

Colonial Pipeline Company

ORDER ON PETITION FOR DECLARATORY ORDER

146 FERC ¶ 61,206 (2014)

In this case, Colonial Pipeline Company (Colonial), a common carrier under the Interstate Commerce Act whose system for at least two years has been over-subscribed by shippers of refined petroleum products, filed a petition for a declaratory order seeking a decision by the Commission approving, among other things, a rate structure for existing pipeline capacity. The petition did nothing to create additional capacity or new infrastructure. Under the rate structure, rates would vary inversely to the level of volumes shippers by contract committed to ship and to the length of years of the commitment. Uncommitted shippers would face different rates. The Commission denied the petition because the rate structure essentially created two classes of shippers out of the one existing class involving the same service, and, under the circumstances, was unduly discriminatory. The Commission noted that this was not an instance in which a petition for declaratory order sought a comparable rate structure for the construction of new or expanded capacity, or even the reversal or reconfiguration of an existing line.

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146 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Colonial Pipeline Company

Docket No. OR14-8-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued March 20, 2014)

1. On November 8, 2013, Colonial Pipeline Company (Colonial) filed a petition for declaratory order seeking Commission approval of (1) the tariff rate structure and terms of service agreed to by Contract Shippers in Transportation Service Agreements (TSAs), (2) the proposed prorationing methodology under which the calculation of a Contract Historic Shipper's capacity allocation will be based on the greater of that shipper's annual volume commitment or its history of refined petroleum products shipped over the relevant twelve month period, and (3) the procedure by which excess system capacity is allocated first to eligible Contract Shippers. For the reasons discussed below, the Commission denies Colonial's petition for declaratory order.

Background

2. Colonial owns and operates a common carrier pipeline system that transports gasoline, heating oil, aviation fuel, and other refined products. The Colonial system includes 5,500 miles of pipe over an area extending from Houston, Texas to Linden, New Jersey near the New York harbor area. Colonial serves refineries in the Gulf Coast and Northeast regions and consumer markets throughout the Gulf Coast, Southeast, Mid-Atlantic and Northeastern states.

3. Colonial states that due to increased production at Gulf Coast refineries as well as other factors, requests for space on its system steadily increased over the last several years. As a result, its main lines have been allocated for the last two years, and the shippers on those lines have seen their nominated volumes reduced. Colonial states that over the past two years it has undertaken a series of capacity expansions and system modifications to alleviate the need to allocate space. Colonial asserts that the ability to further increase capacity in an incremental fashion through system modification is diminishing, and Colonial is reaching the point where it needs to determine whether to initiate large-scale and expensive expansion efforts. Colonial submits that one way of

enhancing a pipeline's confidence in the soundness and tenability of a major investment in new capacity is to secure long-term shipper support for the investment in the form of throughput guarantees. Colonial states that it has turned its attention to finding ways to achieve some measure of volume and revenue certainty, consistent with its shippers' interests and the pipeline's common carrier obligations.

4. Colonial states that while it has also implemented tariff changes to address shippers' concerns regarding their accustomed access to line space on Colonial's system during periods of over-nomination, Regular Shippers¹ continue to experience erosion of their allocations on Colonial. Colonial states that as the class of new shippers build history on the pipeline, they will become Regular Shippers and vie for line-space with the existing Regular Shipper pool. Colonial submits that over time this leads to a degradation of space available to Regular Shippers. Colonial asserts the effect is to interfere with the expectation of long-standing shippers that they will be able to move their volumes in a consistent and reliable manner.

Colonial's Petition

5. Colonial states that it held a widely-publicized open season that commenced on September 12, 2013, and concluded on October 28, 2013. Colonial states that by the end of the open season, a total of 76 TSAs were executed by parties representing 75 percent of the volumes shipped on Colonial's system and 75 percent of Colonial's pipeline-related revenues. Colonial states that TSAs were executed by members of all shipper classes representing the full spectrum of product types shipped on Colonial's system. Colonial states that shippers were able to choose TSAs with contract terms of five or ten years, with the further option to make an annual commitment for either an additional one-year or five-year period.

