the change made in FERC Tariff No. 98.10.0, namely the addition of Grade 62, but rather BP’s concern about potential market confusion if Colonial continued to also offer transportation service for both Grades 61 and 63. Colonial argued that under the ICA protests are limited to challenging “newly tariffed” rates or practices⁵ and BP’s proposal to require Colonial to eliminate or change either the existing Grade 61 or Grade 63 specifications was thus not properly raised in a protest.

⁴ Citing 18 C.F.R. § 343.3(c) (“Commission action ...on a protest will be limited to the issues raised in such protest”).

⁵ *BP West Coast Prods. v. FERC*, 374 F.3d 1263, 1278 (D.C. Cir. 2004); *see also* *CCPS Transportation, LLC*, 139 FERC ¶ 61,125, at P 12 n.5 (2012); *Enbridge Pipelines (North Dakota) LLC*, 132 FERC ¶ 61,274, at P 33 (2010); *TE Products Pipeline Company, LLC*, 130 FERC ¶ 61,257, at P 16 (2010); *Equilon Pipeline Co.*, 91 FERC ¶ 61,210, at 61,762 (2000).

11. Further, Colonial contended that even if the Commission were to consider BP's protest, there is no basis to require Colonial to eliminate either of its Grade 61 or Grade 63 product specifications. Colonial states that while Grade 61 and Grade 63 are similar, they are not, as BP claims, identical. Grade 63 allows ULSD to contain up to five percent renewable diesel at all origins and destinations on its system. The specifications for Grade 61, in contrast, require ULSD to be "clear" at the origin point, although the product "may contain" up to five percent renewable diesel at destinations downstream of Meridian, Mississippi. Referring to BP's concern that on occasion Colonial waived specifications for Grade 61, Colonial explained that such waivers occurred when Colonial accommodated shipper requests for short-term dispensation from the strict terms of the Shipper Manual. None was granted without the consent of the shipper and tankage party involved in a batch, and all batches for shippers that consented to the waivers involved deliveries to points downstream of Meridian, Mississippi, consistent with specifications for Grades 61 and Grade 63. Thus, Colonial asserted it did not grant any waivers that changed the applicable delivery specifications. Colonial contended that it is not its role, however, to dictate which grade of ULSD (whether "clear" or a fuel with a renewable component) ultimately will "serve as the specification for futures contracts and market quotes" and become the industry standard in the liquid market or for NYMEX New York Harbor ULSD Heating Oil futures.

The November 16 Order

12. The November 16 Order explained that Grade 61 is clear only to Meridian, proposed Grade 62 will always be clear, and Grade 63 may contain up to five percent renewable diesel at all origins and destinations, and Colonial had clarified that all waivers granting allowing renewable diesel in Grade 61 occurred downstream of Meridian, consistent with the specifications for that grade. The Commission acknowledged Colonial's explanation that the commingling of like products occurs during transportation service operations because Colonial is a fungible bulk products pipeline, and the complexity of tracking concentrations of mixtures of fuel that may or may not contain renewable diesel and then attempting to label them is not practical on its system. In fact, BP agreed that there was currently no economic way to test for the presence or level of renewable product in ULSD.⁶ Colonial also stated that its specifications require Grade 61 to be "clear" at the origin point, although the product "may contain" up to five percent renewable diesel. The Commission found that there was a need for the proposed clear Grade 62 on Colonial's system, which has not been directly opposed, because BP's suggested remedy went in the main toward requiring changes in existing Grade specifications, that were not the subject of the tariff filing. The Commission concluded

⁶ BP Protest at 13.

that on the record there was no basis to find that there should only be two grades of ULSD or that any of the grades should be eliminated or changed.

13. Finally, the Commission found Colonial's tariff would accurately specify which grades are clear and between which points on Colonial's system. With the addition of Grade 62 shippers now have more choices, and are able to obtain their desired grade of ULSD. Noting the possible need for transitional contracting adjustments by trading entities that had chosen to use Colonial's grade specifications in their contracts, the Commission held these contracting and labeling adjustments should be resolved by those market participants, and should not be a bar to Colonial's offering the new grade of ULSD for transport. Accordingly, the Commission found no basis to reject the proposed new clear Grade 62 specification, and accepted it effective October 29, 2012.

