147 FERC ¶ 61,024
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Airlines Co. and United Airlines, Inc.

v. Docket No. OR14-18-000

Colonial Pipeline Company

ORDER ON COMPLAINT ESTABLISHING HEARING

(Issued April 8, 2014)

1. This order establishes a hearing to address the issues raised by the complaint of Southwest Airlines Co. (Southwest) and United Airlines, Inc. (United) (jointly, Airlines) challenging the lawfulness of rates charged by Colonial Pipeline Company (Colonial) for transportation of petroleum products, including aviation kerosene and jet fuel, from various origins to various destinations. The order also sets for hearing Colonial's practices and charges relating to transmix and product and volume losses.

Background

2. Colonial operates a pipeline that provides interstate transportation of refined petroleum products, including gasoline, jet fuel, diesel fuel, and home heating oil, between Houston, Texas and destinations throughout the Gulf Coast, Southeast and Northeast. Colonial's current rates are the result of years of index-based rate adjustments applied to a variety of antecedent rates. Some of these rates are asserted by Colonial to be grandfathered under the Energy Policy Act of 1992 (EPAct 1992) because none of the shippers on Colonial filed challenges to those rates during the one-year period before the effective date of EPAct 1992. Other Colonial rates apply to origins and destinations for which the Commission approved market-based pricing in 2000 and 2001.[1] Colonial lacks

[1] *Colonial Pipeline Co.*, 92 FERC ¶ 61,144 (2000) (approving market-based rates for the destination markets of Lafayette, Louisiana; Beaumont-Port Arthur, Texas; Jackson, Mississippi; and Baton Rouge-New Orleans, Louisiana); *Colonial Pipeline Co.*,

(continued…)

market-based authority for destinations in Alabama, Georgia, Tennessee, South Carolina, North Carolina, Virginia, and Maryland.

Complaint of Southwest and United

3. The Airlines state they are past, current, and future shippers of aviation kerosene and jet fuel on Colonial Pipeline. For all of their shipments on Colonial, Southwest and United pay the tariff rate from the Houston, Texas origin point, regardless of the actual origin of the barrels shipped. For barrels that actually originate at an origin point with a lower rate to the specified destination, Colonial later credits Southwest and United with the difference in rates. Southwest and United remain liable for this amount to its suppliers and must promptly deliver the credit to them per normal market conventions. The Airlines are bringing this complaint for refunds, reparations, and/or reduced rates with respect to all volumes transported by or on behalf of Southwest and United and their affiliates.[2]

4. The Airlines state their complaint concerns the rates in Colonial's Tariff FERC No. 99.13.0 and all predecessor tariffs, supplements, and reissuances including the Local and Proportional Rates in Items 1-270, the Atlanta Hartsfield Volume Incentive Program rate in Item 290, the Nashville International Airport Incentive Program rate in Item 291, and the Woodbury (Gloucester County) Volume Incentive Program rate in Item 292. The Airlines state that their complaint contains attachments listing volumes they shipped by origin and destination point. The Airlines state that Colonial has market-based authority at several of its destinations, including Linden and Woodbury, New Jersey and Collins, Mississippi. The Airlines state Colonial lacks market-based authority at other destinations including Atlanta Hartsfield Airport, Baltimore Airport, Dulles International Airport, Nashville Airport, and Raleigh Durham Airport.

5. The Airlines assert the costs and revenues reported by Colonial on page 700 of its 2012 FERC Form 6 provide probable cause to believe Colonial's rates greatly exceed just and reasonable maximum levels. The Airlines assert the data on Colonial's 2012 Form 6, Page 700 indicate that Colonial substantially over-recovered its jurisdictional cost of

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95 FERC ¶ 61,210 (2001) (approving market-based rates for Western Gulf Coast including Houston, Texas and Baton Rouge-New Orleans origin markets); *Colonial Pipeline Co.*, 95 FERC ¶ 61,377 (2001) (granting market-based rate authority for Philadelphia and New York City area origin and destination markets and Gulf Coast origin markets).

