

157 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tricon Energy Ltd. and Rockbriar Partners Inc.

Docket No. OR16-17-000

v.

Colonial Pipeline Company

ORDER ON MOTION FOR EXPEDITED CLARIFICATION, ENTRY OF
PROTECTIVE ORDER AND EXTENSION OF TIME FOR DISCOVERY
RESPONSES

(Issued November 14, 2016)

1. On September 13, 2016, the Commission issued an Order on Complaint in the above-referenced proceeding.¹ The Commission found that it required additional information before rendering a decision on the protests² and a complaint filed by Tricon Energy Ltd. and Rockbriar Partners Inc. (Complainants) against Colonial Pipeline Company (Colonial). The Commission directed data requests and requests for production of documents to Colonial and the Complainants to be responded to within 30 days of the issuance of the September 13 Order.³

2. On September 29, 2016, Colonial filed a motion for expedited clarification, entry of protective order and extension of time for discovery responses (Motion). The Motion requested that the Commission (1) clarify the due process protections afforded Colonial in this proceeding; (2) grant Colonial additional time to respond to the discovery requests; and (3) issue a protective order in this proceeding. On October 5, 2016, the

¹ *Tricon Energy Ltd. and Rockbriar Partners Inc. v. Colonial Pipeline Co.*, 156 FERC ¶ 61,176 (2016) (September 13 Order).

² Protests were filed by Concept Petroleum Marketing, LLC and Kelly Energy Logistics Group, LLC; and by Flint Hills Resources, LP.

³ *Id.* P 2.

Commission issued a Notice of Extension of Time, extending Colonial's deadline to respond to discovery requests from October 13, 2016 to November 14, 2016. In this Order, the Commission enters the proposed protective order attached to the Motion into this docket and directs all participants to review and abide by the provisions therein.

3. With respect to Colonial's request for clarification concerning due process, the Commission notes that Colonial did not allege that any violations of due process have occurred. Colonial's concerns are therefore not ripe for Commission review. The proceeding initiated in this docket will comport with any and all due process requirements. Colonial will have the opportunity to address the substance of issues that the Commission determines warrant further examination. Any alleged violations of due process may be raised in the due course of the proceeding.

The Commission orders:

(A) Colonial's Proposed Protective Order, attached herein, is hereby entered into this proceeding.

(B) All Non-Disclosure Certificates must be signed and filed prior to receipt of protected materials.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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PROTECTIVE ORDER

(Issued November 14, 2016)

1. This Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by a decisional authority, as defined in 18 CFR § 385.102(a).

2. This Protective Order applies to the following two categories of materials: (A) A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and (B) A Participant shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 CFR § 388.113(c)(1) ("Critical Energy Infrastructure Information").

3. Definitions -- For purposes of this Order:

(a) The term "Participant" shall mean a Participant as defined in 18 CFR § 385.102(b).

(b) (1) The term "Protected Materials" means: (A) materials (including depositions) provided by a Participant in response to discovery requests and designated by such Participant as protected; (B) any information contained in or obtained from such designated materials; (C) any other materials which are made subject to this Protective Order by the decisional authority, by any court or other body having appropriate authority, or by agreement of the Participants; (D) notes of Protected Materials; and (E) copies of Protected Materials. The Participant producing the Protected Materials shall physically mark them on each page as "PROTECTED MATERIALS" or with words of similar import as long as the term "Protected Materials" is

included in that designation to indicate that they are Protected Materials. If the Protected Materials contain Critical Energy Infrastructure Information, the Participant producing such information shall additionally mark on each page containing such information the words "Contains Critical Energy Infrastructure Information – Do Not Release".

(2) The term "Notes of Protected Materials" means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 3(b)(1). Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials except as specifically provided in this order.

(3) Protected Materials shall not include: (A) any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court; or (B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order. Protected Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

(c) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which Participants who have been granted access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding.

(d) The term "Reviewing Representative" shall mean a person who has signed a Non-Disclosure Certificate and who is:

- (1) a Commission employee assigned to this proceeding;
- (2) an attorney who has made an appearance in this proceeding for a Participant;
- (3) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Subparagraph (2);
- (4) an expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;
- (5) a person designated as a Reviewing Representative by order of the decisional authority; or

(6) employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.

4. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided in Paragraphs 7-9.
5. Protected Materials shall remain available to Participants until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Protected Material is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraph 6, below. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order.
6. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized pursuant to Paragraphs 8-9. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission retains the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities. For documents submitted to Commission Reviewing Representatives, the Commission shall follow the notification procedures of 18 CFR § 388.112 before making public any Protected Materials.
7. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

8. (a) If a Reviewing Representative's scope of employment includes the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy, the provision of consulting services to any person whose duties include the marketing of energy, or the direct supervision of any employee or employees whose duties include the marketing of energy, such Reviewing Representative may not use information contained in any Protected Materials obtained through this proceeding to give any Participant or any competitor of any Participant a commercial advantage.

(b) In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 3(d) above, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached that person shall be a Reviewing Representative pursuant to Paragraphs 3(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the decisional authority for resolution.

9. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate; provided, that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. A copy of each Non-Disclosure Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative.

(b) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

10. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 3(d), access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

11. Subject to Paragraph 18, the decisional authority shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the decisional authority, the parties to the dispute shall use their best efforts to resolve it. Any participant that contests the designation of materials as protected shall notify the party that provided the protected materials by specifying in writing the materials the

designation of which is contested. This Protective Order shall automatically cease to apply to such materials five (5) business days after the notification is made unless the designator, within said 5- day period, files a motion with the decisional authority, as appropriate, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the participant seeking protection. If the decisional authority finds that the materials at issue are not entitled to protection, the procedures of Paragraph 18 shall apply. The procedures described above shall not apply to protected materials designated by a Participant as Critical Energy Infrastructure Information. Materials so designated shall remain protected and subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's Critical Energy Infrastructure Information Coordinator that such materials need not remain protected.

12. All copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to Protected Materials, shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS" and shall be filed under seal and served under seal upon the Presiding Judge (if one is appointed) and all Reviewing Representatives who are on the service list. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information – Do Not Release". For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such, will also be filed with the Commission and served on all parties on the service list and the Presiding Judge (if one is appointed). Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

13. If any Participant desires to include, utilize or refer to any Protected Materials or information derived therefrom in testimony, exhibits or briefs in any hearing (whether evidentiary or paper) in these proceedings, in such a manner that might require disclosure of such material to persons other than Reviewing Representatives, such Participant shall first notify both counsel for the disclosing Participant and the decisional authority of such desire, identifying with particularity each of the Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the decisional authority.

14. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

15. Nothing in this Protective Order shall preclude any Participant from requesting the decisional authority or any other body having appropriate authority, to find that this

Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order. The decisional authority may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

16. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the decisional authority.

17. All Protected Materials filed with the Commission, the Presiding Judge (if one is appointed), or any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information – Do Not Release."

18. If the decisional authority finds at any time in the course of this proceeding that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for three (3) business days from the date of issuance of the decisional authority's determination, and if the Participant seeking protection files an interlocutory appeal or requests that the issue be certified to or otherwise considered by the Commission, for an additional seven (7) business days. None of the Participants waives its rights to seek additional administrative or judicial remedies after the decisional authority's decision respecting Protected Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof. The provisions of 18 CFR §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act. (5 U.S.C. § 552) for Protected Materials in the files of the Commission.

19. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

20. None of the Participants waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Materials.

21. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this (these) proceeding(s). Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

22. To the extent necessary in this proceeding, Participants are permitted to produce and receive information governed by Section 15(13) of the Interstate Commerce Act, provided that such information is treated as Protected Materials pursuant to the provisions of this Protective Order.

23. (a) Notwithstanding any other provision of this Protective Order, a Participant may designate as “Highly Confidential” any Protected Materials that fall in one or more of the following categories: (1) Section 15(13) materials; (2) trade secrets or other protected forms of intellectual property; or (3) materials which, if revealed to one or more other Participants, could have a detrimental impact on the business or competitive position of the Participant providing such materials or a related entity. This designation shall be indicated by placing on such materials the following legend: “HIGHLY CONFIDENTIAL PROTECTED MATERIALS: DISCLOSURE PROHIBITED BY PROTECTIVE ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION” or words or similar import.

(b) Materials designated as Highly Confidential shall be provided solely to: (i) Commission employees who qualify as Reviewing Representatives; (ii) outside counsel for each Participant who have entered an appearance in this proceeding; and (iii) outside consultants or experts who are: (A) otherwise qualified Reviewing Representatives under Paragraph 3(d); and (B) not engaged for the purposes of providing marketing advice to any Participant.

(c) In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 23(b) above, the Participant shall seek agreement from the Participant providing the Highly Confidential Protected Materials. If an agreement is reached that person shall be a Reviewing Representative pursuant to Paragraph 23(b) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the decisional authority for resolution.

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NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Printed Name: _____

Title: _____

Representing: _____

Date: _____