6. Colonial states that the terms of the TSA include (1) the tariff rate structure for Contract Shipper volumes; and (2) the amended prorationing policy. Colonial states the contract rates include, for each origin point and destination point, (a) a base contract tariff rate applicable to all movements of Contract New Shippers,² and all movements of Contract Historic Shippers³ with an annual volume commitment less than 1,000,000 barrels; and (b) discounted contract tariff rates applicable to all movements of Contract

¹ For purposes of allocation priority, Regular Shippers are shippers that met the threshold volume level on the applicable segment during the base period.

² A Contract New Shipper is a Contract Shipper that is an Established New Shipper, New Shipper or prospective New Shipper and has a zero annual volume commitment unless and until such shipper becomes a Regular Shipper.

³ A Contract Historic Shipper is a Contract Shipper that is a Regular Shipper.

Historic Shippers with an annual volume commitment of 1,000,000 barrels or more. Colonial states the contract rates follow a tiered structure with the amount of the discount relative to the base contract rates increasing based on the level of volume commitment and length of term. Colonial submits the TSA provisions are designed to establish a significant measure of volume and rate certainty for Colonial, while providing Contract Shippers with significant rate discounts based on volume commitments. Colonial states that consistent with that motivation, the TSAs provide that, during the term of the TSA, a contracting shipper may not protest or otherwise challenge any of Colonial's rates, including for past periods.

7. Colonial states the TSAs provide that Colonial will amend its prorationing methodology to provide that in return for committing to ship the contracted volume or pay the specified deficiency, a Contract Historic Shipper's capacity allocation on Line 1 and Line 2⁴ will be calculated using the greater of (a) that shipper's annual volume commitment, or (b) its history of movements that originated on the applicable line during the relevant twelve month period. In addition, Colonial states that the TSAs provide qualifying Contract Shippers with first access to the allocation of any available excess system capacity. Colonial submits that excess system capacity exists if shippers with allocated line space choose not to fully utilize their space. Under the TSAs, Colonial will allocate the available excess system capacity to Contract Historic Shippers with a then-current annual volume commitment of at least 1,000,000 barrels. Colonial contends this excess capacity allocation methodology may help Contract Shippers to maximize their use of the system while at the same time slowing erosion of their history.

8. Colonial seeks Commission approval of (1) the tariff rate structure and terms of service agreed to by the Contract Shippers in the TSAs, (2) the proposed prorationing methodology under which the calculation of a Contract Historic Shipper's capacity allocation will be based on the greater of that shipper's annual volume commitment or its history of refined petroleum products shipped over the relevant twelve (12) month period, and (3) the procedure by which excess system capacity is allocated first to eligible Contract Shippers.

9. Colonial recognizes that many of the oil pipeline declaratory orders that the Commission has recently decided largely related to construction projects and have permitted priority service or firm service.⁵ Colonial submits that in permitting priority service for such new construction projects, the Commission has sought to protect shipper

⁴ Line 1 (gasoline) and Line 2 (distillates) run from Houston, Texas to Greensboro, North Carolina.

⁵ Citing, e.g., *CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130, at P 7, 26-27 (2013) (*CenterPoint Energy*).

expectations of access to pre-existing capacity.⁶ Colonial acknowledges that this consideration does not apply here, where there is no offer of priority service, and no construction of new infrastructure. Colonial states no shipper will be immune from allocation in the event of nominations in excess of capacity, and maintains that although in this instance Colonial is not immediately constructing new infrastructure, the TSA is consistent with Commission precedent and policy.

10. Colonial requests the Commission approve the contract rate structure agreed to by shippers that have executed TSAs, and confirm the Commission will accept and uphold the contract rate structure for the term of each TSA. Colonial further requests the Commission confirm the rates for the Contract Shippers will be determined only under the methodology set forth in each TSA, irrespective of any action that Colonial or the Commission may take with respect to non-contract rates. Colonial argues the Commission has a well-established policy of approving as consistent with the Interstate Commerce Act (ICA) discounted rate structures like that provided for in the TSA.⁷ Colonial contends that because the TSA rate structure was offered to all shippers in a transparent open season process, that arrangement presents no issue of undue discrimination. Colonial submits that all shippers and other interested parties have been provided the opportunity to commit to a contract term and volume level, and to receive a discount tailored to their chosen commitment.