[2] Southwest's affiliates are AirTran Airways, Inc. and AirTran Fuel Services. United's affiliates are United Aviation Fuels Corporation and Continental Airlines, Inc.

service in 2012, with interstate carrier revenues ($1,071.4 million) exceeding interstate carrier cost of service ($768.4 million) by $303.0 million, or 39.4 percent. The Airlines contend these earnings amount to a realized rate of return on equity for 2012 of approximately 170.9 percent. The Airlines argue the Commission previously held that an apparent over-recovery of this magnitude, when shown in a pipeline's Form 6, is more than sufficient to warrant setting for hearing a complaint against the pipeline's rates.[3]

6. The Airlines submit the data reported on Page 700 of Colonial's Form 6 likely understate the pipeline's actual over-recovery of costs and resulting realized return on equity because the report excludes certain operating revenue that appears to be jurisdictional. The Airlines contend that while Colonial reports $1,071.4 million of interstate operating revenue on Page 700, this revenue includes only the interstate portion of Colonial's Account 210 Trunk Revenue and completely excludes Colonial's additional $47.2 million in Account 250 Rental Revenue and $3.3 million in Account 260 Incidental Revenue reported on Page 301 of its Form 6. The Airlines assert Colonial's Page 301 reports 99 percent of its Account 210 Trunk Revenue is interstate. The Airlines contend if the same percentage of Colonial's Account 250 Rental Revenue and Account 260 Incidental Revenue is related to its interstate operations, and if that additional revenue were reported on Page 700 of its Form 6, Colonial's reported over-recovery would increase to $353.1 million, or 46 percent of the pipeline's reported 2012 cost of service, with a concomitant increase in Colonial's realized return on equity.

7. The Airlines submit this substantial over-recovery is not an isolated or one-time occurrence. The Airlines assert a similar pattern of cost over-recovery appears on Page 700 of Colonial's Form 6 reports for 2006 through 2012. The Airlines contend in three of the six years before 2012, Colonial's interstate revenue exceeded the pipeline's cost of service by more than 27 percent; in each of the other three years, the over-recovery was more than 7.5 percent. The Airlines argue the persistence of such a substantial over-recovery over multiple years provides evidence that Colonial's jurisdictional interstate rates have been unjust and unreasonable for a significant period of time and indicates that the over-recovery reported in 2012 is not an anomaly.

[3] *Citing America West Airline, Inc. v. Calnev Pipe Line, L.L.C.*, 121 FERC ¶ 61,241, at P 5 (2007); *Tesoro Refining and Marketing Co. v. Calnev Pipe Line LLC*, 134 FERC ¶ 61,214, at P 77 (2011) (*Tesoro)*.

8. The Airlines contend the unreasonableness of Colonial's rates may also be expressed in terms of rate-to-fully-allocated-cost (FAC) ratios.[4] The Airlines assert Colonial's currently collected rates from Houston, Texas to various destinations are 19 to 72 percent greater than the estimated FAC rates. By comparing the rates charged by Colonial against these FAC rates, the Airlines are able to estimate the financial effect on Southwest and United of overpayments they have made for shipments on Colonial between November 1, 2011, and November 30, 2013. The Airlines contend Southwest overpaid by approximately $4.4 million during this period and if Colonial's rates are left unchanged, Southwest will continue to experience, based on recent volumes, a negative financial effect of approximately $1.8 million annually. The Airlines estimate that United overpaid by approximately $5.4 million between November 1, 2011, and November 30, 2013, and if Colonial's rates are left unchanged, United will continue to experience, based on recent volumes, a negative financial effect of approximately $2.6 million annually.

