Colonial Pipeline Company
Order on Compliance Filing
98 FERC ¶61,082 (2002)

Colonial Pipeline Company (Colonial) proposed to charge a fee for changes in nominated volumes. Colonial asserted that, while it was appropriate to include the fee in its tariff, the Commission lacked jurisdiction over the proposal. The protestor argued that the fee represented a rate increase, that Colonial had not made the requisite showing necessary for a rate increase, and that the fees did not relate to any cost incurred by the pipeline.

The Commission determined that these types of charges are jurisdictional and accepted the fee as warranted. Since the charge is a penalty in nature and is intended to deter injurious conduct rather than generate revenue, the pipeline does not have to demonstrate a cost relationship to the fee. However, the Commission required Colonial to keep account of all amounts generated by the fee and report back to the Commission after one year to insure it is not producing substantial revenues.

COMM-OPINION-ORDER, 98 FERC ¶61,082, Colonial Pipeline Company, Docket No. IS00-436-000, (Jan. 31, 2002)

Colonial Pipeline Company, Docket No. IS00-436-000

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Colonial Pipeline Company, Docket No. IS00-436-000

Order on Compliance Filing

(Issued January 31, 2002)

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell.

On August 31, 2000, Colonial Pipeline Company (Colonial) filed a number of Supplements to its tariffs, one of which was Supplement No. 3 to FERC Tariff No. 50. Exxon Mobil Corporation (Exxon Mobil) filed a protest as to Item 27 of Supplement No. 3 to FERC Tariff No. 50, which instituted a new "Nomination Integrity Program," and Colonial filed an answer. On September 29, 2000, the Commission issued an order [1] accepting the Supplements, except that the order accepted and suspended Item 27 of Supplement No. 3 to FERC Tariff No. 50, subject to refund and the conditions stated in the body of the order, to be effective October 1, 2000. Colonial made a compliance filing to that order, and Exxon Mobil filed a response. Subsequently, on March 30, 2001, Colonial filed tariffs addressing the tariff provision.

The Commission finds that Colonial has satisfied the conditions, and will accept the tariff as in the public interest since it will deter shipper conduct that could be detrimental to the interest to all shippers on Colonial. The Commission also will direct Colonial to report the revenues collected under Item 27.

Background

Item 27 of Colonial's Supplement No. 3 to FERC Tariff No. 50 proposed a new "Nomination Integrity Program." Colonial stated that this supplement establishes a volume-based fee on origin nomination changes that will serve to reduce nomination variability and improve origin delivery ratability for its customers. Item 27(a) of Colonial's revised tariff provides that, "Nomination change fees per shipper shall be applicable to changes in the sum of the volumes nominated per shipper for all gasoline products at all Gulf Coast origin locations." Item 27(c) further provides that there will be two "Change Fee Periods," for which Item 27(d) specifies a three cents per barrel rate for Change Fee Period I, and six cents per barrel for Change Fee Period II.

Exxon Mobil protested that Item 27 of Colonial's revised tariff reflects a rate increase, and Colonial had not made the requisite showing under Section 342 of the Commission's regulations, namely that Colonial had not shown that the three/six cent nomination change rate is within its indexed ceiling; nor had Colonial submitted a cost of service rate case. Moreover, Exxon Mobil contended that Colonial had not presented any evidence that it incurs any cost in accommodating nomination changes or, if it does, that the three and six cents per barrel fee bears any relationship to any costs that it may incur.

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In its answer, Colonial argued that the proposed nomination change fee is not a rate increase, but a penalty designed to discourage undesirable conduct. Colonial contended that its nomination change fees are intended to promote the operational efficiency of Colonial's pipeline system and will produce benefits not only to Colonial but to all of its shippers as

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well. Colonial asserted that timely and stable nominations are critical to ratable product movements--which, in turn, are essential to Colonial's ability to honor its delivery cycle commitments. Colonial cites to *Platte Pipe Line Co.*, 82 FERC ¶61,087 (1998) (*Platte*). Colonial states that in *Platte* the Commission, following a technical conference, accepted the pipeline's modified ship-or-pay proposal to charge 95% of the full rate for volumes nominated but not subsequently tendered in periods of prorationing. Colonial maintains its nomination change fee would achieve the same kind of efficiency objectives as those sought in *Platte*, at far more nominal charges.

The September 29 Order stated that while Colonial claimed that this proposed program will assist in eliminating undesirable shipper conduct, it had not submitted any supporting information as to how shippers' nomination changes, which ostensibly is the shipper behavior Colonial seeks to discourage with this program, deleteriously affect its system. Moreover, Colonial had not shown the basis for the proposed three and six cent per barrel fee, or for how the proposed fee bears any relationship to the costs Colonial incurs from accommodating nomination changes. Accordingly, the Commission accepted and suspended the proposed charge conditioned upon Colonial filing additional information in support of its proposed nomination change fee, to which Exxon Mobil could file a reply. [2]

Colonial's Compliance Filing

On October 30, 2000, Colonial filed a response to the September 30 Order. Colonial reiterated its position that while it was appropriate to include the nomination fee changes in its tariff, the proposal is not a service under Section 1(5) of the Interstate Commerce Act (ICA) so the Commission lacked jurisdiction over the proposal. It argued that the fees are not necessary incidents of transportation, and are analogous to bookkeeping services, which the Commission has held is not a basis for asserting jurisdiction, *citing Kerr-McGee Refining Corp. v. Williams Pipeline Co.*(*Kerr-McGee*). [3]

However, if the Commission declined to adopt this reasoning, Colonial submitted an affidavit to establish that the proposed fee strikes an equitable balance between shipper interests in ratability and flexibility and are reasonable and in the public interest.

