153 FERC ¶ 61,270
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Colonial Pipeline Company Docket No. IS16-61-000

ORDER ACCEPTING AND SUSPENDING TARIFF AND ESTABLISHING TECHNICAL CONFERENCE

(Issued December 3, 2015)

1. On November 3, 2015, Colonial Pipeline Company (Colonial) filed FERC Tariff No. 98.22.0 (tariff), proposing modifications to Colonial's minimum tender procedures and pipeline capacity allocation, as discussed more fully below. Colonial requested an effective date of December 4, 2015.

2. Several parties protested, including York Rivers Fuels (York); Castleton Commodities Merchant Trading L.P. and Rolympus (US) Commodities Group, LLC (Castleton); Costco Wholesale Corporation (Costco); Davinscroft, Inc. (Davinscroft); New Shipper Group;[1] NIC Holding Corp.(NIC); Sunoco, LLC (Sunoco); Trafigura Trading LLC (Trafigura). Parties requested the Commission reject the tariff, or accept and suspend the tariff for a full seven months, and either set the matter to hearing or set the matter for a technical conference.[2]

3. Colonial filed an answer to the protests, defending all aspects of its tariff filing.

4. As discussed below, the Commission accepts and suspends FERC Tariff No. 98.22.0, to become effective July 4, 2016, subject to the outcome of the technical conference established in this order.

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[1] New Shipper Group comprises small volume shippers on Colonial's system, and include: Concept Petroleum Marketing LLC; Flagship Resources, LLC; Vertex Energy Inc.; Roslan and Company, Inc.; American Sabre, LLC; Bone Frog Enterprises LLC; Big Black River Energy; Foster Product Services, LLC; and DRP Marketing LLC.

[2] York also requested damages as appropriate.

Background

5. Colonial operates the largest, by volume, refined petroleum products pipeline system in the United States. Colonial's system includes approximately 5,500 miles of pipe from Houston, Texas to Linden, New Jersey, in the New York harbor area. The system currently has more than 210 Shippers. Colonial operates a batched system, where petroleum products are transported through the pipeline in separate batches rather than in a single commingled stream. Colonial's mainline system includes Lines 1 (grades of gasoline) and 2 (distillates, including products such as jet fuel and heating oil), (collectively, Mainlines). Shipments on Colonial are scheduled in 5-day cycles,[3] resulting in approximately 73 shipping cycles each year.

6. Colonial states that since 2012, shipper demand for transportation on Colonial's Mainlines has been greater than the available capacity, and Colonial has had to prorate, or allocate, capacity per the effective rules and regulations of its tariff, FERC Tariff No. 98.20.0.[4] Colonial asserts that the chronic allocation on the system has resulted in changes in shipper behavior as well as a significant increase in the number of shippers (from approximately 140 in 2013 to over 210 in 2015). Specifically, a secondary market for Colonial pipeline capacity has developed, whereby capacity is resold, usually at a premium. Colonial states shippers have traded history on Colonial for values as high as $550 a barrel (bbl). As such, Colonial states the secondary market has caused the price of transportation to exceed the regulated tariff rate, ultimately increasing costs to customers.

7. Colonial states it has also seen an increase in the number of history transfer requests unassociated with the sale of a business. Colonial states that that shippers were no longer using history transfers in connection with the sale of a business or business line, but rather as a method to (1) obtain a greater capacity allocation by virtue of Colonial's rounding multiple, or (2) circumvent the historical allocation program by obtaining the right to ship barrels that exceed the shipper's historical movements. Colonial argues that history transfers undermine the purpose of a history-based prorationing policy by providing shippers the opportunity to ship volumes in excess of their historical movements.

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[3] *See* Item 5, Tariff No. 98.20.0.

[4] Colonial filed Tariff No. 98.21.00 on November 2, 2015, in Docket No. IS16-57-000, proposing revisions to Colonial's rules and regulations tariff. This tariff was protested. The instant tariff filing in Docket No. IS16-61-000 included those revisions on the assumption that they had already been accepted by the Commission and were effective December 3, 2015. The Commission issued an order accepting FERC Tariff No. 98.21.00 on December 2, 2015. *Colonial Pipeline Company*, 153 FERC ¶ 61,264 (2015).