9. The Airlines assert the grandfathering of the antecedents of many Colonial rates 20 years ago by EPAct 1992 does not bar relief from unreasonably high rates today. The Airlines argue the immunity from challenge conferred by grandfathering under EPAct 1992 protects at most the rate levels that were originally grandfathered in 1992, and not any of the subsequent increases to those rates. The Airlines submit since the enactment of EPAct 1992, Colonial repeatedly raised its rates according to the Commission's indexing regulations and through the implementation of market-based rates. Regardless of the status of Colonial's grandfathered rates, the Airlines contend they are entitled to challenge these cumulative post-1992 increases.[5] Thus, the Airlines argue to the extent the just and reasonable level for any of Colonial's rates is found to be less than its current rate, but higher than the grandfathered rate, Southwest and United are entitled to reparations based on the difference between the rate paid and the just and reasonable rate.

10. The Airlines also contend Colonial's underlying rate levels that were grandfathered in 1992 are themselves open to challenge. The Airlines submit grandfathered rates may be "broken," allowing the Commission to reassess them and establish a new rate below the grandfathered level, upon a showing that the economic circumstances that were a basis for the rate have changed substantially. The Airlines

[4] The FAC methodology divides total costs into distance and non-distance related components. Each origin-destination rate includes an equal dollar per barrel component based on the non-distance related costs. Separately, each origin-destination rate is then allocated the distance related cost component based upon the mileage between the origin and destination multiplied by the distance-related costs per barrel-mile.

[5] *Citing Tesoro*, 134 FERC ¶ 61,214 at P 65.

state the Commission's test for deciding whether an intervening change in the economic circumstances is sufficient to open a grandfathered rate to challenge compares the return on equity generated by the rates in question at three points in time: when the rate was established (A); when the EPAct was enacted (B); and when the complaint is filed (C). The Airlines state if the return on equity generated by the grandfathered rates has increased substantially since they were grandfathered, the Commission may disregard the presumption of reasonableness that EPAct 1992 conferred on the grandfathered rates.[6]

11. The Airlines argue the limited availability of data on Colonial's rate of return in all of the relevant periods, and especially the A and B period, and the absence of data of the specific bases for the rates in the A period, precludes a precise determination on the extent of the change in Colonial's return on equity since the A and B periods. Nevertheless, the Airlines assert one can derive a workable estimate of the rate of return for the B period by using some reasonable assumptions and estimates. The Airlines contend a reasonable estimate of the change in return on equity from the B to the C period, based on the limited information available, indicates that the economic circumstances underlying Colonial's rates almost certainly have changed substantially. Based on their calculations, the Airlines contend the change between the estimated realized return on equity in 1991 of 102.8 percent, and the estimated realized return on equity in 2012 of 170.9 percent, is an increase of 66.3 percent. The Airlines submit a lack of perfect certainty is not a basis for dismissing any portion of the complaint. The Airlines contend that while the Commission is entitled to establish threshold pleading requirements for complaints, it cannot establish a test that presents impossible barriers to complainants. The Airlines argue that if the Commission determines any of Colonial's rates are grandfathered under EPAct 1992, it should allow this complaint to proceed to discovery, where the relevant rates of return on equity can be definitively established.

12. The Airlines contend the Commission's findings in 2000 and 2001 that Colonial could have market-based authority in certain destination markets cannot insulate Colonial's rates to those markets from prospective relief or reparations. The Airlines state Colonial enjoys market-based rate authority for transportation to various destinations in Texas, Louisiana, Mississippi, Pennsylvania, New Jersey, and New York. The Airlines state the Commission's policy of leaving market-based rates open to subsequent scrutiny on cost-of-service grounds is required by law. The Airlines submit exempting market-based rates from subsequent challenge on cost-of-service grounds would abdicate the Commission's statutory duty to enforce just and reasonable rates. The Airlines argue the Interstate Commerce Act (ICA), and decades of established federal court and Commission precedent, require all rates, no matter how established, to be just

[6] *Id.* PP 17-18.

and reasonable. The Airlines contend an adequate preliminary showing that a rate is unreasonably high in relation to the carrier's costs of service necessarily trumps any presumption of rate reasonableness previously drawn from a finding of effective competition.