11. Colonial submits that in considering the approvals sought in the petition, the Commission is being asked to acknowledge the important differences between contract and non-contract shippers. Colonial asserts that shippers that sign up for ship-or-pay commitments are potentially taking on a substantial obligation to support the pipeline. Colonial contends that shipper commitments allow for planning and investment decisions that are in the long-term best interests of Colonial and its shippers. Conversely, Colonial submits that walk-up shippers will have no obligation to use the pipeline.

12. Colonial requests the Commission approve its proposed prorationing methodology under which the calculation of a Contract Shipper's capacity allocation on Line 1 and Line 2 of Colonial's system will use the greater of that shipper's annual volume commitment or its history of refined petroleum products shipped over the relevant twelve (12) month period. Colonial asserts the Commission has approved prorationing methodologies under which contract shippers can utilize either their historical volumes or

⁶ Citing, e.g., *Enbridge Pipelines (Illinois) LLC*, 144 FERC ¶ 61,085, at PP 23-24 (2013); *Sunoco Pipeline L.P.*, 139 FERC ¶ 61,259 at PP 13-14 (2012).

⁷ Citing, e.g., *Enterprise Liquids Pipeline LLC*, 142 FERC ¶ 61,087, at P 25 (2013); *Enbridge Energy Co., Inc.*, 110 FERC ¶ 61,211, at P 36 (2005); *Express Pipeline P'ship*, 75 FERC ¶ 61,303, *reh'g and declaratory order*, 76 FERC ¶ 61,245, *reh'g denied*, 77 FERC ¶ 61,188 (1996) (*Express*).

their volume commitments as a basis for allocated capacity in the event of apportionment. Colonial submits the Commission has recognized that treatment of the initial commitment as a historical baseline is appropriate because it helps protect contract shippers that are making long-term commitments to the pipeline and recognizes the fact that the contracting shippers are obligated to pay for the barrels they have committed to move whether or not they actually tender them to the pipeline for transportation.

13. Colonial requests the Commission approve its proposed provision whereby available excess system capacity will be allocated to Contract Historic Shippers with an annual volume commitment of at least 1,000,000 barrels. Colonial argues the Commission has upheld the provision of specific rights and benefits to Contract Shippers to induce them to enter into long-term volume commitments, so long as those benefits are offered to all interested shippers in an open season.⁸

14. Colonial asserts that the Commission should bear in mind that shippers who signed the TSAs affirmatively concluded they will be better off by joining the contract rate program; those that reached the opposite conclusion were free to decline, and they will continue to be able to move product on Colonial in accordance with the pipeline's Rules Tariff.

Public Notice, Interventions and Protests

15. On November 12, 2013, the Commission issued a notice of Colonial's petition and requested comments by December 6, 2013. Due to issues surrounding whether or not Colonial should publicly file its open season documents, the Commission issued a subsequent notice on December 4, 2013, extending the comment date until December 13, 2013.

16. Several parties who executed TSAs filed letters in support of Colonial's petition. The parties are Sheetz, Inc.; CITGO Petroleum Corporation; Phillips 66 Company; and QT Fuels, Incorporated. They assert that executing the TSAs will allow them to slow the erosion of their shipping histories. They also submit they would like Colonial to expand its capacity and are hopeful that multi-year volume commitments will encourage Colonial to move forward with expansion plans.

⁸ Citing, e.g., *Enbridge Pipelines (Southern Lights) LLC*, 141 FERC ¶ 61,244 (2012); *CenterPoint Energy*, 144 FERC ¶ 61,130, at P 13 (2013).

17. The Liquids Shippers Group⁹ also filed comments. This Group consists of crude oil and/or natural gas liquids producers and/or marketers in the United States. The Liquids Shippers Group has recently been formed for the purpose of participating in regulatory proceedings before the Commission in order to advance positions that reflect their common interests. None of the Liquids Shippers Group's members is currently a shipper on Colonial, nor did any member of the Liquids Shippers Group sign a confidentiality agreement or participate in the open season at issue in Colonial's petition. The Liquids Shippers Group's purpose in submitting comments in this proceeding is to advance concerns of a more general nature relating to how common carriers are increasingly doing business today.