8. Colonial states it comprehensively reviewed its rules and regulations tariff to address some of these concerns, and filed the instant tariff with substantial input from its shippers to balance the interests of its shippers with Colonial's common carrier obligation to maintain just, reasonable, and non-discriminatory practices.

9. Colonial's tariff proposes several revisions, including: (1) adding a new Item 32, which limits transfers of shipper history; (2) amending Item 20(a), which reduces minimum tender; (3) amending Item 31, Colonial's prorationing policy; (4) amending Item 91, compressing the lottery system; (5) removing Collins-Plantation, Mississippi as a fungible batch termination location, and (6) Item 60, modifying provisions governing the liability of the carrier.

10. Colonial notes some shippers requested additional time to alter their business activities in response to the modifications to Items 20(a), 31 and 91 (minimum tender reduction, amended rounding process, and amended lottery process). Colonial states that the proposed tariff amendments to Items 20(a), 31, and 91 would not take effect until Cycle 13 of 2016 (approximately March 1, 2016) to aid shipper transition to the amended rules. Colonial states that all other proposed tariff changes, including the new Item 32 (history transfer), would become effective on the Tariff's effective date of December 3, 2015.

Protests and Interventions

11. Several parties filed timely motions to intervene, and Flint Hills Resources LP filed a motion to intervene out of time. The Commission grants all timely and unopposed motions to intervene filed before this order is issued, as granting any unopposed late intervention at this stage of the proceeding will not disadvantage any party. The protests are summarized below.

12. Castleton protested the procedures relating to the minimum tender provision and the prorationing of capacity, stating the proposals have not been shown to be just and reasonable under Section 1(4) ICA. Castleton argues the filing is in violation of 18 CFR 341.0(b)(1), which requires that the terms and conditions of a tariff must be easy to understand and apply. Davinscroft stated it was unable to comply with Colonial's proposed rules by December 4, 2015, specifically with Item 31, and requested a date for implementation closer to the end of the first quarter of 2016.

Tariff Filing

Item 32: Transferring Shipper History

13. The proposed tariff adds Item 32, which provides that a shipper's ticketed history may not be assigned, conveyed, loaned, transferred to, or used in any manner by another Shipper, except that a Shipper may transfer its history in connection with the sale of all

its business or entire business line, and once Colonial approves a shipper's assignment of its history, the transfer shall be irrevocable. Colonial states that limiting history transfers to the sale of business or discrete business line preserves the integrity of the capacity allocation program by limiting the ability of shippers to ship volumes in excess of their historical movements, and reducing the ability to use history transfers to maximize the allocation of certain shippers who engage in the secondary market for history at the expense of other shippers.

14. York protested, stating the proposed language would give Colonial unjustifiable discretion in deciding when it will approve a transfer of shipping history. York points to the ambiguity of the phrase "business line," since it is not defined, and argues the vagueness and uncertainty of the term enables Colonial to engage in unjustifiable discrimination. The New Shippers Group states the prohibition to transfer and aggregate shipper histories except in cases of sale of business or business line will effectively prevent any small volume shipper and/or new shipper from becoming a Regular Shipper. The New Shippers Group states the tariff would exacerbate allocation procedures favoring large volume regular shippers, introduce inefficiencies that are inconsistent with competitive market principles, and threaten the economic viability of the New Shipper Group members, since the proposed changes would reduce the volume awards allocated to New Shippers.

15. York, NIC, and the New Shippers Group argue that Colonial's attempt to abruptly restrict the right to transfer history interferes with pre-existing and current contractual arrangements shippers have relied on for a considerable period of time and is unjust, unreasonable, and unduly discriminatory. The New Shippers Group argues that large volume Regular Shippers have the resources to enter bi-lateral arrangements to preserve their own historical allocations, such as buy-sell agreements or line space trades, which would not be forbidden by Colonial's proposal. The New Shippers Group argues a secondary market for line space trades would still exist, along with the higher rents associated with scarce capacity on Colonial. The New Shippers Group further argues the existing secondary market that Colonial seeks to constrain promotes the efficient allocation and use of pipeline capacity, which is the sign of a properly functioning market, and allows shippers to avoid Colonial penalties which would otherwise apply when a shipper fails to fully utilize its allocated capacity.