13. The Airlines' expert witness Dr. Arthur contends "[e]vidence that price is being sustained above a competitive price level such that an oil pipeline earns an excessive return on equity can provide evidence of an exercise of market power."[7] The Airlines state that Dr. Arthur concludes that "even considering cost measurement issues, evidence of a 39.4% over-recovery of cost reported in Colonial's 2012 Form 6 . . . as well as a 170.9% realized return on equity . . . and the relationship between the estimated FAC rates and the currently collected rates . . . are preliminary evidence that indicate Colonial is exercising market power at its origins and/or destinations by sustaining rates above a competitive price level tied to the cost of providing transportation service."[8]

14. The Airlines contend the factual predicates of the Commission's authorization for Colonial to charge market-based rates in 2000 and 2001 were limited. The Airlines submit in none of these cases was a hearing held, and in two of the three orders, the Commission simply noted that the markets in question were uncontested and found "an apparent absence of market power" in these markets.[9] The Airlines contend all of these findings of a lack of market power have since been undermined by changed circumstances - most notably: (1) Colonial's admission in 2006 that the pipeline faced more demand than it had capacity to serve, and competing pipelines and other modes of transportation were ineffective to supply this demand; and (2) Colonial's ability since 2006 to allegedly sustain significant and non-transitory price increases without suffering unacceptable losses of volume. The Airlines assert changing market conditions since 2000, including refinery closures, increased demand in the Northeast, and purportedly less competitive petroleum imports have likely contributed to Colonial's capacity constraints and ability to sustain price increases. The Airlines argue regardless of the Commission's determinations in 2000 and 2001, there does not currently appear to be sufficient competition in the markets served by Colonial to prevent it from raising its rates to levels that result in excessive returns. The Airlines point out that despite Colonial's rate increases in these markets, it has not suffered a significant loss of volume.

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[7] Affidavit of Daniel S. Arthur at P 30.

[8] *Id.* P 31.

[9] *Citing Colonial Pipeline Co.*, 95 FERC ¶ 61,377 (2001); *Colonial Pipeline Co.*, 95 FERC ¶ 61,210 (2001); *Colonial Pipeline Co.*, 92 FERC ¶ 61,144, at 61,527 (2000).

15. In addition to the alleged unjust and unreasonable rates, the Airlines assert several of Colonial's practices and miscellaneous charges do not appear to be properly stated in its tariff, in violation of section 6 of the ICA. The Airlines submit that because Colonial has not justified or established a basis for these charges and practices, it is impossible to determine whether they are just and reasonable.

16. The Airlines state Colonial employs a system of credits and charges to address product losses due to transmix, a by-product created by the mixing of different products during transportation. The Airlines state Item 60 of Colonial's Tariff No. 98.13.0 (and predecessor tariffs) states that product losses "not due to the negligence of carrier will be allocated to the shippers as provide in Item 75 of this tariff." The Airlines assert Item 75 does not specify a specific charge for transmix, and it is unclear the manner in which the charges assessed for transmix and revenue received from sales of transmix are accounted. The Airlines contend the sale price of transmix is unknown, as are the parties to whom the transmix is sold and/or the parties with whom Colonial contracts to dispose of transmix. The Airlines submit the end result is that some shippers, including the Airlines, end up paying Colonial for transmix services. Given the dearth of information about these charges, the Airlines contend it is impossible to tell whether these payments are just and reasonable.

17. The Airlines point to Item 60 of Colonial's Tariff No. 98.13.0 (and predecessor tariffs) which states that product losses "not due to the negligence of carrier will be allocated to the shippers as provided in Item 75 of this tariff." Item 75, in turn, states, "[a]ny overage or shortage not due to the negligence of the carrier . . . including losses resulting from shrinkage, evaporation, other physical product loss and interface mixture in any calendar month, will be allocated on a monthly accrual basis among shippers in the proportion that the total number of barrels delivered from the entire system for each shipper bears to the total number of barrels delivered from the entire system for all shippers." The Airlines state neither Item 75, nor any other provision of Tariff No. 98.13.0, nor any provision of Tariff No. 99.13.0, contains any reference to a charge to shippers related to product losses.