18. The Liquids Shippers Group states there has been a sharp increase in common carriers' use of the Commission's discretionary declaratory order process to solicit advance Commission approval of a rate structure and terms and conditions of service generally following an open season for a new pipeline or new capacity created by an expansion. The Liquids Shippers Group believes the Commission should initiate a rulemaking or policymaking proceeding to develop a standardized set of rules or principles governing common carriers' use of open seasons and TSAs to establish the rules under which common carriers should be allowed to provide non-traditional, i.e., contract or committed shipper jurisdictional services, on their pipeline systems. The Liquids Shippers Group asserts the Commission should address (1) whether a common carrier should be required to publicly file the TSA at issue in a petition for a declaratory order; (2) whether it is permissible for a common carrier to require a potential shipper to sign a confidentiality agreement in the open season which hampers that potential shipper's ability to challenge the common carrier's subsequent petition for declaratory order; (3) whether it is permissible for a TSA to contain language which requires the parties to maintain the confidentiality of the terms and conditions unless disclosure is required by operation of law; and (4) what limits should be placed on the scope of a "duty to support" clause in the TSA offered to potential shippers in open seasons.

19. Suncor Energy (U.S.A) Marketing Inc. and Suncor Energy Marketing Inc. (Suncor) state they are shippers of crude oil on various interstate pipelines but do not state they are shippers on Colonial. Suncor filed comments of a general nature similar to those of the Liquids Shippers Group. Suncor asserts that given the flaws in the open season and TSA process as currently implemented by pipelines, the Commission should ensure that pipelines conduct their open seasons so that shippers will have an opportunity to make a commitment to ship on a pipeline without being forced to accept unduly

⁹ For purposes of this filing, the Liquids Shippers Group includes: Anadarko Energy Services Company, Apache Corporation, ConocoPhillips Company, Devon Gas Services, L.P., Encana Marketing (USA) Inc., Marathon Oil Company, Pioneer Natural Resources USA, Inc., and WPX Energy Marketing, LLC.

prejudicial, unreasonable, and unlawful restrictions on shipper rights under the ICA. Suncor requests the Commission to provide the following clarifications and requirements with respect to the open season and TSA process: (1) a requirement that pipelines seek any requested petitions for declaratory order before the TSAs are executed by shippers; (2) a requirement that a pipeline must make all open season documents and TSAs publicly available as part of a petition for declaratory order seeking Commission approval; (3) a prohibition against any requirement that shippers waive their rights and remedies under the ICA in order to execute a TSA; and (4) a clarification that a shipper can protest or complain against pipeline rates that have been proposed or are in effect, even if a shipper has executed a TSA as to those rates.

20. Colonial's petition was protested by Chevron Products Company; Marathon Petroleum Company LP; and Southwest Airlines Co. and United Airlines, Inc. Since each of these parties has raised similar issues in their protests, they will be referred to as the Protesters and their arguments will be consolidated below. Unlike the Liquids Shipper Group and Suncor, the Protesters are current shippers on Colonial's system.

21. The Protesters assert that Colonial's proposed tariff modifications are unduly prejudicial to shippers that did not execute the *pro forma* TSA because if the petition for declaratory order is granted, Colonial will be allowed not only to use its capacity to perform a higher priority service for Contract Shippers, but will also give the Contract Shippers a lower discounted rate. The Protesters assert that prior to executing the TSA, all those shippers were existing similarly situated shippers and thus Colonial's proposal contravenes section 3(1) of the ICA by now transforming them into two classes to the unreasonable disadvantage of the inferior class. The Protesters explain the ICA generally prohibits private rate (contract) agreements because it requires that the existing rates to all shippers be uniform, and the Commission has only allowed different rates and terms for contract shippers as opposed to other shippers when the contracts supported new infrastructure.

22. Specifically, the Protesters submit when the Commission has approved contracts in petitions for declaratory order, the pipelines' proposals were initial rates associated with proposed new pipelines or pipeline expansions. The Protesters contend that Colonial is not proposing any new capacity or new or expanded facilities even though Colonial's current capacity is in allocation. Moreover, unlike initial rates for new pipelines or expansions, here there is a specific cost and revenue history. The Protesters argue that the Colonial proposal to create a new class of contract shippers with discounted rates and preferential access to existing pipeline capacity is fundamentally at odds with its common carrier obligations under the Section 1(4) of the ICA. The Protesters assert that Colonial's plan would convert what is now a common carrier pipeline into a pipeline primarily dedicated to contract carriage. The Protesters argue that Colonial's proposal is not designed or intended to support any concrete plan for expansion or new construction; it relates only to existing pipeline capacity.