Colonial asserted that it does incur some increased operating and maintenance costs as a result of untimely nomination changes. However, such increased costs would be difficult to quantify, and, in any case, are not the basis on which Colonial has established or seeks to justify the nomination change fees.

Rather, Colonial stated that the fees were determined by seeking to strike a balance between shippers' need for ratability and flexibility. In support of its position, Colonial submitted the affidavit of William F. Berry, who was the persor within Colonial having primary responsibility for the design, development and implementation of the Nomination Integrity Program.

Mr. Berry stated that the program had two principal objectives: flexibility and ratability. Flexibility is necessary to allow shippers to respond timely to changes in relative demand for various refined petroleum products. However, there is also concern for ratability. Berry stated that Colonial, as an oil pipeline, unlike a natural gas pipeline, does not transport a single fungible commodity. Rather, it transports as many as forty unique products, transported on Colonial in discrete batches, and ratability is the speed at which the various constituent lines will operate.

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Mr. Berry explained that Colonial's Nomination Integrity Program allows significant flexibility:

The Nomination Integrity Program penalizes origin nomination changes only when they will be disruptive to ratable shipments and they are 'tiered' (*i.e.*, three cents versus six cents) in relation to the degree of untimeliness of the nomination changes. No penalties are imposed for nomination changes up to 10 days before a cycle begins lifting, for nomination changes between five-day phases of Colonial's scheduling cycles, or for nomination changes made after products are within the system. Even within the nomination change fee periods, nominations can be changed free of any penalty for 50,000 barrels or 20 percent of nominations recorded at the start of the periods, whichever is greater. In addition, nomination changes are not subject to the fees if the change origin localities or product grades within the same cycle (where the volumes remain constant), and credits are given for nomination changes made at Colonial's request to enhance ratability.

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The affidavit then explained in detail why accurate nominations are necessary to assure the pipeline operates effectively. Mr. Berry stated that Colonial's system is extensive, consisting of thousands of miles of mainlines, stublines and delivery lines; thus scheduling shipments on Colonial is a complex undertaking, and requires that Colonial make scheduling decisions well in advance of the dates that the products are actually to be tendered to it. Such decisions include, among other things, the flow rate of the pipeline–*i.e.*, the speeds at which the various constituent lines will operate. If the flow rates selected prove to be inappropriate because of untimely reductions or increases in nominations, then products will not be lifted or delivered on schedule which incurs additional costs for shippers who relied upon the previous schedule.

Mr. Berry stated that if nominations are inflated in relation to ultimate tenders (or last minute nomination changes), then Colonial is sometimes put in the position of making an allocation call when it turns out that capacity will in fact be adequate to satisfy all shipper demands. This is clearly not in Colonial's nor its shippers' interests. Nor, just as clearly, is it in Colonial's or its shippers interests for nominations to be significantly increased at the last minute. In that event, providing for the fair and equitable prorationing of capacity becomes virtually impossible.

With respect to how the three cent/six cent charge was derived, Mr. Berry stated: that these amounts were not rigorously "cost based." He stated that the basis for the three and six cent charges is Colonial's attempt to strike a balance between amounts that would be so low as to constitute nothing more than a payment for a "license" to change nominations on an untimely basis without a second thought, and amounts that would be so high as to impose an undue burden on shippers.

Moreover, Mr. Berry asserted that the fees were not "onerous" amounting, for example, to less than 3% and 6% of Colonial's longest-haul tariffs, and they are well below 10% of Colonial's average tariff (approximately $.80 cents per barrel based on origin and delivery distribution to date). In fact, he maintained that these charges "are not in the nature of transportation rates and are not intended to generate revenues; in fact, the *fewer cents* Colonial collects under the Nomination Integrity Program, the *more successful* that program will be." [1]

Exxon Mobil filed a response contending that the nomination fee changes are clearly within the Commission's jurisdiction because the nomination process is inextricably tied to transportation.

Exxon Mobil also asserted that Colonial failed to justify the three cent/six cent charge citing Colonial's admission that it could not quantify the increased costs to Colonial from nomination changes by shippers. Moreover, Colonial's contention that the amount was an attempt to strike an equitable balance is meaningless because an "equitable balance" is not the test for determining whether rates are just and reasonable. Second, Colonial's assertion that it has struck an "equitable balance" is wholly unsupported. Exxon Mobil argues that other

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than vague generalities, Colonial offered no support for the proposition that the 3 cents and 6 cents levels constituted an appropriate balance. Instead, it appears that the specific fee level is merely a guess.