16. The New Shippers Group argues Colonial offers virtually no justification for the changes other than increased number of shippers on the system coupled with an increased number of history transfer requests that have contributed to the development of secondary markets in which capacity is often sold at prices above Colonial's tariff rate. The New Shippers Group questions why Colonial, which fully recovers its tariff rate for all shipments through the line, should be anything but indifferent to the developments. York argues that secondary markets could direct petroleum more efficiently to the users that value it the most, similar to the use of a net present value analysis in allocating capacity,

and therefore have the highest use for the product. York states that Colonial's attempt to prohibit the transfer of shipper history will have an anti-competitive impact.

17. The New Shippers Group states that, over time, the trading and acquisition and subsequent aggregation of shipper histories has, for all practical purposes, served as the exclusive means by which a small volume and/or New Shipper on Colonial has been able to ascend to the status of Regular Shipper. The New Shippers Group argues that the proposed rounding modification, discussed below, should adequately fix the allocation issue, without the need to terminate shipper history transfers.

Item 20(a): Minimum Tender

18. The proposed tariff amends Item 20(a) to reduce the minimum tender for Mainline shipments from 25,000 bbls to 15,000 bbls from Woodbury to Linden. This measure, taken in concert with revising Item 31, prorationing, is meant to reduce the rounding increment and minimum tender to produce allocations that are more closely aligned with Regular Shippers' actual history. Colonial argues the changes will reduce the gap between ticketed history and allocation; reduce the incentive to purchase history as a means of increasing a shipper's allocation through the rounding process; and produce a similar rounding impact across Regular Shippers of all volume classes. Additionally, the reduction in the minimum tender in conjunction with the amendment to the definition of "Shipper Batch Volume" is further intended to aid New Shippers in the lottery process.

19. York notes that 125,000 bbl is allocated to New Shippers in each shipping cycle; if the minimum batch size was revised to be 15,000 bbls, each cycle would see a capacity award for approximately 8.3 shippers. York states that if the minimum batch size for a New Shipper changes to 15,000 bbl, and New Shippers don't have the ability to transfer their shipping history, a New Shipper would have to win the Colonial lottery at least 55 times during the year to accumulate the throughput that would enable it to become a Regular Shipper. York points out that since the number of New Shippers competing for an allocation greatly exceeds the total amount allocated to New Shippers, the only way in which a New Shipper can become a Regular Shipper is by combining shipping history with another New Shipper.

20. The New Shippers Group, Trafigura, and NIC point out that the practical effect of the lower minimum batch size is to create a mismatch between the volume a New Shipper may transport on Colonial and the usual minimum batched sale requirements of Gulf Coast refineries, New York Harbor markets, and/or other volume requirements in the market, which are sold in 25,000 bbl batches. Costco states the 15,000 bbl batch is not readily available in the market, and a New Shipper will likely have to pay a premium. Trafigura notes that the reduction of minimum tender will likely not aid many shippers, simply because the odd lot size does not readily correlate with normal cycle allocations. Trafigura notes the change would force some shippers to attempt to acquire small volume batches to fill out their allocation, but since the small batches will likely not be available,

the policy will preclude many shippers from fully utilizing their volume allocations, resulting in a decrease in their shipper history.

21. NIC argues Colonial's proposal to move away from the 25,000 bbl benchmark is unjust and unreasonable unless shippers are given adequate time to adjust. NIC asks to delay implementation of its proposal until at least January 4, 2017 to give the market sufficient time to adjust to the proposed changes.

Item 31: Prorationing

22. The proposed tariff revises Item 31, Colonial's prorationing and capacity allocation program. Specifically, the tariff proposes to change the calculated cycle historical allocation (CCHA), the calculated minimum nomination, shipper codes for committed nominations, New Shipper procedures, Regular Shipper procedures, and shipper batch volumes on the Mainline.