18. Nevertheless, the Airlines state Colonial assesses a product loss allocation charge to shippers. The Airlines state Colonial's Shipper Manual sets this charge at 16 cents per delivered barrel, but it was raised to 18 cents per delivered barrel effective August 1, 2013. The Airlines submit neither the 16 or 18 cent charge nor the Colonial Shipper Manual was filed at the Commission. Assuming that all the barrels delivered on Southwest's behalf between November 1, 2011 and November 30, 2013, were assessed this charge, Southwest paid Colonial approximately $1.9 million dollars in product loss allocation charges. Likewise, assuming that all the barrels delivered on United's behalf between November 1, 2011 and November 30, 2013 were assessed this charge, United paid Colonial approximately $2.2 million dollars in product loss allocation charges. The Airlines also assert certain short haul movements are charged only 4 cents per barrel for

product loss allocation, but this charge is also absent from Colonial's tariffs. The Airlines contend Colonial gives no basis for differentiating this charge based on the length of the movement. The Airlines argue if there is no legitimate basis for distinguishing between short haul and long haul movements, this charge may be unduly discriminatory against long haul shippers in violation of section 3(1) of the ICA.

19. The Airlines object to the fact that the 16 or 18 cent per barrel product loss allocation charge (or 4 cents per barrel on short haul movements) Colonial imposes on shippers has never been filed with the Commission. Accordingly, the Airlines submit all charges collected from shippers on this basis were illegally collected. The Airlines ask the Commission to direct Colonial to justify this loss allocation charge and refund any and all portions of the charge found to be unjust and unreasonable. Accordingly, the Airlines request the Commission set all these matters for hearing, establish just and reasonable practices, and direct appropriate compensation to the Airlines for past unreasonable practices and charges.

Colonial's Answer

20. On January 23, 2014, Colonial filed an answer to the complaint of the Airlines. Colonial asserts the complaint is procedurally deficient and urges the Commission to dismiss it for failure to comply with the requirement that a complainant identify the specific rates that are challenged. Colonial contends the Airlines fail to carry their burden of demonstrating substantially changed circumstances regarding grandfathered rates. Colonial argues the Airlines present no evidence regarding the level of competition in the origin and destination markets for which it has market-based rate authority, and thus fail to present any reasonable grounds for investigating its market-based rates or its market-based ratemaking authority. Colonial contends the Airlines fail to set forth any reasonable ground to investigate Colonial's transmix and product loss allocation policy and charges.

21. Colonial states the Airlines challenge the rates from all its origins to all destinations in its tariff. Colonial submits such a generalized pleading fails to meet the Commission's standards. Colonial asserts it is particularly inappropriate here where the Airlines concede they do not use all of Colonial's rates, but only the rates for jet fuel and kerosene on certain routes. Colonial argues the complaint is thus fatally deficient and must be dismissed on this ground alone. Colonial asserts to the extent the Commission does not dismiss the complaint in its entirety, the Commission should nonetheless make clear that the complaint is limited to those rates for transportation services that are actually used by the Airlines and dismiss the complaint to the extent it purports to challenge rates for transportation services other than those specifically identified in the complaint Exhibit 2, Attachments F and G.