Request for Rehearing

14. BP asserts that the November 16 Order failed to address both BP's substantive arguments in its protest, and NYMEX's comments regarding the introduction of Grade 62 as proposed by Colonial. Basically, BP argues that the introduction of Grade 62 without the elimination of Grade 61 will inhibit development of a market price for renewable diesel, and will result in unjust contract renegotiation costs, contrary to Commission policy that the proper functioning of energy markets is to yield just and reasonable rates.⁷

15. BP argues it was error for the Commission to find that the three grades of ULSD can easily be distinguished given the existence of the grant of waivers by Colonial of product for Grade 61. Next, BP asserts it was error for the Commission to find that Colonial's grant of waivers for Grade 61 did not negatively affect locations downstream of Meridian, Mississippi. BP argues that such waivers do have a negative impact on market participants who are not involved in the transportation of product for which waiver was granted. BP states that shippers who were not aware that Grade 61 could contain renewable diesel and thus may have unknowingly exported ULSD containing renewable diesel that did not comply with EPA regulations. BP cites to one instance where Colonial granted waiver to Valero that permitted Valero to ship renewable diesel upstream of Meridian as Grade 61. BP claims there is no benefit in having three grades when in reality there are only two that are needed, clear and renewable. BP urges the

⁷ The Commission would note, however, that its obligation under the Interstate Commerce Act is to ensure just and reasonable rates for the transportation of oil and petroleum products the carrier holds itself out to transport, not to ensure that the establishment of a new grade does not have unforeseen results arising from the arguably imprecise language in existing trading contracts.

Commission to either require elimination of Grade 61 or prohibit Colonial from granting waivers.

16. BP also contends it was error for the Commission to find that shippers have requested multiple grades on Colonial's system. BP states the evidence in the record shows that, at most, the market wants two grades of ULSD. BP argues it was error for the Commission to find that there was a need for a third grade, Grade 62 as defined by Colonial, on the basis of operational constraints.⁸ BP contends that because Colonial granted waivers to Grade 61 upstream of Meridian, Grade 61 has been compromised since not all shippers were aware of that, and many shippers may have valued Grade 61 as clear and thus more valuable than a grade containing renewable diesel. Thus, unless the Commission bars Colonial's past waiver practices, these unwitting parties may suffer financial penalties based upon their misunderstanding of what Grade 61 actually represented.

Discussion

17. We find no merit in BP's contentions and deny rehearing. Contrary to BP the November 16 Order fully explained why it was not error for the Commission to accept Colonial's filing that establishes Grade 62. Clearly it is not the shipper who determines what grades a pipeline will ship, and absent a statutory reason to bar it, a pipeline may determine the grades on its system.

18. As explained above Grade 62 is distinct from the two related grades, Grade 61 and Grade 63. Grade 61, commencing in 2006 was "clear," but was then modified in 2010 to allow up to five percent renewable ULSD downstream of Meridian. In 2010 Colonial established Grade 63 which allows five percent renewable at all points on Colonial's system. The instant proceeding involves the establishment of Grade 62, which is clear, with no renewable permitted at any location.

19. Contrary to BP's contention, introduction of Grade 62 with the continuation of Grades 61 and 63 will not create confusion. Rather, the existence of Grade 62 provides some shippers with another option they have requested from Colonial. Thus, Grade 61 is clear to Meridian and may contain up to 5 percent renewable diesel downstream of Meridian. Grade 63 allows up to 5 percent renewable always on Colonial's system, and

⁸ BP argues that it did protest the introduction of Grade 61 and the November 16 Order erred in stating it did not. Since BP conditioned acceptance of the filing of Grade 62 on the elimination of Grade 61, for purposes of this rehearing BP will be considered as having protested the filing.

new Grade 62 will always be clear. Shippers can choose to ship any grade, and if shippers do not use one of the three grades of ULSD, Colonial can cancel that grade.