23. York, Costco, and Castleton argue the proposed changes make it virtually impossible for a New Shipper to acquire Regular Shipper status, in direct violation of Commission precedent and the Interstate Commerce Act (ICA) Section 3(1). Under the proposed tariff, a New Shipper must ship a minimum of 82,250 bbl within a year in order to become a Regular Shipper in the following month on main lines 1 and 2. Unless New Shippers are able to combine their shipping history through transfers, these protesters argue it would be virtually impossible for any New Shipper to reach the 82,250 bbl level. Costco argues the proposed changes unlawfully discriminates against New Shippers, and favors Regular Shippers over New Shippers in violation of the ICA.

24. Castleton notes that when a shipper buys barrels in the market, it often will not know the origin from which the barrels will ship until the actual scheduling deadline day when such barrels must be scheduled on the Colonial system, or even afterwards. If a shipper's Raw Historical Allocation is rounded up or down to the nearest 5,000 bbls, a shipper may not be able to source the requisite number of barrels of the relevant grade at the relevant origin. The shipper would also need to ship this odd number of barrels from an origin that is already loading the same grade of product in order to satisfy the 25,000 bbl minimum batch requirement.

25. Castleton argues that from an operational standpoint, the proposed tariff amendments do not appear to take into consideration the sheer volume of scheduling-day and post-scheduling-day modifications that would be needed to match batches and their origins and the proper grades of product in order to meet the shipment requirements of the Colonial system. Castleton states Colonial's proposal to change the rounding increment in Item 31(b) from 25,000 bbls to 5,000 bbls will provide an undue preference or advantage to larger Regular Shippers that have proprietary sources of supply and/or who can source from multiple potential origin markets at the expense of Regular Shippers who do not have their own supply without regard to their historical shipping patterns.

Trafigura concurs, stating Colonial failed to justify reducing the rounding increment from 25,000 bbls to 5,000 bbls. Trafigura notes that with the revised Item 32 in place, there is no need to adjust the 25,000 bbl rounding increment to protect against shippers who trade history in such a way that both parties would be able to round their allocated capacity upwards. Trafigura argues Colonial has not demonstrated that the percentage variance between allocation and ticketed history for large volume and small volume shippers justifies reducing the 25,000 bbl rounding increment at all, let alone to the 5,000 bbl level.

26. Sunoco supports Colonial's filing, with one exception. Sunoco asks the Commission to direct Colonial to modify its filing so that current shippers on the system are grandfathered and not subject to the allocation treatment for affiliated shippers. Sunoco argues the proposed revision to Item 31 improperly increases administrative and economic burdens on affiliated shippers, and there is no indication in the tariff filing that affiliated shippers are manipulating the prorationing process.

Item 91: Lottery

27. Colonial notes that its currently effective tariff includes a two-tiered lottery system for allocating volumes to New Shippers during prorationing. Tier 1 includes New Shippers who have nominated but did not win, or have become a New Shipper in the instant cycle. Tier 2 includes New Shippers that failed to nominate in the prior cycle or that won in the previous lottery.

28. Colonial proposes to amend its lottery process to compress the two-tiered system into a single step. Colonial states the modification is intended to simplify the lottery process, and put New Shippers on equal footing for each cycle, bringing the lottery process in line with that used by other pipelines. Colonial states that, under the revision, all New Shippers that nominate in a cycle will be eligible to receive a shipper batch volume based on a random software generation process. The modification will allow New Shippers to nominate, or refrain from nominating, based on market conditions on a cycle by cycle basis.

29. The New Shippers Group argues that collapsing the two-tier new shipper lottery to a single tier may not provide New Shippers a reasonable opportunity to develop histories sufficient to attain Regular Shipper status. Costco notes that currently, its demand along the Colonial pipeline is in excess of the minimum amount required for a New Shipper to become a Regular Shipper, but if Costco is less able to obtain capacity through the new single-tier lottery system, not only will Costco be prevented from attaining Regular Shipper status, but Costco will be required to seek and pay the premium line space fee in the secondary market. Costco argues that paying the transport fee and the premium line space fee results in Costco's paying an amount for gasoline and diesel fuel transportation that is above Colonial's tariff rates and puts it at an economic disadvantage to its competitors.