22. While Colonial denies any of its rates exceed the just and reasonable level or that its return is grossly excessive as the Airlines allege, Colonial does not dispute that the reasonableness of the portion of the indexed rates that exceeds the grandfathered level would be a legitimate subject for hearing to the extent the complaint is not dismissed for failure to meet the pleading requirements discussed above. Colonial asserts there is no reasonable basis, however, to permit a challenge to Colonial's grandfathered rates. Colonial submits the Airlines fail to meet their burden of demonstrating substantially changed economic circumstances under the required standard. Colonial argues that the Airlines expert witness, Dr. Arthur, fails to apply the Commission's "C-B/A" test correctly, and makes various other errors and assumptions that are inconsistent with the Commission's regulatory policies that render his calculations unusable as a ground to initiate a complaint against Colonial's grandfathered rates. Colonial contends Dr. Arthur acknowledges that he was not able "to definitively demonstrate that a substantial change has occurred."[10]

23. Colonial asserts since rates established pursuant to its market-based ratemaking authority just and reasonable, the Commission may only change them prospectively. Colonial contends any prospective change in the pipeline's market-based rates is justified only if the complainant can show that the pipeline has significant market power in the relevant markets and thus is no longer entitled to market-based ratemaking authority. Colonial submits there is no basis for permitting a challenge to a pipeline's market-based rates on the ground the rates are not cost-based. Colonial asserts allowing such a complaint to go forward would eviscerate the whole point of market-based rates, which are meant to serve as an alternative to cost-of-service ratemaking and are justified by the Commission's finding of effective competition in the relevant markets. Colonial argues where, as here, the existing rate is a Commission-approved just and reasonable rate, the complainant is not entitled to reparations for past charges.

24. Colonial asserts in order to change its market-based rates prospectively, the Airlines would, at the very least, need to show that Colonial has significant market power in the challenged markets such that it is no longer entitled to market-based ratemaking authority.[11] Colonial submits the Airlines fail to make a factual showing regarding competition in the applicable markets or otherwise address any of the relevant market power measures that the Commission uses in determining whether market-based rates are warranted. Instead, Colonial asserts the Airlines rely solely on their allegation that Colonial's market-based rates exceed the cost-based level.

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[10] Arthur Aff. at P 15.

[11] *Citing Buckeye Pipe Line Co., L.P.*, 142 FERC ¶ 61,140, at P 14 (2013).

25. Colonial argues the Airlines do not cite a single Commission or court decision that permits a prior Commission order granting market-based ratemaking authority to be subject to collateral attack based on what it terms an unsubstantiated blanket assertion that the pipeline recovered excessive returns. Colonial submits the Airlines' allegations of price-cost divergences, even if they were accurate, do not provide reasonable grounds to call into question the Commission's findings that Colonial lacks market power in certain markets nor to investigate Colonial's market-based rates. Colonial concludes the Commission must therefore dismiss the complaint to the extent it challenges Colonial's market-based rates and market-based ratemaking authority.

26. Colonial also disputes the Airlines' challenge to its method for dealing with transmix and product losses; specifically, the Airlines' claim that the transmix and product allocation charges are not properly set out in the tariff and it is therefore unclear how the charges are assessed. Colonial asserts its tariff address both issues and additional detail is provided in Colonial's Shipper Manual, giving shippers more than adequate notice of how it calculates the charges. Colonial contends the Airlines' challenge to these policies is without merit and should be dismissed. Colonial asserts there is no merit to the argument that the charges are inconsistent with the ICA. Colonial argues an oil pipeline is not required to include in its tariff all details regarding its operations.[12] Colonial contends Item 75 provides an appropriate and reasonable amount of detail regarding its policy, and the Airlines' challenge must be dismissed.

27. Finally, to the extent the complaint asserts that Colonial's rates are not just and reasonable based on a conventional cost of service analysis, Colonial denies that the Airlines have satisfied their burden of making that showing. Colonial asserts the presentation set forth in the complaint is rife with incorrect and unsupported assumptions and inputs.