23. The Protesters argue that in this proceeding none of the shippers had an opportunity to take advantage of the discounted rates if they wanted to retain their rights under the ICA. The Protesters contend there are no existing differences among the shippers. The Protesters assert that Colonial proposes to construct a difference by crafting two classes of customers where only one exists by requesting authority to create Contract Shippers and treat them differently. The Protesters contend that Colonial has violated the ICA by proposing unduly discriminatory treatment of the rates and capacity entitlements for Contract Shippers. The Protesters assert that the Contract Shippers will receive discounted rates while at the same time they will enjoy access to service at a higher priority than the non-contract shippers. The Protesters submit that paying relatively less for a superior service is patently undue discrimination under the ICA.

24. The Protesters state that section 13 of Colonial's TSA - "Agreement Not To Challenge" - requires the shippers signing the TSA to waive their right to have any of their Colonial rates reviewed by the Commission. The Protesters state that section 13 requires interested shippers not only to (i) waive their ICA statutory rights and ability to challenge Colonial's discount rates, current base rates, and any changes to these rates (including an application for market-based rates) pursuant to the terms and conditions of the TSA, but also to (ii) waive their ICA statutory rights and abilities to challenge Colonial's past tariff rates prior to the effective date of the TSA. The Protesters submit that section 13 therefore violates the ICA and its policy goals and thus the Commission should conclude it is both unlawful and unenforceable and deny Colonial's petition. The Protesters assert that Colonial's TSA should not be approved if written to broadly prohibit shippers from exercising their rights at the Commission. The Protesters argue that Colonial's proposed TSA requires that for shippers to have access to rates below those that have generated in excess of \$350 million in cost-of-service over-recoveries in 2012 alone, shippers must waive their statutory rights to complain against or otherwise challenge past rates as well as those rates referred to and/or changed by the TSA.

25. The Protesters submit that Colonial has presented shippers with a choice: pay Colonial's existing tariff rates that generate substantial over-recoveries, or sign the TSA and waive any right to challenge Colonial's current or TSA rates for the privilege of paying a lower or less excessive rate. The Protesters assert that for a shipper disinclined to litigate, the choice is clear - a discounted rate will always be preferable to an undiscounted rate, especially when the shipper can simply pass such costs on to the public. The Protesters contend, however, this does not mean the discounted rate is reasonable. The Protesters argue that the Commission should direct Colonial to strike the section 13 "Agreement Not To Challenge" provision and redo the open season so that interested shippers can have a fair and reasonable opportunity to sign up for the proposed incentive discount rates without having to unreasonably waive their ICA statutory rights to seek Commission redress where Colonial's rates, terms, and conditions of service violate the ICA.

26. The Protesters contend that, while Colonial's suggestion that its plan to create a new class of contract shippers will result in rate certainty for contract shippers, the rates for contract shippers are anything but certain under the Colonial TSA. The Protesters point out that the Colonial TSA makes clear, and the petition acknowledges, that Colonial has reserved the right to adjust its contract rates - apparently at its sole discretion. The Protesters submit that shippers who signed Colonial's TSA are contractually barred from challenging any such adjusted rates before the Commission and therefore will have even less rate certainty than they have now. The Protesters contend that the primary purpose of the Colonial proposal appears to be to encourage and/or coerce shippers to sign a TSA under which they must waive their rights under the ICA to challenge the pipeline's past, current, and future rates. The Protesters submit that while it may not be unreasonable to require contract shippers to be bound to specific rates to which they have agreed for access to *expansion* capacity, it is manifestly unjust and unreasonable to require shippers to be bound to rates for *existing* capacity that can be adjusted at the whim of the pipeline.