Moreover, Exxon Mobil asserted that Colonial failed to limit the fees to those nomination changes that may in fact be disruptive. As an example, Exxon Mobil refers to when a shipment originally scheduled and nominates barrels out of Baytown, TX refiners, and later those same barrels are sold to another shipper at the same Baytown, Texas source. In that situation there would not be any change to the number of origin barrels going into Colonial's pipeline, but there would be a charge under Colonial's program.

On November 15, 2000, Tosco Corporation filed an out-of-time motion to intervene and protest. In support of its motion, Tosco asserts that in reviewing Colonial's filing, because there were so many items included, it did not recognize the potential effect upon it of the nomination fee change proposal. Tosco's protest is not unlike Exxon Mobil's protest. Since Tosco's intervention would not disrupt the process of this case, we will grant the motion for good cause.

On December 11, 2000, Colonial moved for leave to answer. In its answer it reiterated its contention the nomination fee changes are not jurisdictional. Colonial also argues the equitable balance is a proper basis for setting the fees.

On March 30, 2001, in Docket No. IS01-203-000, Colonial filed a number of tariff supplements, which related to the Nomination Integrity Program (the March 30 filing). These changes, Colonial asserted, expanded the volume credits under the program. [5] No protest was filed to that filing.

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Discussion

The Commission finds that the nomination change fees are inextricably tied to transportation and jurisdictional, like the ship-or-pay provision in *Platte*. These types of charges are designed to affect shipper conduct, in contrast to the bookkeeping charges in *Kerr McGee* where "the transactions occur after the product has been delivered to one of [the pipeline's] terminals." [6]

The Commission also finds that Colonial has adequately demonstrated that there is justification for the nomination change fees. As explained by Colonial, the purpose of the fees is to deter conduct that could be detrimental to Colonial and other shippers. In that situation, where the charge is not for the purpose of generating revenue, the issue does not relate to the pipeline's costs, but whether the charge is warranted.

The fees to be charged here are of a smaller magnitude than other fees the Commission has authorized to deter deleterious conduct such as in *Platte*, where the shipper was subject to paying 95% of nominated volumes that were not actually shipped. In *Platte*, the Commission did limit the provision to when the pipeline was in an overcapacity situation and prorating. However, in *Platte* the pipeline's reason for the provision was to deter conduct "during periods of high capacity utilization on Platte." [7] Here, Colonial has explained that accurate nominations are required at all times, so we will not limit the proposal to only over-capacity situations.

Moreover, Colonial's March 30 filing modified the proposal to address a concern raised by Exxon Mobil. As modified, the program would not impose a fee for nomination changes arising from qualified trades of like product movements between shippers. Thus, the proposal is now more limited, and tailored to deter conduct that could negatively impact Colonial and other shippers. Accordingly, the Commission accepts the proposal as modified by the March 30 filing. However, since Colonial avers that the program is "not intended to generate revenues; in fact, the *fewer cents* Colonial collects under the Nomination Integrity Program, the *more successful* that program will

be," we will require Colonial to record and identify the revenues collected under Item 27 separately. We also direct Colonial to file a report detailing those revenues within one year after the issuance date of this order so the Commission can ensure that the program is operating as intended and not generating substantial revenues for Colonial.

The Commission orders:

(A) The suspension of Item 27 of Supplement No. 3 to FERC Tariff No. 50 is terminated and the refund obligation is lifted.

(B) Colonial must file a report as described in the body of this order within one year after the issuance of this order.

– Footnotes –

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[1] 92 FERC ¶61,289 (2000).

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[2] The order stated that if Colonial's compliance filing did not to provide the requisite justification for its proposed fee, staff could convene a technical conference to further explore this issue.

[3] 72 FERC ¶61,274, at p. 62,199 (1995).

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[4] Affidavit at ¶9.

[5] The two new provisions were as follows:

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(g) Volume credits shall be awarded to shippers who, pursuant to Carrier's request, agree to change their scheduled batches for the purposes of maintaining or improving Colonial's system ratability. Quantified changes shall be defined as Carrier requested adjustments a shipper makes to the volume or lifting start-time of a scheduled batch. The amount of volume credits awarded for qualified changes shall be on a barrel for barrel basis equal to the volume of the specific batch that is changed. Volume credits accrued shall be applied to subsequent barrels that would otherwise be subject to the nomination change fees until they are exhausted. All unused credits shall terminate after 180 days from accrual. There will be no monies exchanged for volume credits.

(h) Volume credits will be awarded for nomination changes arising from qualified trades of like product movements between shippers. Qualified trades of like product movements will consist of offsetting nomination changes involving the same product type if the movement is during the same cycle and phase and from the same origin location. The amount of volume credits awarded for qualified trades shall be on a barrel for barrel basis equal to the volume of the offsetting nominations. All shippers participating in the trade must notify the carrier in writing to be eligible for volume credits by no later than the date corresponding to the end of cycle in which the trade occurs. There will be no monies exchanged for volume credits.

[6] 72 FERC ¶61,274, at p. 62,198 (1995).

[7] 80 FERC ¶61,036, at p. 61,081 (1997).

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