Discussion

28. The Airlines challenge a number of aspects of Colonial's rates. They argue that Colonial's current rates are unjust and unreasonable because they assert Colonial is over-recovering its cost-of-service. The Airlines challenge Colonial's base grandfathered rates, asserting that there has been a substantial change in the economic basis for the grandfathered rates that render them unjust and unreasonable and no longer subject to protection under EPAct 1992. The Airlines contend the Commission should no longer permit Colonial to maintain market-based rates in several origin and destination markets. Finally, the Airlines submit that certain charges for transmix and product losses may be unlawful because they are not in the tariff and how those charges are computed has not

[12] *ARCO Alaska, Inc. v. FERC*, 89 F.3d 878, 884-86 (D.C. Cir. 1996).

been adequately justified. Colonial asserts that the Airlines' complaint is not supported and should be dismissed. Colonial contends that the Airlines have not specifically stated which rates they are challenging and therefore the complaint is procedurally deficient. Aside from the procedural challenge, Colonial argues that the Airlines have not met their burden of proof with respect to the other aspects of their complaint.

29. In the first instance, the Commission will not dismiss the complaint of the Airlines on the ground that they have not stated with specificity the rates being challenged. While there are instances in the complaint where the Airlines have made general references to Colonial's rates, it is disingenuous for Colonial to argue that it is unaware of the specific rates the Airlines are challenging. The complaint states the Airlines transport aviation kerosene and jet fuel and contains several charts and other references to specific origin and destination points used by the Airlines. Most specifically, there are attachments to the complaint which list volumes transported by Southwest and United for the past two years by billing code origin and delivery point and delivery dates. Therefore, the Airlines have established they have standing to challenge such past and current rates as to the specific origin and destination points used by the Airlines.

30. The Commission finds that with respect to Colonial's current rates, the Airlines have made a threshold showing based on the use of the Commission's Form 6 that the Colonial's current rates may be unjust and unreasonable because it appears Colonial is over-recovering its cost-of-service. Although Colonial asserts the complaint of the Airlines is rife with errors, assumptions, and incorrect inputs are used to analyze Colonial's cost-of-service, the Commission finds the complaint of the Airlines makes a sufficient showing based on the data available to them, to raise disputed issues of material fact that require examination at a hearing in order to determine the current reasonableness of Colonial's rates and other practices. The Airlines' complaint raises complex issues that require discovery, cross-examination, and litigation before an Administrative Law Judge (ALJ). There is nothing in Colonial's answer that convinces the Commission that summary disposition is appropriate at this juncture, whether as a matter law or fact.

31. Challenging grandfathered rates under EPAct is a complex undertaking given the fact that complainants must determine a pipeline's return on equity at three different points in time. Calculation of the A component of the formula, i.e., when the rates were established, can be particularly challenging since those rates may be decades old and information may not be readily available. In this case, the Airlines concede they did not make the calculation for the A period because of a lack of data. Colonial asserts the challenge to grandfathered rates must be dismissed because of the lack of the A component of the formula and because the B and C components are filled with errors and assumption rendering them unusable. Colonial's assertions concerning the manner in which the Airlines calculated the B and C components of the formula for challenging grandfathered rates are not dispositive and simply create a genuine dispute of material

fact that must be examined at a hearing. The Commission also finds that a challenge to grandfathered rates, while difficult, is not designed to be impossible or insurmountable, and a lack of publicly available data does not prevent a challenge at hearing, but may in fact require further investigation before a trier of fact and law. Moreover, the Commission has recognized that even at a hearing there may be instances where there is a lack of evidence that addresses the year in which rates were established.[13] The Commission has further held that "if a pipeline is unable to produce anything during discovery that bears on the economic basis of the rate at issue, it will not be permitted to defeat the purpose of the statute on the absence of evidence . . . ."[14]

32. In their challenge to Colonial's market-based rate authority at certain origin and destination points, the Airlines focus their case on the assertion that Colonial's market-based rates so exceed rates calculated on a cost-of-service basis that the premise of competitive restraint underlying the rates for markets in which Colonial was held not to have market power should be re-examined. The Airlines make generalized references to changes to market conditions that they allege would not sustain a finding that Colonial continues to lack market power, but provide little to no evidence at this stage to support their assertions. Colonial argues the Airlines lack of a fully-detailed market-power analysis requires dismissal of the complaint.