Item 20(c)(2) Removal of Collins-Plantation as a termination point

30. Colonial proposes to remove Collins-Plantation, Mississippi from Item 20(c)(2). Colonial states that Collins-Plantation, Mississippi has inadvertently been included in the list where a segregated, fungible or joint batch may be terminated, and no such batches are currently being terminated at this location, and such batches cannot be terminated at the Collins-Plantation delivery point without incurring significant operational impacts. Specifically, Colonial states while barrels can be delivered at Collins for transportation downstream to Plantation Pipe Line, terminating a segregated, fungible, or joint batch at Collins would require reducing Colonial Mainline's flow rate, which would disrupt cycle timing and ultimately reduce the number of barrels delivered per cycle, and the overall efficiency of the system. Colonial states the change does not affect its Shippers' ability to deliver products to Collins-Plantation subject to the minimum delivery requirement.

31. The New Shippers Group argues eliminating the Collins delivery point into Plantation would deprive shippers of an important delivery option when downstream capacity is constrained on Colonial. Because Plantation Pipe Line parallels Colonial from Collins to Greensboro, North Carolina, shippers have historically had the option of transporting on Colonial to Collins and then moving their product to Plantation Pipe Line for delivery to Greensboro. Costco expresses a similar concern, noting if the proposed change eliminates or even reduces shippers' ability to deliver barrels at Collins to Plantation Pipe Line, the change will exacerbate the already constrained Colonial system.

Item 60: Modification of Liability

32. Colonial proposes to add to its tariff's liability provision a sentence providing that Colonial shall not be liable for "any incidental, consequential, lost profits, punitive and other indirect damages of any kind regardless of whether such damages, losses or claims arise in tort, strict liability, fraud, or under any other theory of liability." Colonial states the modification to limit liability for indirect damages is consistent with the practice of other pipelines in the industry.

33. Trafigura argues that while Colonial claims this limitation is consistent with the practice of other pipelines in the industry, the Commission has regularly rejected similar attempts to limit liability. Certain airline company intervenors also questioned the purported intent of this additional language.

<u>Colonial's Answer</u>

34. Colonial filed an extensive answer on November 23, 2015, defending all aspects of the proposed tariff filing. The answer notes that carriers have the discretion to implement tariff changes so long as they comply with their common carrier obligations to

maintain just and reasonable rates and practices and do not unduly discriminate against similarly situated shippers.[5] Colonial reiterates it developed the proposed tariff modifications through extensive consultation with its shippers, including six webinars and a follow-up survey, to balance the interests of its shippers with Colonial's common carrier obligations to maintain just, reasonable and non-discriminatory practices.

Commission Discussion

35. On review of Colonial's FERC Tariff No. 98.22.0, the multiple protests, and Colonial's extensive answer, the Commission concludes the issues require additional exploration and scrutiny that can best be accomplished at a technical conference. The technical conference will be an informal, off-the-record conference at which all parties and the Commission's Staff can explore the issues raised by the filing, gain an understanding of the facts, and obtain additional information regarding the positions of the parties to facilitate a more prompt resolution of the issues raised by the filing. Following the technical conference, all parties will have the opportunity to file comments that will be included in the formal record of the proceeding and will form the basis of the Commission's final decision on the filing.

36. The burden in this proceeding will be on Colonial to justify the proposals, and Colonial must be prepared to further support and explain how its proposals are consistent with the ICA and the Commission's policies thereunder, and are reasonable and fair to all of Colonial's shippers. Accordingly, the Commission will accept Colonial's filing and suspend it to be effective July 4, 2016, subject to further order considering the outcome of the technical conference.

The Commission orders:

(A) Colonial's FERC Tariff No. 98.22.0 is accepted and suspended to be effective July 4, 2016, subject to the outcome of the technical conference established in this proceeding and further order of the Commission.

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[5] Colonial cites 49 U.S.C. app. §§ 1(4), 1(6), 3(1), (1988).

(B) The Commission's Staff is directed to convene a technical conference to explore the issues raised by Colonial's filing and to report the status to the Commission within 180 days of the date of issuance of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.