27. The Protesters also point out that Colonial's TSA Force Majeure provisions state that in the event a Force Majeure situation causes the pipeline to be completely shut down, Colonial will not be considered to be in breach of the Agreement, and a TSA signatory would be obligated to continue to pay the Deficiency Payment associated with its Minimum Annual Volume Commitment. The Protesters submit that the only exception to this requirement appears to be when Colonial experiences operational problems which fall short of a complete shut-down of the system, and a prorationing or allocation of capacity is put into effect. The Protesters argue that requiring a TSA shipper to continue to pay its full Deficiency Payment when Colonial's pipeline system is completely unavailable due to a Force Majeure or other event is unjust and unreasonable and contrary to existing Commission policy.

28. The Protesters state that section 12 of the TSA provides that in the event Colonial breaches the TSA it cannot be held liable for any damage claims whatsoever, but if a TSA shipper breaches the agreement, the shipper will be held liable for its Deficiency Payments and any other related payments. The Protesters assert that in light of the fact that Colonial has drafted the TSA in order to insulate itself from any liability associated with its breach of the agreement; Colonial has no incentive not to breach the agreement if it suits its interest to do so. Protesters conclude that the liability provision should be rejected or at least modified to protect the interests of the shippers in a balanced way.

Discussion

29. In its petition, Colonial requests the Commission approve contract rates for certain shippers for existing capacity, priority for excess capacity for contract shippers, and a prorationing methodology for contract shippers based on the greater of its historical average or contract commitment. Several shippers support Colonial's petition as a way of slowing the erosion of shipping histories on a pipeline that has been in allocation for two years. Other shippers protest Colonial's petition, asserting that the proposal is

discriminatory and otherwise unlawful under the ICA, Commission precedent and policy. The protesting shippers urge the Commission to deny the declaratory order or to redo the open season with modifications to various aspects of Colonial's TSA. Finally, several parties who are not shippers on Colonial's system request that the Commission examine pipelines' use of open seasons and declaratory orders for non-traditional rate structures and institute a proceeding that would establish standards for their use.

30. At the outset, the Commission will address certain general issues concerning the requests of the Liquids Shippers Group and Suncor that the Commission institute a proceeding to establish standards for open seasons and declaratory orders where non-traditional rate structures are sought. While the Commission will not commence such procedures at this time, the Commission will discuss some broad principles concerning confidentiality provisions during open seasons and duty to support clauses in TSAs.

31. The Commission recognizes a pipeline's need for confidentiality agreements during an open season to protect the pipeline from competitive harm due to the release of potential rates, discounts, contract terms etc. However, those confidentiality agreements should be narrowly tailored and should not prevent potential shippers from bringing to the Commission's attention issues arising from the open season or proposed contract provisions that may conflict with applicable law, precedent or policy.

32. The Commission will also look with disfavor upon duty to support clauses that require too broad a waiver of a shipper's statutory rights to seek redress before the Commission. Whether a duty to support clause is too broad depends on the facts and circumstances of particular case. For example, in *Nexen Marketing U.S.A, Inc. v. Belle Fourche Pipeline Co.*,¹⁰ the Commission found that it was reasonable to require shippers signing a TSA to support the pipeline's efforts to obtain authorization for construction. The Commission found, however, that the duty to support clause was too broad because it prevented shippers who might otherwise support the construction project from bringing to the Commission's attention legitimate issues concerning rates and terms and conditions. While it appears to be reasonable for contract shippers to support the specific rates to which they agreed, requiring those shippers to also waive their statutory rights as to past rates or other rates of the pipeline to which they have not specifically agreed is likely too broad.

33. The threshold issue to be addressed is whether the Commission should grant a declaratory order where the pipeline seeks approval for contract or committed rates for existing capacity. The core of Colonial's petition for declaratory order is the novel request for Commission authorization for contract rates for existing capacity that is fully utilized. If the Commission declines the request for contract rates in this circumstance, where no new capacity or facilities are proposed, the Commission need not address the

¹⁰ 121 FERC ¶ 61,235 at P 52 (2007).

other issues raised by Colonial's petition such as the prorationing methodology, priority rights for excess capacity, waiver of the right to challenge Colonial's rates, or terms related to force majeure, and liability of the carrier. Nor does the Commission need to direct Colonial to redo the open season to eliminate potentially unlawful or discriminatory provisions, if the central notion of reclassifying existing shippers on existing facilities is rejected.