20. The Commission will not dictate what grade the pipeline should hold itself out to transport, absent showing a statutory violation in the pipeline's decision as to what grades to offer to shippers. There has not been any showing of a statutory violation related either to rates or to undue discrimination among shippers. At best BP's argument in a number of different ways relies upon Colonial's grant of waiver from the grade specifications as proof that the three grade situation is discriminatory. However, Colonial explained that the waivers occurred when Colonial accommodated shipper requests for short-term dispensation from the strict terms of the Shipper's Manual, and all these movements were ultimately within the downstream of Meridian specifications, and consented to by all parties to the transaction.

21. As more fully explained in Colonial's November 6, 2012 response at 6, and in Valero's October 12, 2012 protest in Docket No. IS12-588-000 at 11-12, the waiver was a special allowance to allow the shipper to ship Grade 63, renewable diesel blends up to 5 percent, as Grade 61 from the origin. The waiver was necessary because of a Mississippi fuel labeling requirement tied to renewable diesel sold within Mississippi. In operation, Colonial originally required ULSD volumes containing up to 5 percent renewable diesel and originating upstream of Mississippi to be designated as Grade 63 for identification, tracking, and labeling purposes in the event such volumes were delivered in Mississippi. However, to the extent product designated as Grade 63 ULSD was destined for non-Mississippi destinations, including every Colonial destination downstream of Mississippi, Colonial simply commingled all Grade 63 ULSD volumes with Grade 61 ULSD volumes as the product specifications for both were the same.

22. Colonial granted the temporary waiver to allow the shipper to supply/originate product meeting the Grade 63 specification as Grade 61 based on shipper notification that these barrels being supplied as Grade 61 actually meet Grade 63 specifications upstream of Mississippi and Grade 61 downstream of Mississippi. Colonial stated that none was granted without the consent of the shipper and tankage party involved in a batch, and all batches for those shippers that consented to the waivers involved deliveries to points east of Meridian, Mississippi, which is consistent with specifications for Grade 61 and Grade 63. Colonial asserted, and no party contradicted, that it did not grant any waivers that changed the applicable delivery specifications. We find nothing discriminatory in the waiver process, as further clarified by Colonial in its response.

23. Colonial also satisfactorily explained why it rejects BP's proposal to change Grade 63 to a grade that "must contain" 5 percent renewable diesel rather than the existing "may contain" that amount of renewable diesel provision. Colonial stated that there are shippers who do not currently have or desire the ability to blend renewable fuels at the origin point may be negatively impacted by a "must contain" provision since

Colonial cannot operationally deliver Grade 62, clear ULSD, to markets south of Greensboro, NC due to tankage constraints.

24. Colonial operates a fungible bulk products pipeline system in which commingling of like products must occur. The Commission finds it is operationally not feasible for Colonial to determine the amount of renewable diesel contained in the fuel that has been injected into the Colonial fungible system for shipment to various destinations. Moreover, as BP conceded in its Protest at 13, the complexity of tracking concentrations of mixtures of fuel that may or may not contain renewable diesel and then attempting to label them based on those levels is simply not practical on this system. The solution, however, is not to hamstring Colonial in the transportation services and grades of product it wishes to offer to transport. Colonial has adequately explained why Colonial needs to retain the “may contain” grade to continue to allow for customer deliveries of ULSD at locations where only a single ULSD product can be supported and commingling is required.

25. In conclusion, the Commission finds that the specifications for the three grades discussed here are just and reasonable, clearly defined, and accommodate shipper needs in a not unduly discriminatory manner. Market participants can now contract for the transportation services they need, and trading entities should not expect that Colonial’s function is to conform its service to fulfill particular language in commodity contracts. Rather, Colonial has the discretion under the ICA to decide what transportation services it will offer as a common carrier, and the Commission finds it has appropriately done so here, with respect to ULSD Grades 61, 62, and 63.

26. Accordingly, we deny rehearing.

The Commission orders:

BP and NYMEX’s request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.