33. Recently, the Commission issued an order where it addressed comments concerning the proper interpretation of the decision of the United States Court of Appeals for the D.C. Circuit in *Mobil Pipeline Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012) *(Mobil)*, as it related to the Seaway Crude Pipeline Company System application for market-based rates as well as its impact on the Commission's established rate regulations and policies for determining whether an oil pipeline can exercise market power.[15] In that order the Commission determined, among other things, that *Mobil* did not fundamentally alter the Commission's regulatory regime concerning market power applications of oil pipelines. As pertinent here, the Commission explained:

> [I]t is improper to simply presume, without any analysis of costs or market dynamics, that the regulated rate of a pipeline seeking a market power determination is a valid proxy for the competitive price. It is also contrary to the Commission's prior orders on market based rates, which have

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[13] *ARCO Products Co., et al. v. SFPP*, 106 FERC ¶ 61,300, at P 64 (2004).

[14] *Id.*

[15] *Enterprise Products Partners L.P. and Enbridge Inc.*, 146 FERC ¶ 61,115 (2014) (Seaway Order).

explicitly stated the expectation that market-based rates will exceed cost-of-service rates.[16]

34. Here, contrary to the Commission's finding, the Airlines are almost exclusively focusing on the fact that Colonial's market-based rates purportedly exceed a cost-of-service rate. However, because of the uncertainty created by the *Mobil* decision as evidenced by the wide range of differing comments in the Seaway Order, and the fact that the Seaway Order was issued only recently, the Commission will not dismiss the Airline's complaint concerning Colonial's market-based rates. The Seaway Order does not require, and Colonial is not required to show, that its market-based rates are cost based. Therefore, the Commission will permit the Airlines to supplement their case at hearing to provide an analysis containing the relevant measures of market power contained in the Commission's regulations and recently explained in the Seaway Order. The Airlines must support with evidence their assertions that refinery closures, increased demand in the Northeast, and less competitive petroleum imports have likely contributed to Colonial's capacity constraints and ability to sustain price increases. If after discovery the Airlines are unable to appropriately supplement their case challenging Colonial's market-based rates, they may then run the risk of an adverse summary judgment before the ALJ on their market-based rate challenges.

35. Finally, a number of questions have been raised concerning Colonial's transmix and product loss charges which warrant further investigation at a hearing. Colonial is correct in asserting that a pipeline is not required to put in its tariff all details of its operations. However, while Colonial's tariff does contain provisions addressing transmix and product loss, it does not appear that the charges themselves are stated in the tariff, which may be contrary to section 6 of the ICA and section 341.8 of the Commission's regulations requiring carriers to publish in their tariffs "charges . . . which in any way increase or decrease the amount to be paid on any shipment or which increase or decrease the value of service to the shipper."[17]

36. Further, the fact that additional details on the transmix and product loss charges are contained in Colonial's Shipper Manual does not render such charges or provisions just and reasonable. The Commission has found that while all policies and procedures are not required to be stated verbatim in the tariff as long as they are available to shippers, it "also requires that those policies and any subsequent revisions to those policies be filed with the Commission so that the Commission and shippers can review

[16] *Id.* P 52 (footnote omitted).

[17] 18 C.F.R. § 341.8 (2013).

them before the policies and any changes to them are placed in effect."[18] Accordingly, these transmix and product loss issues, as well as all the rate issues raised by the complaint of the Airlines, are set for hearing.

The Commission orders:

(A) Pursuant to the authority conferred on the Commission by the ICA, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the ICA, a public hearing shall be held concerning the Airlines' complaint against Colonial.

(B) A Presiding Administrative Law Judge (ALJ), to be designated by the Chief ALJ, shall, within 15 days of the date of the Presiding ALJ's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The Presiding ALJ is authorized to establish procedural dates and to rule on all motions as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[18] *Enterprise TE Products Pipeline Co. LLC*, 131 FERC ¶ 61,134, at P 11 (2010).