34. The history of the Commission's use of declaratory orders to consider non-traditional rate structures for oil pipelines, such as contract rates, began in *Express Pipeline Partnership (Express)*.¹¹ In the *Express* proceeding the Commission recognized that under the Administrative Procedure Act whether to issue a declaratory order was within the Commission's discretion.¹² The Commission determined that in certain situations, it was better for the Commission to review ratemaking proposals outside the compressed time schedule of tariff filings requiring action by the Commission within 30 days.¹³ In approving committed rates in *Express*, the Commission based its decision on the principles discussed on *Sea-Land Service, Inc. v. Interstate Commerce Commission (Sea-Land)*¹⁴ where the court held that it was unjustified "to condemn contract rates as inherently discriminatory."¹⁵ However, the fact that contract rates are not inherently discriminatory does not mean they must always be approved or that such rates are appropriate under all circumstances.

35. Beginning with *Express*, and occurring more frequently in recent years, the Commission has issued numerous declaratory orders approving contract or committed rates. The Commission recognizes that due to increased oil production in the U.S. and Canada, changing market dynamics for crude oil and refined products, and the large financial commitments necessary to increase infrastructure, oil pipelines have proposed and the Commission has approved various types of committed or contract rate structures. Unlike the proposal by Colonial to establish contract rates for existing capacity, the Commission's body of precedent has approved contract rates with respect to new pipelines, expansion projects, or, at the very least, reversals or reconfigurations of existing pipelines in order to serve new markets or respond to changing market conditions. In all of the cases approving contract rates, contractual commitments of

¹¹ 75 FERC ¶ 61,303 (1996), *reh'g and declaratory order*, 76 FERC ¶ 61,245 (1996), *reh'g denied*, 77 FERC ¶ 61,188 (1996).

¹² 75 FERC at p. 61,967.

¹³ *Id.*

¹⁴ 738 F.2d 1311 (D.C. Cir. 1984).

¹⁵ 738 F.2d at 1317.

shippers were necessary to, among other things, determine support for construction of the project, obtain financing, ensure the initial financial viability of the project, or to determine the support in new or growing markets. Even in the case of existing pipelines seeking to reverse or reconfigure their systems, contract rates ensure that a pipeline's investments to serve new markets are necessary in the long term.

36. In this proceeding, although Colonial states that it "is reaching the point where it needs to determine whether to initiate large-scale and expensive expansion efforts,"¹⁶ it nevertheless also states that it "is not immediately constructing new infrastructure."¹⁷ The fact that Colonial has been in allocation for the past two years suggests that shippers value the capacity. In addition, a number of the parties supporting the petition submit that they would like to see Colonial's capacity increase through expansion. The instant petition, however, does nothing to create additional capacity or new infrastructure.

37. The Commission finds that Colonial's request to create two classes of shippers, committed and uncommitted, out of one class of shippers who are currently receiving the same service on existing capacity, is unduly discriminatory in these circumstances. In other cases, contract shippers make financial commitments to support the long-term viability of a new project. Such commitment is unnecessary here for a long-standing pipeline such as Colonial that has been in allocation for at least two years. The subject TSA proposal simply would ensure Colonial a legally unassailable revenue stream whether or not committed shippers make any shipments and without any commitment that new capacity will be added to a constrained system; at the same time it would degrade the service of existing shippers that would not (or could not) prudently sign the TSA as against their interests.

38. The Commission finds that approving committed rates for existing capacity as requested by Colonial would essentially legalize such undue discrimination. If Colonial believes that there will be demand for capacity in the long-term, then it should consider expansion and determine the various methods by which such expansion can be financed. On the other hand, if the current allocation on the system is more of a short-term phenomenon that does not require expansion, there is no reason to create financial certainty for Colonial by way of guaranteed contract, while at the same time degrading relative service terms and rates for existing shippers who could not acquiesce to the proffered TSA.

39. Therefore, the Commission denies Colonial's petition for declaratory order, as inconsistent with the Commission's policy of entertaining such proposals essentially in support of new infrastructure to support changing market needs. Accordingly, the

¹⁶ Colonial's Petition at 4.

¹⁷ *Id.* at 14.

Commission does not address the specific objections raised to particular provisions of the TSAs because in denying the petition for declaratory order, the entire rate structure and terms of these contracts have been rejected.

The Commission orders:

Colonial's petition for declaratory order is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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